(24,636)

20792

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 89.

W. A. CISSNA, PLAINTIFF IN ERROR.

vs.

THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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a United States Circuit Court of Appeals, Sixth Circuit.

No. 1088.

H. W. STOCKLEY, Plaintiff in Error,
vs.
W. A. CISSNA, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

b United States Circuit Court of Appeals, Sixth Circuit.

No. 1088.

H. W. STOCKLEY, Plaintiff in Error,
vs.
W. A. CISSNA, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

RECORD.

Original transcript filed March 25, 1902.

1 TRANSCRIPT OF RECORD.

Circuit Court of the United States for the Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Declaration.

Filed May 13, 1901.

The plaintiff, H. W. Stockley, a citizen and resident of Tipton County, Tennessee, sues the defendant, W. A. Cissna, a citizen and resident of the State of Illinois, to recover the following two tracts of land, to wit:

First. A certain tract of land lying and being in the eleventh civil district in Tipton County, in the state of Tennessee, and described by metes and bounds as follows. Beginning at the north-east corner

of Simon Huddleston's 2,000 acre tract which said tract was granted to the said Huddleston by the state of Tennessee, by grant number 21,206, issued on January 22, 1824, and which said tract of land is situated and lies in the eleventh surveyor's district in range nine (9), sections five (5) and six (6) in Tipton County, Tennessee, and which northeast corner is seventy-eight (78) chains north of the south-east corner of said tract; and running from said north-east corner of said Huddlestons 2,000 acre tract, then with the north line of said tract N. 41 W. thirty-five (35) chains; thence with said north line of said Huddleston's said tract S. 82 W. thirty-four (34) chains; thence with said Huddleston's north line M. 71 W. fifteen and thirty-two hundredths (15.32) chains; thence N. 8½ W. sixty-six (66) chains to the south-east corner of N. Potter's 640 acre tract, on Island Thirty-Seven; thence north fifty-five chains to north-east corner of John Triggs 100 acre grant on said island; thence east sixty-
2 one (61) chains to the middle of the old main bed, or channel, of the Mississippi river, as the same existed prior to the Centennial cutoff in 1876, but which old river is now dry land; thence with the said middle thread of the said old river bed; or channel, S. 18 E. seventyone (71) chains; thence along the middle thread of said old main bed, or channel, of said Mississippi river which is now dry land; S. 31 E. sixty-two (62) chains; thence S. 49 W. forty-two (42) chains to the beginning. The middle of the said old main bed or channel of the Mississippi river aforesaid being the middle of the main body of said river, when the State of Tennessee was admitted into the Union in 1796, and being the west boundary line of the state of Tennessee. Said tract containing one thousand and fifty (1,050) acres of land, more or less. The value of this tract being six thousand five hundred ($6,500) dollars.

Second. Also another tract of land lying and being in Tipton County, in the State of Tennessee, and lying south of and adjoining the tract above described, being more particularly described as follows. Being a portion of the tract of 2,000 acres of land granted by the State of Tennessee to Simon Huddleston on January 22nd 1824, by grant No. 21,206, as above described, and being situated in and being the northeast corner of said Huddleston's said tract and being described by metes and bounds as follows: Beginning at the northeast corner of said Huddleston's said tract, which corner is seventy-eight chains (78) north of the southeast corner of said tract, as above described, and running from said northeast corner with said Huddleston's north line N. 41 W. thirty-five (35) chains; thence with Huddleston's said north line N. 71 W. twenty- (28) chains to H. W. Stockley's field on the east end of Centennial Island; thence in an easterly and southeastwardly direction along the line of the said H. W. Stockley's field on Centennial Island to a point opposite the north line, or bank, of what is sometimes called Tow-head Island, the west end of which belongs to the said H. W. Stockley.
3 Thence eastwardly with the north line, or bank of said Tow-head Island to the east line of the said Simon Huddleston's 2,000 acre tract; thence with the east line of the said Huddleston's 2,000 acre tract, north to the point of beginning. This tract being

bounded as follows: On the north and northeast by the north line of the Huddleston 2,000 acre tract as above described; on the east by the east line, and on the northeast by the first call of the north line of the said Huddleston tract, and also on the north by the tract hereinbefore described; on the south by the tract of land belonging to H. W. Stockley on what is sometimes called Tow-head Island, and which was the subject of a suit by the said Cissna against Enos White and the said H. W. Stockley in the Circuit Court of the United States for the Eastern Division of the eastern District of Arkansas, at Helena, Arkansas, being No. 105 on the docket of said court; and bounded on the west by the land of H. W. Stockely on Centennial Island; the track herein described as well as said Stockley's other aforementioned tracts on Tow-head Island and Centennial Island, being a part of the said Huddleston's 2,000 acre grant, the east part of which the said Stockley now owns. The value of this tract being three housand five hundred dollars ($3,500). Both of the aforegoing described tracts of land lying and being in the eleventh civil district in Tipton County, Tennessee. Their aggregate value being Ten Thousand Dollars ($10,000). Qnd both of which the said plaintiff, H. W. Stockley, was seized and possessed, claiming the same in fee simple and claiming and having a perfect right thereto in fee simple on the first day of 1901, said day being after the said title had accrued to him; and after said possession accrued the defendant, W. A. Cissna, on the first day of May, 1901, entered thereon and unlawfully withholds and detains the same; unlawfully claiming the same as accretions to a tract he claims to own in the State of Arkansas, by virtue of grants from that State, while the title of plaintiff Stockley is legally deprived from the State of Tenneesee by virtue of various grants from said state, and the accretions thereto. Wherefore the plaintiff sues for said tract of land as aforesaid, together with three thousand dollars ($3,000.00) due for the detention thereof, and in the trial of this case demands a jury.

4

G. J. McSPADDEN,
Attorney for Plaintiff.

The President of the United States of America, to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon W. A. Cissna, citizen of the State of Illinois, if to be found within your district, to appear before the Judges of the Circuit Court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said district on the fourth Monday in May next, A. D., 1901, and then and there to answer H. W. Stockley, citizen of the State of Tennessee, in a plea of ejectment to the damage of said plaintiff (as he says) in the sum of three thousand dollars, the value of the land, being as he says, ten thousand dollars ($—). Herein fail not and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court,

at said Memphis, this 13th day of May 1901, and the 124th year of American independence.

JOHN B. CLOUGH, *Clerk*,
D. F. ELLIOTT, *D. C.*

Know all men by these presents, that we, H. W. Stockley and C. A. Stockley, are held and firmly bound unto said defendant, W. A. Cissna, in the sum of two hundred and fifty dollars; but to be void on condition that the said defendant, W. A. Cissna, do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the Circuit Court of the United States for the Western District of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay all costs.

Witness our hands and seals this 13th day of May, A. D. 1901.

H. W. STOCKLEY. [L. S.]
C. A. STOCKLEY. [L. S.]

Approved and acknowledged before me, the 13th day of May, A. D. 1901.

JOHN B. CLOUGH, *Clerk.*
D. F. ELLIOTT, *D. C.*

Marshal's Return.

This writ came to hand on the date of its issuance, and is now returned by me to the Circuit Court of the United States, at Memphis, Tennessee, unexecuted, as the said defendant is not to be found in my district.

T. H. BAKER, *U. S. Marshal,*
By T. H. BAKER, JR., *Deputy.*

Memphis, Tennessee, May 16, A. D. 1901.

No. 3601. U. S. Circuit Court, Western District Tennessee, Western Division. H. W. Stockley vs. W. A. Cissna. Summons. Returnable to Nov. Term, A. D. 1901. G. J. McSpadden, Attorney. Returned and filed at Memphis, on the 13 day of May A. D., 1901. John B. Clough, Clerk.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1900, at the United States

Court House in the City of Memphis, in said district, on, to wit, the 13th day of May, A. D. 1901, in the following cause to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

6 This day comes the plaintiff herein by his attorney and files in the court here his declaration in the suit, and gives the usual cost bond in this behalf, and it is ordered that the usual summons issue returnable to the next term with copy thereof and of the said declaration herein, for service on defendant.

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon W. A. Cissna, citizen of the State of Illinois, if to be found within your district, to appear before the Judge of the circuit court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District on the fourth Monday in May next, A. D. 1901, and then and there to answer H. W. Stockley, citizen of the State of Tennessee, in a plea of ejectment to the damage of the said plaintiffs (as he says) in the sum of three thousand dollars. The value of the land being as he says, ten thousand dollars ($10,000.00). Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 13th day of May, A. D., 1901, and the 124th year of American Independence.

[L. S.]

JOHN B. CLOUGH, *Clerk*,
DAN F. ELLIOTT, *D. C.*

This writ came to hand on the day of its issuance and is now returned by me to the Circuit Court of the United States, at Memphis, Tennessee, unexecuted, as the said defendant is not to be found in my district.

Memphis, Tennessee, May 16th, 1901.

[L. S.]

T. H. BAKER, *U. S. Marshal*,
By T. H. BAKER, JR., *Deputy*.

Copy No. 3601. U. S. Circuit Court, Western District Tennessee, Western Division. H. W. Stockley vs. W. A. Cissna. Sum-
7 mons. Returnable to May Term, A. D. 1901. G. J. McSpadden, Attorney.

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Affidavit of H. W. Stockley.

Filed May 13, 1901.

The affiant, H. W. Stockley, the plaintiff in the above styled cause, makes oath that he is acquainted with W. S. Cissna, the defendant in said cause, that he knows the place of residence and citizenship of said Cissna, deriving his knowledge from statements made to him by the said Cissna, that the said defendant, W. A. Cissna, is a resident and citizen of the State of Illinois; residing in and being a citizen of the city of Chicago, in said State of Illinois; that the said W. A. Cissna owns, or claims to own, a plantation on Dean's Island, in Mississippi county, Arkansas, to which he claims the land herein sued for by plaintiff is an accretion; that one W. W. West is the manager or agent of said Cissna on said Dean's Island plantation and the said West is a citizen and resident of the State of Arkansas; that both said W. A. Cissna, and his said agent, West, are citizens of other states than Tennessee, and reside without the Western District of Tennessee and within the jurisdiction of this Court, so that its processes can not be served upon in the direct and ordinary way; that the process of this court can only be served on the said defendant, W. A. Cissna, by order of the court in the manner prescribed by Act of Congress made and provided for such cases. Affiant further makes oath that the land described in his declaration, filed in this cause, is situated in Tipton County, in the State of Tennessee, within the jurisdiction of this court; that affiant verily believes the value of said two tracts of land is ten thousand dollars ($10,000.00), the same being a reasonable estimate of their volue. That affiant is the true and lawful owner of, and has a valid legal title to
8 the land described in said declaration, to recover which he has brought this suit; and that affiant is entitled to the relief he herein seeks. Therefore, affiant prays the court to make an order in this cause, setting a certain day and requiring the defendant, W. A. Cissna, to appear in this court in this cause on said day and plead, answer or demur to the declaration in this cause. That notice of said order and the original process in this cause be served on the said W. A. Cissna in the district or state wherein he may be found; and that said order and notice be served on said agent, W. W. West, in the state wherein he may be found. And in the event such services on the said Cissna is found to be impracticable, that he may be brought into Court by publication in the manner prescribed by the Act of Congress made and provided for such cases.

And further affiant sayeth not.

H. W. STOCKLEY.

Sworn to and subscribed before me this 13th May, A. D. 1901.
[L. S.] DAN F. ELLIOTT,
Deputy Clerk U. S. Circuit Court,
Western District of Tennessee.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

In this cause on this day, came the plaintiff, H. W. Stockley, by his attorney and moved the court for an order directing the defendant W. A. Cissna, to appear in this cause within the time set by the court and plead, answer or demur to the declaration filed herein against him on May 13th, 1901. And the same having been considered by this court, and it appearing to the court from the pleadings and proof filed in this cause, including the affidavit of H. W. Stockley filed herein on Mau 13th, 1901, that this is a suit
9 in ejectment to recover a certain tract *a certain tract* of land, lying and being in Tipton County, Tennessee, within the jurisdiction of this court and to enforce the legal right or title to the same, as the declaration alleges, and that the said plaintiff, H. W. Stockley, is a citizen and resident of Tipton County, Tennessee, and that the defendant, W. A. Cissna. is not to be found within the district, as appears by return of the Marshal upon the process heretofore issued herein, but that he is a citizen and inhabitant of the State of Illinois, residing in the City of Chicago, ans is a non-resident of the State of Tennessee and is within the jurisdiction of this court, the court is, therefore, of the opinion that the motion is in all things right and proper, and the same is hereby granted.

And therefore, the said defendant, W. A. Cissna, is by the court, hereby ordered and directed to appear in this cause in this, the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis, and held in the Federal Building, in said city, on or before the fourth Monday in July, 1901, and plead, answer or demur to the declaration filed in this cause against him by the said H. W. Stockley, or the court will entertain and take jurisdiction and proceed to the hearing and adjudication of this cause in the same manner as if the said defendant, W. A. Cissna, had been duly served with process within this district.

And the clerk of this court is hereby ordered to issue a copy of this order, together with a copy of the declaration filed herein and such other prosesses and orders as the custom of this court requires, and as provided by law, to the Marshall of the United States for the Northern District of Illinois, and he is directed to execute and serve the same on the said defendant, W. A. Cissna, by reading, or

offering to read, this order to him, and by leaving a copy of the same, and a copy of the declaration filed herein with him, and to make a due and proper return of his execution of this order to this court by returning this order sent him with his endorsement of services thereon.

10 This the 16th day of May, A. D. 1901.

[L. S.] JOHN B. CLOUGH, *Clerk.*
DAN. F. ELLIOTT, *D. C.*

The within order of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, sitting at Memphis, came to hand on this the 18th day of May, 1901, and was executed by me by reading the same to defendant, W. A. Cissna, by leaving with him a copy of the same, and also with a copy of the declaration filed in the cause of H. W. Stockley vs. W. A. Cissna, No. 3601, Law Docket of said court.

JOHN C. AMES,
U. S. Marshal, Northern Dist. of Ill.,
By HENRY C. WADE, *Deputy.*

Returned and filed this the 22nd May, 1901.

JOHN B. CLOUGH, *Clerk.*
DAN. F. ELLIOTT, *D. C.*

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Pleas.

Filed July 23, 1901.

Comes the defendant in person and by attorneys and pleads in abatement of this cause, and says that the lands mentioned and described and sued for, are not situated in the Western Division of the Western District of the Circuit Court of the United States for the Western District of the State of Tennessee, and are not situated in the said State of Tennessee, but are and were at the time of the commencement of this suit *sutiated* and lying in the state of Arkansas. Wherefore the defendant says this court has no jurisdiction of this suit, or right to try and determine the same. And the said defendant prays judgment of the court will or ought to have further cognizance of the plea aforesaid.

11 The defendant for further plea to the declaration says he is not guilty in the manner and form therein alleged, and of this he puts himself on the country.

PIERSON & EWING,
Attorneys for Defendant.

W. A. Cissna, being duly sworn, says he is the defendant in the foregoing case and that the plea in abatement above set forth is true in substance and in fact.

W. A. CISSNA.

Sworn to and subscribed before me this 18th day of July, 1901.
[L. S.]
J. D. HAGANS,
Notary Public for Pike County, Ohio.

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Replication.

Filed July 24, 1901.

The plaintiff for replication to the plea in abatement filed herein denies that the tracts of land set forth and described in his declaration and sued for in this cause, are in the State of Arkansas, and says that they are in Tipton County, in the State of Tennessee, as in his declaration alleged, and are within the jurisdiction of this court. And in the trial of this issue demands a jury.

G. J. McSPADDEN,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

12 Proceedings had in said court at a regular term thereof begun and held for its May term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit the 18th day of November, A. D. 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the cause be and it is hereby continued until the following term of this court.

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Agreement of Counsel as to Death of A. W. Massey.

Filed November 19th, 1901.

In this case it is agreed that E. W. Massey, who gave his deposition on February 12th, 1901, in the case of W. A Cissna vs. Enos White and H. W. Stockley, then pending in the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas, at Helena, Arkansas, is dead, he having died in the month of April, 1901, since his said deposition was taken; and that the fact of his death shall be considered as proved in this cause without the introduction of any witness to testify thereto. But the defendant, Cissna, reserves the right to object to the introduction of said deposition as evidence in this case upon every and any other ground except that of the proof of death hereby agreed to.

This November 15th, 1901.

G. J. McSPADDEN,
Attorney for W. H. Stockley.

PIERSON & EWING,
Attorneys for Cissna.

13 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Amended Declaration.

Filed December 2, 1901.

The plaintiff, H. W. Stockley, by the leave of the court, first had and obtained, comes and for amendment to the declaration, heretofore filed in this cause by him, says he was seized and possessed of the lands described and set forth in said declaration, possessing a valid legal title to the same, on the 25th day of April, 1901, and that the date of the demise set forth in said declaration was written therein by mistake.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States, Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D. 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 2 day of December, A. D. 1901, in the following cases to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

This day came the said plaintiff with his attorney, and the said defendant by his attorney, and comes also a jury of good and lawful men, to wit: S. Heiner, A. M. Applewhite, G. W. Ferguson, S. H. Thomas, J. M. Crofford, W. C. Davis, W. E. Todd, W. T. Lucas, J. H. Cole, J. N. Norment, J. W. Hanna, and W. S. Bledson, who, being duly elected, empaneled, tried and sworn, well and truly to try the issues herein joined and a true verdict render ac-
14 cording to the law and the evidence when the trial of the suit was commenced, and there not being sufficient time to conclude the same to day its further consideration is hereby postponed until to-morrow morning.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit: the 3 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Come again the same plaintiff with his attorney, and the said defendant with his attorneys, and comes again also the jury heretofore

empaneled and sworn herein on yesterday. When the trial of this suit was again resumed, and there not being sufficient time to complete the same to-day, the further consideration of the case is hereby postponed until to-morrow.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 4 day of December A. D, 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

15 Came again the said plaintiff with his attorney, and the said defendant with his attorneys, and comes again also the jury heretofore empaneled and sworn herein when the trial of this cause was again resumed, and there not being sufficient time to complete the same to-day the further consideration of this case is hereby postponed until to-morrow.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term A. D., 1901, at the United States Court House in the City of Memphis, in said district on, to wit, the 5 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the said plaintiff with his attorney, and the said defendant with his attorneys, and came again also the jury heretofore

empaneled and sworn herein, when the trial of this suit was again resumed and there not being sufficient time to complete the same to-day the further consideration of this case is hereby postponed until to-morrow.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit,
16 the 6th day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the said plaintiff with his attorneys, and the said defendant with his attorneys, and came again also the jury heretofore empaneled and sworn herein, when the trial of this suit was again resumed and there not being sufficient time to complete the same to-day the further consideration of this cause is hereby postponed until to-morrow.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court *in* a regular term thereof begun and held for its November term, A. D. 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 7 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the plaintiff with his attorneys and the said defendant with his attorneys, and comes again also the jury heretofore em-

paneled and sworn herein, whe- the trial of this suit was again resumed, and there not being sufficient time to complete the same today the further consideration of the case is hereby postponed until next Monday.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States within and for the
17 Western Division of the Western District of Tennessee *of Tennessee*, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular — thereof, begun and held for its November term, A. D., 1901, at the United States Court House in the City of Memphis, in said District, on, to wit, the 9 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the said plaintiff with his attorneys, and the said defendant with his attorneys, and comes again also the jury heretofore empaneled and sworn herein, when the trial of this suit was again resumed, and there not being sufficient time to complete the same today, the further consideration of this case is hereby postponed until to-morrow.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 10 day of December, A. D., 1901 in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the said plaintiff with his attorneys, and the said defendant with his attorneys, and came again also the jury heretofore

empaneled and sworn herein, when the trial of this suit was again resumed and there not being sufficient time to complete the same to-day the further consideration of this case is hereby postponed until to-morrow.

18 UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 11 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came again the said plaintiff with his attorneys, and the said defendant with his attorneys, and comes again also the jury heretofore empaneled and sworn herein, when the trial of this suit was again resumed, whereupon, for satisfactory reasons to the court appearing, it is hereby ordered by the court that the further consideration of this cause be and it is hereby continued until next Friday.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, at said district on, to wit, the 13 day of December, A. D., 1901, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came the parties by their attorneys and the jury of good and lawful men heretofore empaneled and sworn herein, to wit:
19 A. M. Applewhite, G. W. Ferguson, S. H. Thomas, J. M. Crawford, W. C. Davis, W. E. Todd, S. Heiner, W. T. Lucas,

J. H. Cole, J. M. Norment, J. W. Hanna and W. S. Bledsoe, when the trial was resumed, and all the evidence having been heard, the defendant withdraws his plea in abatement, and admitting that a small part of the island sued on is situated in the State of Tennessee, and that this Court for that reason has jurisdiction of a part of the subject matter of this suit, and the said defendant having also moved the court to direct a verdict in his favor upon the issues joined upon plea in bar, it is by the court adjudged and ordered that said plea in abatement be overruled and dismissed, and that the said motion of the defendant for the direction of a verdict in his favor be granted, and thereupon the jury aforesaid upon their oaths do say that they find for the defendant and it is considered by the court that the defendant go hence without day and recover of the plaintiff and C. A. Stockley, and surety on his vond, the costs of this suit in behalf expended and the same is accordingly entered. To the action of the court in so directing a verdict for the defendant, the plaintiff then and there excepted and asked that said exception be entered of record, which is now ordered donw by the court accordingly.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit, the 18 day of January, A. D., 1902, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

On this day came the parties to this suit, by their respective attorneys, when the plaintiff, by his attorney, moved the court
20 for a new trial in this suit, which having been considere- by the court was, by the court, overruled, and a new trial of this suit was refused, to which action of the court in so overruling the said motion and refusing to grant such new trial, the plaintiff, by his attorney, excepts and asked that his exceptions be noted of record, which is hereby accordingly done.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on, to wit: the 24 day of January, A. D., 1902, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

And now again comes the said plaintiff, H. W. Stockley, and tenders to the court his bill of exceptions herein, and moved the court that it be by the court signed, sealed, allowed and ordered to be made a part of the record of this suit, and filed as such. And the same having been examined by the court and found to be in all things proper, accurate and correct and the court having duly signed, sealed and allowed the same, it is hereby ordered and directed by the court that the said bill of exceptions of the plaintiff be filed as such, and be made a part of the record of this suit.

And the same is accordingly done.

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

21 *Bill of Exceptions.*

Allowed and Filed January 24, 1902.

Be it remembered that this cause came on to be tried on this the 2d day of December, 1901, the same being a day of the regular term of said court, before the Honorable Eli S. Hammond, Presiding Judge. The case, having been called, both plaintiff and defendant, by their respective counsel announced themselves ready for trial. A jury was duly elected, empaneled and sworn to try the issues joined and all witnesses were sworn.

The case was stated to the jury by counsel for the plaintiff and de-

fendant respectively. The following evidence was thereupon heard in open court:

Evidence on Behalf of the Plaintiff.

Miss SUE E. MURPHY, witness, for the plaintiff, being first duly sworn, testified as follows:

Direct examination by G. J. McSpadden, counsel for plaintiff:

Q. What is your name, please:
A. Sue E. Murphy.
Q. Where do you live?
A. At Covington, Tennessee.
Q. I will ask you if you are acquainted with the Register's office in Tipton County, Tennessee?
A. Yes sir.
Q. I will ask you if *you if* these copies—I will just pass them to you, and ask you if these are the copies you made for me?
A. Yes sir.

(Testimony is taken subject to objection by the defendant, which is reserved.)

Q. Do you say that you made these copies?
A. Yes sir.
Q. From what books did you makes these copies?
A. I made them from the record and the survey books in the Register's Office at Covington?
Q. You examined these books and then made these copies from the records of the Register's Office at Tipton County, Tenn.?
A. Yes, sir.
22 Q. Will you take them bundle by bundle and just read the deeds that you have made, read the copies, or the heads?
A. Yes sir.

(Here the reading of the copies was waived.)

Q. You copied each and every one of these copies that you made carefully from the records, did you not?
A. Yes sir.
Q. I will ask you if they are true and accurate copies?
A. Yes sir; to the best of my knowledge.
Q. You made them as accurately as you could?
A. I did.
Q. And they are true?
A. Yes sir.

Cross-examination by counsel for defendant:

Q. Where did you get the list that you were to copy, did Mr. McSpadden furnish it to you?
A. Yes sir.
Q. And you copied this list that was furnished you from the deed books and the survey books?

A. In the Register's Office at Covington.
Q. Is this actually as they were written there?
A. Yes sir.

Counsel for plaintiff then offered in evidence the copies of the certificates of survey, to which counsel for defendant objected on account of the absence of certificate of the entry taken for Tipton County. Objection is sustained, but time is given in which to get the necessary certificate, which was done.

Plaintiff excepted to the ruling of the court and asked that his exception be noted of record, which was granted by the court, counsel for plaintiff then offered the copies of the deeds which were claimed constituting a chain of title to the various tracts of land claimed by the plaintiff on Island 37 and to the Huddleston tract, all of which has been identified by the witness as having been made by her. Counsel for defendant objected to their introduction because they were not certified copies made by the Register of Tipton
23 County. The objection was sustained by the court and the copies of the deeds ruled out, to which ruling the plaintiff excepted and asked that his exception be noted of record, which was by the court allowed. Witness excused. Certified copies of said deeds and surveys were afterwards introduced and are in the record.

J. W. FARNVILLE, witness for the plaintiff, being first duly sworn testified as follows:

Direct examination by counsel for plaintiff:

Q. State your name and place of residence?
A. A. J. Farnville; State of Arkansas.
Q. I will ask you, Mr. Farnville, if you pointed out recently any section corner to Maj. Humphreys, who was then surveying?
A. Yes, sir; I did.
Q. What section corner?
A. The corner between 11, 12, 13 and 14.
Q. In what county?
A. In Mississippi County, Arkansas.
Q. How was it you come to know that corner?
A. Well, it was an old established corner. Mr. McGavock's land cornered there and W. K. H—'s cornered there and all the corners came together at a bid iron stake.
Q. Do you know who drove that stake there?
A. No, sir; I believe Mr. A— put it down.
Q. And that is where all the corners came together?
A. Yes sir.

Cross-examination by counsel for defendant:

Q. How old are you, Mr. Farnville.
A. I am fifty-three years old.
Q. Where is the iron stake?
A. It is on the co-ner between 11, 12, 13 and 14.
Q. How far is it from the Mississippi river as it now runs?

A. It is a mile and a few steps.

Q. How far did you live from the Mississippi River in the year 1876?

24 A. I lived right in that immediate neighborhood in 1871. I lived on Dean's Island in 1870 and 1871.

Q. You say you lived on Dean's island in 1871?

A. Yes sir.

Q. Dean's Island commences at the intersection of the Mississippi River and the north corner of the chute?

A. Yes sir.

—. I will ask you if commencing at that point the river does not run in a southeasterly direction?

A. Yes, sir; some little.

Q. Striking the Tennessee bank at the point of Dean's Island the river then turns and runs southwest, does it not?

A. It runs west.

Q. Are you familiar with the topography of that country in 1874?

A. Yes, sir; tolerably so.

Q. And are you familiar with the way the river flowed and the general outline of that country at that time?

A. Yes, sir; tolerably well.

Q. I will ask you if that map is a correct statement of the way the country lay in 1871-2-3-4.

A. I do not understand the map.

Q. I will ask you whether or not the Mississippi River ran around in here or turned and came in this way prior to the cut-off of 1876?

A. I could not — about the turn or the run of the river.

Q. Would you say that that was a correct representation as to how the river ran before the cut-off?

A. No, I could not say it is correct.

Q. Does the river, as you know, run differently?

A. No, sir, just about the same, seems to me.

Q. I will ask you whether the bank on the Tennessee side was caving, commencing at the bend about even with the Tennessee side of Dean's Island?

A. No sir, it started about a mile above the head of Dean's

25 Island. Most of it was right along in here (pointing to map.)

Q. The Arkansas bank across from Dean's Island was a sloping bank, was it not?

A. Yes sir; a kind of sand bar.

Q. So that commencing with Dean's Island the situation was such that the caving bank was on the Tennessee side?

A. Yes, along the head of Dean's Island was caving all the time.

Q. Commencing at the head of Dean's Island there was originally a very large point which was washed away before the cut-off wasn't there?

A. Yes sir; but the island was making out into the river.

Q. Before this island was making out, do you remember where the cut-off was?

A. Yes sir; about there it was.

Q. Your idea then, is that the river cut right across that way?
A. Yes sir.
Q. That the river cut through along in here, is that your idea?
A. Yes sir.
Q. This is dried up now, has it not?
A. Yes sir; this is chute 37.
Q. How was the current as compared to that of 1876?
A. At the time of high water the boats would have to come down in here, there was no other way, this was deed right here.
Q. This is still pretty deed, is it not?
A. No, sir, it is dry.
Q. Has Dean's Island increased any since you were there?
A. Yes sir.
Q. Taking this point along down in here, did that cut off any?
A. Along there it did.
Q. Do you know whether the water washed this bank along there —when was the last time you examined this point?
A. It has been about fifteen years since I was familiar with the country.
Q. Does this look to you to be a correct representation of the way this river ran in 1876?
26 A. I can say this much correctly that I know in going to Shawnee Village we did not have to make so large a bend, we did not have to go around in here.
Q. Then, the river at this time did not make this wide turn?
A. It does not seem so to me. We went right through the chute there, and this was a little sand bar.

Redirect examination by counsel for the plaintiff:

Q. You stated that that did not extend near that far?
A. Oh, no, sir; it came down here right in front of this little chute.

Recross-examination by counsel for defendant:

Q. If this was the chute, you did not call it the Mississippi River, did you?
A. No, sir; we called it Tow-head chute. I was there at that time and the river was right along about that point (indicate it on the map) that was the chute.
Q. And this your mark?
A. Yes, as near as I can mark it. I do not mean to say that that was the main current of the river, the main current was farther out.
Q. Where do you say was the main current of the river, can you mark it?
A. Well, it was farther out.
Q. Which is Dean's Island on this map?
A. Right here.
Q. What is this that runs between Dean's Island and the river?
A. It is Dean's chute.

Q. The river comes down here and runs in this course, don't it?
A. Yes sir.
Q. Where on the Tennessee side in 1870 and '74 was the caving bank?
A. I should say it was about a mile and a half down there.
Q. Now the river in 1870, you think, was running along these blue lines?
A. Yes sir.
Q. Where from that time until 1876 were you?
27 A. I was down in Arkansas.
Q. You remember that in crossing the river ran in here due north?
A. Yes sir.
Q. Was any change made in 1876?
A. Yes, it cut right through here.
Q. What did the people call this place in here?
A. They called it old river.
Q. At the time you were there in 1870, was this island growing out into the Mississippi River?
A. Yes, sir.

Direct examination by counsel for plaintiff:

Q. In 1870-1 you say that the water was running over in there, what was the occasion of this?
A. Because right here there was a sand bar.
Q. This land that was growing up, it was quite different from the main land, was it not?
A. Oh, yes, sir.
Q. Now, after 1876 did the land grow up rapidly?
A. Yes sir; it filled up almost solid.
Q. As I understand you this is the first time you ever saw this map?
A. Yes sir; it is the first time.
Q. Does this map represent the country as it appeared to you?
A. Yes, sir; for general purposes as I recollect it.
Q. For whom was Dean's Island named?
A. For an old man named Dean.
Q. Did Dean's Island cave rapidly?
A. Yes, sir; the river ran around there very rapidly.

Recross-examination by counsel for defendant:

Q. Have you lived near Dean's Island since 1876?
A. I lived there before that time and since 1876. I have been by there frequently.
Q. I will ask you if this map represents Dean's Island and the cut-off after 1876, when the river ran right through here does that represent it?
A. I will tell you since the river cut through there here
28 is the river and there is the chute (points them out on the map).

Q. Up above Dean's Island now here is where it used to run, right along in this way?

A. Yes, sir.

Q. And then it cut through right through here in 1876, did it?

A. Yes, here was the head of Dean's Island, the river ran straight in here and then it turned down in this way, but this all looks too large in here to me.

Q. Then, you do not think it was large in 1883. Taking the trigonomical survey of 1879-80 would that be a fair representation of how it was?

A. No, sir; this little chute came down in here.

Q. Where were you living in 1879?

A. I think I was living in Arkansas at that time.

Q. If this proposes to be an accurate survey you would differ from it, would you?

A. Well, it don't look just like it ought to me, Dean's Island came more to a point.

Q. Then, you do not know anything about the correctness of this map?

A. No, sir; I don't.

Q. Would you take this map to be a correct representation of the river in 1876?

A. No, sir; I could not do so, it does not show it up as well as the other one.

Witness excused.

S. S. BATEMEN, witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by counsel for plaintiff:

Q. Your name S. S. Bateman?

A. Yes sir.

Q. Where do you live Mr. Bateman?

A. I live at Watt's Landing.

29 Q. How old are you?

A. I am fifty-two years old.

Q. I will ask you if you are acquainted with the land lines and the northwest corner of the Jesse Benton fourteen hundred and thirty-six acre tract in Tipton County, Tennesseem near Corona?

A. Yes, sir; I have been familiar with it all my life.

Q. I will ask you if you have ever pointed out a corner on this Benton fourteen hundred and thirty-six acre tract to any surveyor at the instance of Mr. H. W. Stockley?

A. Yes, sir; I did to Maj. Humphreys.

Q. When did you point it out to him?

A. Well, it has been a few months ago.

Q. Was there any other person present at the time you pointed it out to him?

A. Yes, sir; Mr. E. W. Massey was present that I remember of.

Q. I will ask you to tell the court how you came to know that corner.

A. Well, it has been pointed out to me a number of times, nearly all the lines have been run from here ever since I could remember, and it is just as familiar to me as anything could be. A number of lines corner there.

Q. Is that an old and established corner?

A. Yes, sir.

Q. And you have lived in that neighborhood?

A. Yes, sir; I was born and raised there.

Cross-examination by counsel for defendant:

Q. Where did you say that corner was, on which side of the Mississippi river?

A. It is on this side, on the Tennessee side.

Q. How far from the river?

A. I suppose it may be two or two hundred and fifty yards.

Q. Does the river run between the corner and Dean's Island?

A. Yes sir.

Q. How close is it to Dean's Island?

A. I don't know.

Q. At the time you pointed out that corner to Maj. Humphreys he wanted to survey between Arkansas and Dean's Island, and he would have to cross the river, would he not?

A. He went across the river.

Q. He commenced in Tennessee and run his line over the river?

A. He went across where we call the towhead.

Q. That Tennessee bank of the river has been for years a caving bank, has it not?

A. Yes, sir. On the river shore it has been caving a good deal.

Q. The river has gradually shipted over that to make the bank?

A. This river has come over this way, on the Tennessee side.

Q. How old are you Mr. Bateman?

A. I will be fifty-three next April.

Q. And you have lived there all your life?

A. Yes, sir; I was born there and have lived there all my life.

Q. Well going back as far as you can remember I will ask you whether during all that time the river on the other side has been making and the river on the Tennessee side has been caving?

A. Possibly on one side of the *two*head, but there is a difference in what we call the towhead then and now.

Q. I am not asking you about your land marks, what I want to know is if the Arkansas shore was making out into the river, and the Tennessee caving?

A. Oh, yes, sir; it was.

Redirect examination by counsel for plaintiff:

Q. This extension of the Arkansas shore, I think, is due south of Dean's Island, is it not?

A. Yes, it is south, or about south of Dean's Island.

Q. This caving that you spoke of is towards the east part of the old Benton tract and is about south of Dean's Island is it not?

A. Very nearly so I think.

Q. The old river that ran along north of Island 37 was considered the State boundary of Tennessee, was it not?

A. That was beyond 37 and went around 37.

31 Q. Do you know the stream of water that was considered the boundary between Arkansas and Tennessee and what it was called, was it the river, or was it the chute of 37?

A. It was called old river.

Q. The one that went north of 37?

A. Yes sir.

Recross-examination by counsel for defendant:

Q. You have testified that the caving and making of the banks was at a point south of Dean's Island, I will ask you if there was any caving at any other point?

A. Here is Dean's Island (referring to map) and here is the bend above Thompson's Landing, it has caved in here for a number of years, right here above Thompson's Landing.

Q. And this along down in here had filled up that curve?

A. Yes sir.

Q. Where did the old river run in 1874?

A. I could not tell you precisely, here is an elbow where the cut-off was made.

Q. Was the cut-off made right here?

A. Yes, the river came around here and here was the —— of 37.

Q. So you agree with this map that this is how the river ran in 1874?

A. I think it was, yes sir.

Q. Do these dotted lines represent where the main channel of the river was in 1874?

A. I believe they do very nearly represent where the river ran.

Q. But do they represent where the main chanel of the river ran in 1874, and if they are not right tell us where the main channel did run?

A. I know about where the river ran in 1874, and these dotted lines may represent the main channel, I don't know.

Redirect examination by counsel for plaintiff:

Q. Now about this main channel that Mr. Ewing has spoken about, do you know in what State the Island 37 is?

32 A. It is in Tennessee.

Q. Do you know in what State the people of Island 37 pay taxes?

A. They live in Tennessee and vote in that district, and I suppose they pay their taxes where they vote and live.

Q. Are the processes of Tennessee served on Island 37?

A. Yes sir.

Q. Then what you mean by the main channel of the river is the boundary line between two states, is it?

A. Yes sir.

Witness excused.

J. A. GROVES, witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by counsel for plaintiff:

Q. Please state to the court your name?

A. J. A. Groves.

Q. Where do you live Mr. Groves?

A. I have been living on Island 37, but now, and for the last two years have lived in Arkansas.

Q. Are you familiar with the corners of the land lines of the various tracts on Island 37?

A. Yes sir.

Q. I will ask you if y-u have recently pointed out any corner up there to Maj. Humphreys?

A. Yes, sir; I have.

Q. The corner of what island?

A. It was on the northeast line and it was the northwest corner of what I think is called the Sanford land.

Q. Have you ever known it as the T. P. Hall's grant?

A. I think it is marked T. P. Hall.

Q. I will ask you to state how you came to know that to be a corner?

A. In 1874 or 1875, I would not be positive which, along in July or August, sometime in the summer, a man by the name of Hurley and his wife were living there then and we helped to run these lines at that time.

Q. Then this northwest corner was pointed out to you at that time?

A. Yes sir; at that time.

33 Q. Do you recollect any other person who was living there at that time; was Mr. McCling there?

A. Oh, yes; Mr. McClung was there at that time, he told me he came there when he was a boy.

Q. How old was he at that time, when those lines were run?

A. Sixty some odd years, old.

Q. This corner was established at that time?

A. Yes sir; there were several established lines came together there, one came from a hackberry tree on McKenzie chute.

Q. Who pointed out that hackberry tree?

A. Mr. McClung.

Q. Did Mr. McClung point out that hackberry at that time?

A. Yes sir.

Q. Then this corner that you showed Maj. Humphreys was the corner located at that time?

A. Yes, it was located at the time I speak of; it was either in 1874 or 1875.
Q. Does that corner still remain there?
A. Yes sir.
Q. Those lines have been established there since that time?
A. Yes, sir.

Cross-examination by counsel for defendant:

Q. Is that corner on this side or the other side of the Mississippi River?
A. It is on this side of the river.
Q. Did you live there in 1874? ?
A. Yes, I lived right at the head of Island 37.
Q. I will invite your attention to this map and see if this river runs about like you remember. Now this represents Dean's Island, this that chute and this the river, I will ask you if the river ran along the lower part of Dean's Island in 1874, between Dean's Island and Island 37?
A. Yes sir.
Q. Between Island 37 and this body of land which was cit off by the cut of 1876, was there any water?
A. The river went on both sides of 37.
34 Q. On which side of island 37 did the largest body of water go?
A. It struck the island proper on the head——
Q. Well, when it did that it turned one way or the other?
A. In a medium stage of the water steamboats would fall over towards the foot of Dean's Island.
Q. Now, a boat coming down would strike island 37, did the boats turn to the left, or to the right?
A. They would turn to the north, there was a sand bar on the tow heads.
Q. Where are these tow heads?
A. They lie along right opposite Dean's Island.
Q. Where is this Dean's Island?
A. This is it.
Q. Now, then, here were the bars, did the steamboats pass over them?
A. No, sir; they were a little above the mouth of Dean's chute.
Q. Did the boats go over where these bars were?
A. Why, at that time the chute of 37 was a steamboat channel.
Q. Where was that, point it out on the map; it looks like it was right there where those dotted lines are, does it not?
A. I don't know that I understand the map exactly.
Q. Do these dotted lines represent the way the largest body of water flowed, and if they do not point out which way the largest body of water did flow. You must certainly know on which side of Island 37 the largest body of water flowed?
A. I know the boats went through McKenzie chute and a number of them would run over on the oppoiste side of Dean's Island.

Q. You certainly can point out on the map which way the boats went; we want to know and want you to point it out?

A. Well, it is just as I have stated, the boats went down old river and had to come in pretty close to Island 37 and then fall over to the foot of Dean's Island to make Shawnee Village.

Q. Suppose this was going down the river?

35 A. They run the McKenzie chute.

Redirect examination by counsel for plaintiff:

Q. Are you a steamboat captain, Mr. Groves?

A. No, sir, I am not.

Q. Do you know anything of the depth of water in these various chutes or of old river?

A. No sir.

Q. Is it your idea, Mr. Groves, that the boats take the shallowest water?

A. No, I think they would go through the deepest water.

Witness excused.

J. H. HUMPHREYS, witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by counsel for plaintiff:

Q. Please state your name and profession?

A. J. H. Humphreys; civil engineer.

Q. How long have you practiced your profession?

A. Forty-five years.

Q. How long in the State of Tennessee?

A. I have been in the State of Tennessee since about 1855.

Q. I will ask you, Maj., if you have recently made any surveys for Mr. H. W. Stockley on Island 37 in the Mississippi River, and on Centennial Island?

A. Yes, sir; I have.

Q. When were those surveys made?

A. Last January; about a month ago; and a few days ago.

Q. Three different surveys?

A. Yes sir.

Q. I will ask you, Maj., if you have made any maps of that country that you surveyed?

A. Yes, I made some maps.

Q. Will you please examine this one that I now hand you and see if it is the map you made?

A. Yes, sir; that is it.

36 The plaintiff here introduced into evidence and exhibited to the jury the map made by Major J. H. Humphreys and thus identified by him, of the Tennessee main shore in the neighborhood of the two thousand acre tract granted to Simon Huddleston on the Devil's Elbow, island 37, and Dean's Island, and the adjacent parts of Arkansas.

Q. Are all the lines represented on that map those that you run yourself or some of them taken from old records of surveys?

A. The black lines are boundaries of grants from the State of Tennessee; the blue lines represent the Mississippi river as it now runs, together with certain chutes.

Q. I pass you, Major, some copies of various grants made by the State of Tennessee, and ask you if you used these instruments in the preparation of your map?

A. Yes, sir; I used these.

Q. Will you please examine these instruments and state whether or not they are the ones you used?

A. I know they are for they have been in my possession until the last day or two.

Q. Here are some certified copies of the certificates of these old official surveys in Tennessee, am I correct in understanding that you used them?

A. Yes, sir; I used them also.

Q. Will you point them out, Major?

A. Here the witness identifies the certified copies of the instruments used by him which were as follows: By the entry taker of Tipton County, Tennessee, the following certificates of surveys made by the official surveyors of Tennessee:

John Triggs, 30 acres, dated October 13, 1837.
John Triggs, 152 acres, dated October 14, 1837.
John Triggs, 151½ acres, dated October 14, 1837.
John Triggs, 37 acres, dated October 16, 1837.
T. P. Halls, 100 acres, dated October 16, 1837.
John Triggs, 100 acres, dated October 16th, 1837.
N. Patters, 640 acres, dated October 14th, 1837.
Chalmers, et al., 135 acres, dated October 13, 1837.
R. H. Burns, 200 acres, dated July 20, 1837.
T. P. Halls, 610 acres, dated October, 14, 1837.
R. H. Burns, 204½ acres, dated July 20, 1840.
R. H. Burns, 274 acres, dated October 16, 1837.
37 T. P. Halls, 148 acres, dated December 14, 1836.
C. I. Love, 172 acres, dated October 16, 1837.
James Sloan, 12 acres, dated December 14, 1836.
G. S. Fogleman, 125 acres, dated January 22, 1845.
G. S. Fogleman, 200 acres, dated January 23, 1845.
Simon Huddleston, 2000 acres, dated December 19, 1823.
Stephen Slades, 2460 acres, dated December 24, 1823.

By the Register of Shelby County, Tennessee, the following official certificates of survey by the official surveyors of Tennessee:

N. Patters, 252 acres, dated November 11, 1837.
Green B. Batemans, 45 acres, dated January 4, 1837.
Geo. S. Foglemans, 100 acres, dated January 4, 1837.

By the Register of Tipton County, Tennessee, the following certificates of survey made by the official surveyors:

Green B. Batemans, 400 acres, dated November 16, 1845.
John Jenkins, 100 acres, dated December 27, 1823.
Green B. Batemans, 155 acres, dated March 7, 1836.

Green B. Batemans, 256 acres, dated February 10, 1837.
Heirs of John Benton and Jesse Benton, 1636½ acres, dated November 24, 1834.
John Triggs, 253 acres.
Green B. Batemans, 56¼ acres, dated November 19, 1845.
By the Register of Tipton County, Tennessee, the following deeds:
John Trigg to Lucy J. Stockley, dated May 7, 1862.
William T. Brown to Henry C. Walker, dated June 4, 1853.
The foregoing instruments are copied in the record at another place—at the end of plaintiff's evidence—and need not be copied here.

Examination of witness resumed:

Q. Major, have you examined the records in the office of the Register of Shelby County?
A. Yes, sir; I have.
Q. You are of course, familiar with the records in the office of Shelby County?

Objection to this question by counsel for defendant as having no bearing on the case at bar. Objection sustained.

Q. Now Major, I have handed you some plats from the land office, will you identify them as having been used by you in the preparation of your map?
A. Yes sir.

(Here the witness identifies the several plats.)
38 Counsel for plaintiff here introduces the several plats and surveys which are as follows:
Plat from the General Land office of the United States of the Department of the Interior of T. 9 N. R. 9 E. 5th principal meridian of Arkansas.
Plat from the General Land office of the United States.
Plat from the General Land office of T. 9 & 10 N. R. 10 E. 5th principal meridian of Arkansas.
Plat of T. 9 N. R. 9 East of the 5 principal meridian of Arkansas.
Tracing of the survey of Frac. T. 9 & 10 N. R. 10 East, dated Little Rock, Ark., 30 Dec., 1834. From General Land Office of the United States.
Plat of T. 9 N. R. 8 East of the 5th principal meridian of Arkansas.

Q. Major, is that map made from your own actual surveys made upon the ground?
A. It was constructed first from the plats and then the measurements I made also.
Q. Now Major, tell the Court how the map was made?
A. Well, the first survey I made I began on the northwest corner of the Benton fourteen hundred acre tract, produced that line north and crossed the river and then ran up the river to connect on the Huddleston grant and located the northeast corner of the Huddle

ston grant, then after making various surveys to show the sand bar, I ran from where it crossed the old river there up into Island 37 and connected with the corner. Subsequently I began at the corner that Mr. Groves showed me and ran a line to make the intersection, and in that way established that corner; I also ran from that corner due east over to Arkansas, I then came up here to the corner of 11, 12, 13 and 14 and ran one mile south, where I found a tree marked for a corner, and then ran two miles east where I found another tree; and then ran south until I intersected with this other line which I had run.

39 Q. Then that map is drawn from these original surveys and your own lines run from a fixed point on the shore of Tennessee to a fixed point on Island 37?

A. Yes sir.

Q. Is that map an accurate representation of all the lines shown there?

A. Yes, sir; it is.

Q. It was made by your best skill and care, was it?

A. Yes sir.

Q. Major, will you explain to the jury how you ran on the Tennessee main shore ?

A. I began at the corner of the Benton grant.

Q. Who showed you the corner?

A. Mr. S. S. Bateman and Mr. E. W. Massey. You understand that this is the river as it now runs and here is the way it originally run; the river now runs between these two lines. This is the bank of old river and this is the McKenzie chute between Island 37 and the main shore; this is what is known as the Devil's Elbow.

Q. Did the deeds furnished you at the time enable you to run those lines by their calls for adjoining tracts?

A. Yes sir.

Q. Will you state as to whether your work was accurately donw?

A. Oh, yes; It was accurately done.

Q. You did it with the utmost care?

A. Yes, I used accurate instruments for the purpose. I then ran the north line of the Huddleston Grant along McKenzie chute; subsequently I ran a line to where it struck this old river and ran on into Island 37; here I established this corner; and then ran a line due east into the State of Arkansas.

Q. Who was it that designed the corner where you started?

A. Mr. Groves.

Q. Was there anything there to lead you to doubt the accuracy of that corner?

A. Nothing at all. I ran a line due east from there ti a stake on the Arkansas bank and then came up there to the corner

40 of sections 11, 12, 13 and 14, township 10, N. R. 9 E.

Q. Now, Major, you were describing the line which you ran into Arkansas; who was it that pointed out that section corner to you?

A. It was Mr. Farnville.

Q. Is he the gentleman who testified here this morning?

A. Yes, sir.

Q. Tell us how you ran that line, and what marks, if any, there were, to show you that you had struck a section corner?

A. I began at an iron stake which he showed me and ran to two gum trees with lines on them. I then ran one mile east and found another tree marked, then two miles east and found a stake tree marked to proper distance, and then a half mile from there found an iron stake at a proper distance.

Q. Are you familiar with the system of government surveys?

A. Yes sir.

Q. Is it not a fact that they mark each section corner?

A. Yes sir.

Q. Were you perfectly satisfied that you had located a section corner?

A. Yes sir; I had no doubt about it at all.

Q. This map that you have here represents the actual survey that you made from these accepted and established corners?

A. Yes, these corners are all on the map. This survey was made for the purpose of connecting the Tennessee survey with the Arkansas survey.

Q. Did you run a line from any fixed point on island 37 to a fixed point on Centennial Island?

A. Yes, I began at a fixed point on Huddleston's north line and ran to the northeast corner of the Trigg 100 acres on 37.

Q. Was that the corner Mr. Groves showed you?

A. Yes.

Q. I believe you stated that you had already begun on the Tennessee main shore at Benton's corner and had run Huddleston's east and north line?

A. Yes sir.

41 Q. Then that made a continuous line which you ran from the Benton corner on the Tennessee main shore to this Trigg 100 acres northeast corner on 37, did it?

A. It did.

Q. Were you able to run these lines accurately and fix these points on Centennial Island and island 37 accurately?

A. Yes sir.

Q. Then you took the certificates of surveys and deeds and other records given you and platted in the other tracts on 37 and the Tennessee main shore in order to make a map, did you?

A. Yes, but the map shows many actual surveys that I made.

Q. State whether or not the lines an*f* figures *s*hich purport to show the present condition of things were actuall- run by you or not?

A. They were. The lines of the old tracts and the course of the river and McKenzie chute are all that are platted from the old surveys. The rest of it was made from the surveys that I made.

Q. Did you *chains* these lines and thus obtain the locations and distances that you have given?

A. I did in all instances except in crossing from the Tennessee main short. That was done, of course, by triangulation.

Q. Were your measurements all accurate?

A. Yes, as accurate as I could get them.

Q. How did you connect the Arkansas bank with your surbeys on 37 and Centennial Island and the Tennessee main short, if you did so?

A. As I have stated, I began at the northeast corner of the Trigg 100 acres on 37, which I had already established, and ran due east until I struct the Arkansas bank. Then I drove a sta-e to mark the spot, then I went to the corner of Sections 11, 12, 13 and 14, in Tns. N.R.E. in Mississippi County, Arkansas, and ran south one mile to a marked section corner. Then I ran two miles to another marked section corner, then I ran south until I had found the other line I had run from the starting point on 37

42 to the Arkansas bank.

Q. Was the section corner where you began the one pointed out to you by Mr. Farnville?

A. Yes.

Q. Were you able to locate the Arkansas bank when the township plat was made, or rather when the United States government survey was made in 1823?

A. Yes sir.

Q. Were you by the lines you ran able to locate the Tennessee shore on island 37 in reference to the Arkansas shore on Dean's Island?

A. Yes sir.

Q. How did you draw Dean's Island and the other parts of the Arkansas shore on your map?

A. From the certified copies of the original government surveys as shown by the plats in the general land office. Having run a line from the Tennessee shore to a fixed section corner in Arkansas, I took the plat of the township surveys and platted in Dean's Island and the neighboring townships as shown on the maps.

Q. Did this method enable you to locate accurately the banks of the river at the time the surveys were made in 1823?

A. It did.

Q. From these surveys and drawing you have made and the government surveys in Arkansas and the official surveys in Tennessee, state whether or not you were able to accurately measure the width of the river as it was in 1823, the date of the original survey?

A. Yes, it can be done very accurately from this data. You see I have connected the corners of the old surveys made in both states by an accurate survey. I think it can be done very accurately.

Q. Then what was the width of the river measuring across from the bank near the northeast corner of the 100 acre tract on island 37?

A. 76 chains.

Q. What was the width of the river measuring directly across from Huddleston's north-east corner?

43 A. 85 chains.

Q. State whether or not from these old official surveys that is the United States Government Surveys and the official surveys

made in Tennessee, all made about the year 1823, and from the data gathered from your own surveys did you cover the middle of the main channel of the Mississippi River as it was then between Dean's Island on the one side and 37 and the Huddleston tract on the other?

A. I have.

Q. Do the lines purporting to show it on your map shot it correctly?

A. They do.

Q. Suppose the boundary lines between Arkansas and Tennessee to be the middle of that main channel of the Mississippi River as it was in 1823, would the lines on your map represent it correctly?

A. They would.

Q. Have you ever surveyed the larger tract of land described in the declaration and claimed by the plaintiff, Stockley, in this case?

A. I have.

Q. Is that the larger tract of land shown you upon your map and marked A?

A. Yes sir.

Q. Is this tract of land within the State of Tennessee if the boundary of the state is assumed to be at the middle of the old main channel of the Mississippi river as it was at the middle of the old surveys in 1823?

A. It is, except that it runs over to a little extent as I have described to you.

Q. Is the smaller tract described in the declaration and marked B, on your map within the boundary of the state of Tennessee as it was in 1823?

A. It is; it is a part of the old Huddleston granted by the state of Tennessee.

44 Q. Did you survey this smaller tract?

A. I did.

Q. What is its area?

A. One hundred and thirty-one acres.

Q. And it is within the boundaries and part of the old Huddleston tract?

A. Yes sir.

Q. Describe the land as to its height at the point where you ran the north line of the old Huddleston tract on to the present high bank of Centennial Island?

A. It was about as high as it was anywhere on that island. It ran about to the middle of Stockley's field there.

Q. What have you to say of the appearance of the age of the land there?

A. Oh, I could tell nothing about that. He seemed to be as old as the other land he has in cultivation there. To the north near to 37 it is lower.

Q. But how was it at the point where Huddleston's north line ran into Stockley's field?

A. It was just a part of his cotton field; cotton was growing on

it and hands were picking it. I could see nothing to show any difference in the time it was made from the other part of his field.

Q. I notice that your map shows the Trigg 37 acres, the Trigg 30 acres, the 135 acre tract belonging to Chalmers and others, and the 200 acres to R. H. Burns on 37 to be on Centennial Island now. How about that?

A. That probably resulted from the caving on 37 and the making to Stockley's place on Centennial Island.

Q. I mean is it a fact that these old tracts are now south of the old slough or dry river you show on the map?

A. Yes, it is; They are all enclosed inside of Stockley's fence on Centennial Island now.

Q. How far is it from Stockley's field on 37 to his field on Centennial Island?

45 A. It is about 250 or 300 yards. I did not run the distance though.

Q. Then, this Burns 200 acres and the Chalmers 235, and the Trigg 30 and 37 acres are enclosed in Stockley's field on Centennial Island at the present time?

A. Yes, except what is included in the bed of old river.

Q. Did Stockley's east line that you ran go over on Centennial Island?

A. Yes, on to what is now called Centennial Island.

Q. Then Stockley's land on 37 joins his land on Centennial island?

A. Yes, except that old river is along there.

Q. I mean that there is no stream of water between them?

A. No not unless in time of high water.

Q. In running the east line of the Trigg 100 acres and the Potter land on 37 did the line at any place run off the high bank of the old original land down on to the made land?

A. It did. The bank bends in towards the west and that line runs north and south.

Q. What was the distance from Trigg's northeast corner of his 100 acre tract where you began to survey to the point where the line ran off the high bank to the made land?

A. 32 chains.

Q. Then part of Potter's 640 acre tract that Stockley now owns was washed away and now includes part of the main land?

A. Yes, I think so. It certainly includes a part of the main land.

Q. Does this made land there lie directly against the old high bank of 37 which still remains there?

A. Yes, it is right by Stockley's field all along there on 37. You go right down off the land on to the made land.

Q. What lines of the old Huddleston grant did you run?

A. I ran the east line and the north line.

Q. The east line and the north line, where is the south line?

A. The south line is in the river.

46 Q. I will ask you, Major, if that smallest tract marked "B" is within the lines of the Huddleston grant?

A. Yes; it is.

Q. I notice a place on this map marked sandy chute, is that laid down from actual survey?

A. Yes, it is laid down by actual survey.

Q. Will you describe Sandy Chute, whether or not it has water in it and the nature and description of its bed?

A. Sandy Chute has no water in it except an occasional pond. There is a considerable pond at one place, but for the most part it is just barren sand.

Q. What is the width of Sandy Chute?

A. Six or seven chains.

Q. What is the elevation of its banks above its bottom?

A. Six or eight feet.

Q. You have a place marked on this map called old river, will you describe it?

A. Well, that is deeper than sandy chute, and has not so much sand in it, during last winter the water flowed through old river, this summer it was quite dry all along at the north part of it has a lot of holes in it.

Q. I will ask you if there is any road across old river?

A. Yes, there is a road leading from Corona to Island 37, and this road also leads into Arkansas.

Q. Does that road cross this place on a bridge?

A. No, there is no bridge there at all.

Q. Is there any water in old river?

A. There is not now.

Q. About what is the elevation of its banks?

A. Twelve or fifteen feet I should think.

Q. Major, did you notice this old main land on the Huddleston grant where the call of thirty-two chains of the north line ran on it?

47 A. Yes, I recollect it.

Q. I will ask you is there is any sign or indication of McKenzie Chute, or chute of 37 as it is called, at that place?

A. No, none at all.

Q. Is there any difference as to the land north of the line and south of the line in point of elevation?

A. No, I do not think there is.

Q. I will ask you whether this land marked H. W. Stockley is in cultivation or woods?

A. Most of it is in cultivation.

Q. Will you show the jury Stockley's land on Centennial island that is in cultivation?

A. (Here witness points out this land). Along down in here there is eight or ten acres that is not in cultivation.

Q. What is the distance to this north bank of old river from Huddleston's north line?

A. About forty chains, a half mile.

Q. Then Stockley's extends from where it was a half mile to what was at that time island 37?

A. Yes sir.

Q. Major, I will ask you to point out on this map the high bank of island 37 where the made land comes to?

A. It is pretty well defined by this road; the road is right on top of it.

Q. Then, these tracts of land have all been made there?

A. Yes, they have all been in the river, but have filled up, this whole territory has filled up.

Q. Will you tell us what these red lines are here?

A. That red line there represents the middle of the river at the time of the original survey, but these lines here the original bank.

Q. What was the width of the river right here at Huddleston's northeast corner?

A. Eighty-five chains.

Q. What is the width of the northeast corner of the Trigg 1000 acre tract on island 37?

48 A. About Seventy-two chains.

Q. I will ask you Major, whether that red line indicates as correctly as you can measure it, the middle of the river when these surveys were made?

A. Yes, taking the original survey of the Arkansas bank and the original Tennessee bank as shown by the survey.

Q. What is the nature of that country through which these lines run?

A. It is pretty good country capable of cultivation.

Q. Is it in the woods?

A. Yes, there are trees there two feet in diameter.

Q. I notice a place here marked Stockley, what place is that?

A. That is the place called the tow-head.

Q. What is the width of old river at the tow-head?

A. It is pretty hard to get the width of the river here, it is dry one time, at another wet and then under water.

Q. In other words, old river is not much lower than the tow-head bank?

A. No, sir; up there it is higher.

Q. Are the high banks that remain there on 37 clearly defined?

A. Oh, yes.

Q. Point out to the jury Mr. Stockley's land on Island 37?

A. Well, this is the west line of it right here; it extends east to here, and this is the north line.

Q. The south line is over a considerable distance in his field on Centennial Island, is it not?

A. Yes.

Q. I will ask you to point out to the jury the course of the river as it is now?

A. Here it is (indicating on the map).

Q. Point out his land on Centennial Island?

A. Here is his land on Centennial Island. Centennial Island and 37 run together, there is nothing here to show where Mc-

49 Kenzie Chute is, it is all filled up.

Q. Running the lines through 37, across into Arkansas, tell if you found the Arkansas bank?

A. Where I run across in connection with the Arkansas survey the bank seems to be almost where it was in the original survey.

Q. Was there and remainder of that bank there?

A. The bank is there now.

Q. Did you run this north bank of Sandy Chute and the east bank of old river?

A. Yes sir.

Q. What is the width of the river where you measured across in running from the Tennessee side?

A. About sixth chains.

Q. How many chains in a mile?

A. Eighty.

Q. Did you run this east bank of Stockley's place on Centennial Island?

A. Yes, I run part of it.

Q. Now, Major, take this map and show us what part you did run?

A. I started here and run all along here and the other side. I run all the way.

Q. State whether or not you have ever surveyed any land for the plaintiff, H. W. Stockley, on Island 37, if so, when?

A. Yes, in the month of October of this year, I surveyed this land on 37 for Mr. Stockley.

Q. Where did you begin, from point or corner?

A. I began at the northeast corner of the John Trigg 100 acre tract which is part of Stockley's place.

Q. Who pointed out this corner to you, if any one?

A. A Mr. Groves.

Q. The same man who testified here this morning, I believe you have said?

A. Yes sir.

Q. Now tell the court what lines you ran?

50 A. I ran the east line of the Trigg 100 acre tract, and the east line of Potter's 640 acres, which is but a continuation of the Trigg line, I then came back to the high bank of 37 and chained it until it intersected Stockley's west line which is the Potter west line. I then ran the other lines of that tract.

Q. Describe that high bank of 37 you speak of?

A. It appears to be what remains of the old original bank of 37. It shows that it was the bank of the river at one time. On top of it and extending to it is Stockley's field which he has in cultivation. Right by and against it is the made land which is covered by a thick growth of cotton woods and willows.

Q. Does the old bed line which you call old river, lie right against the high bank of 37?

A. It does against the south bank, but not against the east bank I was speaking of. It does not come precisely at the point where the high bank begins, it strikes the high bank two or three hundred yards further west.

Q. I believe you said you chained this high bank of 37 on the south of the island?

A. Yes, until I struck Stockley's west line.

Q. Was that south bank a high bank and part of the original land?

A. Yes, it is clearly the old original land. That can be told by the elevation of the bank which appears to have been a caving bank at one time, and the remains of the large trees standing dead in Stockley's field, and the timber just west of Stockley's.

Q. Do the blue lines marking what you call old river on your map show the present location of it?

A. They do.

Q. Does the road you have marked on your mak as running from Corona on Centennial Island over to 37 run along this original high bank after it gets on to 37?

A. It does. The road runs on to Arkansas I was told, but it is only shown on the map to be the point where I actually surveyed it.

51 Q. I will ask you if in your opinion, judging from what you saw there is this old high bank on 37 *is* what was the high bank of the river at one time?

A. It is. The indications show it to have been the bank of the river at one time, and I was informed by the people around there that the river ran there prior to the cut-off.

Q. State whether or not the land described in the declaration lies against and adjoining the land owned by Stockley and the old Huddleston tract, or what is left of it on Centennial Island?

The defendant objected to this question because it tended to prove title to land by parole; the court stated that the title to any land in controversy could not be proved except by proper title papers and that this and similar questions could be asked for the purpose of designating land or tracts and would not be received as proof of title to said lands.

A. It does, it lies in front of his land on 37 and touches it and extends south to his land and the two-head and covers part of the Huddleston tract and the washed away tracts on 37. They are all joined together now. But this land he is claiming as accretions now is lower than his land on both islands.

Q. Is it lower than Stockley's land on the tow-head?

A. No, I think not.

Q. Is there anything to separate the smaller tract from the larger tract?

A. No, they are all in one body of made land. I don't know why they are described separately.

Q. I will ask you, Major, whether or not in entering Stockley's field this made land is not right there in plain view?

A. Yes, sir; it is. It adjoins his field, but the road runs along there.

Q. Is it not very noticeable when you enter his field on 37 by the road coming from Corona?

A. Yes, it is there plainly in sight.

52 Q. I will ask you is it possible for any one to go on his place on 37 and not notice this made land?

A. Of course not, his field runs right up to it, and the road is right along there on the bank. The made land is covered with a thick growth of tall cottonwood trees that grow right up to the bank on which the field is. You can not help but see it.

Q. State whether or not in your opinion the field and made land do not appear to be all the same body of land?

A. Yes, it would — to anyone to be accretions to Stockley's 37 place because it is generally understood that the accretions belong to the man who owns the land along the bank.

Q. State whether the Trigg 152 acres and the 37 acre tracts on 37 are east or west of the high bank that remains there now?

A. They are all east of the high bank except a small part of the 152 acres, which is still there on the bank in the field.

Q. State whether or not the remainder is part of the made land down in the old bed of the river?

A. Yes. It must have been washed away at one time and has been made back. All of those two tracts lie out there in the woods now except a small piece of the northwest corner of the 152 acres, which is on the top of the old bank in the field.

Q. How much of it was left there?

A. I don't know, I did not measure it, probably fifteen or twenty acres.

Q. What is the scale of this map you have made and we have introduced here?

A. Thirty chains to the inch.

Q. Now on the Potter grant there east of that road, did you run the bank?

A. Bank of old river; yes, sir.

Q. Does the bank come inside of the Potter Grant?

A. Yes, part of the Potter grant had been washed away.

Q. Does this road there mark the remains of the grant?

A. Yes, that road is just on the edge of the bank after crossing the river, it is on the edge of the bank.

53 Q. Was there any pond there?

A. Yes, this is the pond right here.

Q. Tell us about the width and depth of this pond?

A. It is three or four chains wide, and from two inches to one foot deep, it is mostly mud, the last time I crossed it I did not have to wade.

Q. Major, what is the distance measured from Huddleston's east line to this road that you have spoken of?

A. One hundred and five chains.

Q. One hundred and five chains, a mile and a half?

A. Nearly.

Q. Major, what is the distance from Mr. Stockley's southeast corner, northeast to the Huddleston line on the shore?

A. One hundred and thirty chains.

Q. What is the distance from the old river down there from the John Jenkin's place up to the center of Mrs. Stockley's field?

A. Eighty-five chains.

Q. Major, will you tell us whether the larger tract described in

the declaration is the same as the tract of land shown on your map and marked "A"?

A. Yes, that covers it and a little more.

Q. The land in the declaration?

A. Yes sir.

Q. What is the distance over?

A. Six or seven chains.

Q. Then the land described in the declaration extends six or seven chains further east?

A. Yes sir.

Q. This last call in here is about the same?

A. Yes, about the same, a difference of half a chain.

Q. Then, the larger tract of land that shows on the map marked "A", the tract described in the declaration, includes all that tract?

A. Yes, sir.

54 Q. Major, did you survey the larger tract of land by actual measurement?

A. Yes, sir; I did.

Q. Now, I will ask you this question. Major, in going up this road to 37 after crossing old river can you see this made land from that road?

A. Yes, sir.

Q. It is plainly visible?

A. Yes, sir.

Q. Does it appear to be attached to that land right along the road?

A. Yes, it appears to be attached to it.

Q. The bank of 37, is that higher than the made land?

A. Yes, it is some higher.

Q. About how much higher?

A. The made land at the foot of the bank is ten or twelve feet lower, it rises some as it goes east.

(By the Court:)

Q. What makes Centennial Island?

A. Centennial Island is a part of the main land of Tennessee that was cut off by the river at the time of the Centennial cut-off in 1876, now the river comes in here and makes a great bend, there is not much land on Centennial Island proper. You would never know when you pass from Centennial Island into Island 37, there is nothing there between the two.

Q. Now Major, is there any sign of that chute in there at the place your maps shows it?

A. None whatever.

Q. What is there in there?

A. They call it old river, just by way of giving it a name.

Q. How did they get this old river so far north?

A. I don't know, but I suppose it had cut in there before the cut-off came.

Q. I will ask you, Major, if that red line there is the middle of the river at the time these surveys were made?

A. Yes, that represents the middle of the river, taking the
55 original surveys on that side.

Q. Now Major, I hand you a recent grant and entry. I wish you would look at them and see if they show any of the land marked on this map?

A. Yes, they show practically that marked "A" here.

Q. Does the middle of the river run practically the same?

A. Yes, practically the same in here.

Q. I will ask you to read the date of this grant, the entry is H. W. Stockley, dated on the 20th day of April, 1901, and state whether it is practically the same as that tract marked "A" on your map. The grant is dated November 26th 1901, by the State of Tennessee to H. W. Stockley?

A. Yes, it is substantially the same.

Q. Then, Major, this land marked to W. W. Stockley is the land in front of his?

A. It lies just east of it.

Q. Yes, that is what I mean. Now, Major, what sort of land is that marked "A", does it bear any identification of being made land?

A. Yes, I think it does.

Q. What is the character of timber on it?

A. Almost entirely cottonwood.

Q. Are there any willows on it?

A. Yes, some willows, not much except in wet places, mostly cottonwood.

Q. Is there any cleared land on tow-head belonging to Mr. Stockley?

A. Yes, sir; there is a field there.

Q. What did you estimate the size of the field to be?

A. I did not examine it closely. I would think about forty or fifty acres.

Q. In what direction from Centennial Island is the main channel of the river?

A. Do you mean the present main channel of the river?

Q. Yes sir?

A. It is south of Corona.

Q. That map was prepared as carefully as you could do it, was it?

A. Yes, sir.

56 Q. According to the surveys of 1820, as far as you have made them, did not the line of Tennessee and Arkansas run right along in here?

A. Yes, sir; this was the original survey on the Tennessee side, and this on the Arkansas side.

Q. Qill you point out the present course of the river?

A. Here it is between these blue lines.

Q. How did you find that, Major?

A. I found it by actual survey.

Cross-examination by counsel for defendant:

Q. Major, you have furnished the description upon which this claim was made, have you not?
A. I don't know whether I did or not. I may have done so.
Q. Who proposed to have the examination made?
A. It was Mr. Stockley's lawyer.
Q. Well, Major, I believe you made several surveys?
A. I have been up there several times surveying.
Q. When did you make this survey?
A. Just a short time ago.
Q. You then remember what you stated was the channel of the river of 1823?
A. Yes sir.
Q. You were in about fifteen feet of the right bank?
A. I may have been.
Q. Now, in what you state was the middle of the strea-, there were cotton wood trees two or three feet in diameter?
A. I called it middle pond.
Q. You say this pond was dry, how long ago did it go dry?
A. I could not tell. I think it very likely it has water in it not at high water.
Q. Between this place and the Mississippi River were large trees getting down to small bushes on the bank?
A. Well, I don't know about that, they got larger up at Sandy Chute, though there was no great difference in the size.
57 Q. Now, Major, take this map here and point out Dean's Island?
A. Here it is.
Q. What direction is that?
A. It is east.
Q. Does the river run this way?
A. It does not run this way now, it runs here now.
Q. Is it a fact that the corner of Dean's Island has washed away?
A. I understand it to be a fact, I do not know.
Q. Now, this in here is made land, is it?
A. Yes sir.
Q. And all of this in here is made land?
A. Yes sir.
Q. And where you have the river of 1823 there are trees two and three fett in diameter?
A. Yes, sir; here is where the river is now but there is where it was.
Q. Where, according to this map would that cur-off, be?
A. Well, I could not licate it definitely.
Q. Could you give us your best idea?
A. The cut-off occur-ed from the best information I could get, a short distance from this point here.
Q. Where did the cut-off take place from what you know?
A. I do not think any surveyor could say definitely where the cut-off took place.

Q. Then this line in here represents the middle of the river in 1823 by your survey?

A. Yes, sir.

Q. Where was the middle of the river in 1876?

A. That is more than I could say.

Q. Have you undertaken to draw on the map the river of 1876?

A. No, sir; I have not.

Q. Were you informed as to where the river was in 1876?

A. No, sir; I was not.

Q. Do you think the river came further over this way from 1823 to 1876?

58 A. This ground here shows that it had all been under the river up here to this road.

Q. Now, in order to make it perfectly plain this land in here has at one time been under the Mississippi River?

A. Yes s-r.

Q. I will ask you if you know about how long since it has been under the water?

A. I do not know anything of my own knowledge except from the size of the trees I saw there.

Q. How old did those trees look to be?

A. Some of them were nearly three feet in diameter.

Q. Where does that made land appeat to stop?

A. Here, it is right here.

Q. At this old river?

A. Here is the boundary of the made land on Island 37 apparently and I would judge that this land here had all been in the river and this in here has been in the river.

Q. Well, now your idea is that this island, or all this part here, passed under the river to this point on old river?

A. Yes sir.

Q. Do you know whether this land filled up here before or after the cut-off?

A. No sir, I do not know.

Q. You know that this land here claimed by Mr. Stockley at one time has been under the Mississippi river?

A. I think so, from the indication that it has.

Q. I will ask you whether you examined the river sufficiently to say if this map accurately represents the whole of Dean's Island?

A. I can recognize some of it, some of the features are the same, but I would not like to say that it represents it very accurately.

Q. Do you know that old river is the bed from which the river turned in the cut off of 1876?

A. No, I do not understand it.

Q. Has this point here passed under the water?

59 A. Yes, I have said that.

Redirect examination by counsel for plaintiff:

Q. By all that you mean to say *is* that the land has been under the river?

A. Yes, it has that appearance.

Q. Mr. Ewing has spoken of some little trees on what is called the tow-head, is the tow-head a sand bar?
A. Well, it is quite sandy.
Q. Should not the size of the trees depend upon the quality of the soil?
A. Yes, I think so.
Q. Now as to the soil in this made land up near this road, what kind is it?
A. It looks like good land to me.
Q. Was it suited to the growth of cottonwood trees?
A. I should say it was.

Recross-examination by counsel for defendant:

Q. Major, you mean to say that this river washed this land away and then restored it?
A. Yes, that is what I mean to say.
Q. Now, if the river was here in 1823, where would that bank be now?
A. I do not know where that bank would go to.
Q. You can understand the river bank running there in 1823, now at what later period would it pass from this situation?
A. I do not know; it has been in here long enough for cottonwood trees to grow two or three feet in diameter.

Redirect examination by counsel for plaintiff:

Q. You won't undertake to say that those trees commenced to grow before or after the cut-off?
A. No sir.

Witness excused.

60 O. K. JOPLIN, witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by counsel for plaintiff:

Q. Please state your name, place of residence and business?
A. O. K. Joplin; line at Corona Landing; am a farmer.
Q. Have you ever been engaged in the river business?
A. Yes, I was for quite awhile.
Q. About how long?
A. About twenty-eight years.
Q. Over what course of the river did you run in 1876?
A. I was making three trips a week from Memphis to Osceola, Arkansas in 1876.
Q. What was your business in running the river at that time?
A. I was captain of the steamer Osceola Bell.
Q. Were you familiar with the channel and course of the river?
A. Yes, sir; I was.
Q. I will ask you, if it was a part of your business to be familiar with the river?

A. Yes, I studied the river and got pilot license just to be able to tell where I was at any time.

Q. I pass you this map introduced by Maj. Humphreys, and indentified by him, and ask you if it accurately represents the river when you first got acquainted with it?

A. Yes, this is all right in here and through 37 is all right.

Q. Does *of course* of old river north represent the river as it was?

A. Yes, practically speaking, except Dean's Island had settled down a little there.

Q. It was the main channel of the river along around there?

A. Yes, this was the chute of 37 and here was the river.

Q. What was the width of the chute of 37?

A. A little less than one-fourth the width of the river.

Q. Then this was the main river?

A. This was the river right here.

61 Q. Which one of these streams did the boats navigate?

A. That would probably apply to the stage of the water.

Q. Could you navigate McKenzie Chute?

A. Oh, yes; but it would depend upon the draft of the boat.

Q. I will ask you what was the distance right across the corner of the elbow?

A. Right around one mile.

Q. I will ask you if you noticed the land marked Mrs. Stockley?

A. Yes; it was right there at Corona.

Q. I will ask you if Mrs. Stockley had a landing on the river just before the cut-off?

A. Yes, on the south side about the middle of her farm near Corona.

Q. Can you point it out to the jury?

A. I would say it was here (pointing to map.)

Q. Now Captain, if it was about the middle of her farm how far was it north of her south line?

A. A quarter of a mile from the south line of the Huddleston tract, this had caved off *w*uite a lot.

Q. From what direction?

A. It caved from the north.

Q. Will you take your pencil and indicate to the jury the north bank of the river by Mrs. Stockley's land just prior to the cut-off?

A. The river came down this way and then around the curve, this was gradually caving in here. Her landing was on the north bank of the river.

Q. This marked Jenkins one thousand acres was there any landing place?

A. We made three or four landings there; Browns, Triggs, Masseys and then we stopped at Jackson's in the woods.

Q. Was that woods on the Huddleston grant?

A. Yes, on the south side.

Q. Do you know that the river had caved up to Mrs. Stockley's south line?

A. Yes sir.

62 Q. Follow the course of my finger and see if it practically follows the north bank of the river at that stop?

A. Yes, that is the river bank and that is the chute that I remember.

Q. Here is a place marked Walker's direcrly west of Mrs. Stockley's was there a landing place?

A. We rarely ever made that landing from the fact that it was wood land there.

Q. Did the river at that time wash Trigg's south line?

A. We had a landing that we called Trigg's or Massey's landing between the Stockley and the Brown landing about a mile apart.

Q. Did the river at that time wash the south line of the Huddleston tract?

A. That was my opinion of it.

Q. Do you live in that region?

A. Yes, I live right there at Corona landing.

Q. How wide is the river there?

A. About a *sact* mile.

Q. Do you know these lands, the enclosed part?

A. The enclosed part of those lands are on what we called the walts or the Bateman land.

Q. Here is marked a tract of land called the Batemen 155 acres land. I will ask you is that was still there prior to the cut-off?

A. Yes, sir; I used to get off there to visits a girl.

Q. Was this land there washed up by the cut-off?

A. Yes, there were two farms destroyed by the cut-off in here.

Q. Can you point out on this map where this land was?

A. This place here at that time was known as the Trigg property, then as the river receded south it carried off here what was known as the Red Brown property, and it took a great deal of Mrs. Stockley's land; there was about twelve or fourteene hundred acres destroyed in about three or four days.

Q. Can you point out the caving bank?

63 A. There was a heavy caving going on at the head of the bend, this water would come across from Dean's Island and cause a heavy caving; there was very little caving going on at the upper side of Devil's Elbow.

Q. I will ask you what was the width of the river there?

A. That was an extremely wide part of the river, I should think over a mile.

Q. Let us get down to Mr. Ewing's old river; I will ask you if that was in the river over there?

A. Ni, sir; that was growing cotton there.

Q. Assuming right there to be the bank of 37, where did the chute of 37 come out?

A. Assuming this as 37 here it just went out into the river right here.

Q. Was the north line of the Trigg tract in the woods?

A. Yes sir.

Q. Has there been any caving on the east bank of what is known as Centennial Island since the cut-off?

A. The caving stopped on the head of Centennial Island, within a few days after the cut-off.

Q. I will ask you if there has been any caving on the Tennessee side since the cut-off?

A. That is gradually caving; never has quit since the cut-off.

Q. Was there any sand bars in that section of Dean's Island?

A. There were no sand bars on the foot of Dean's Island.

Q. Were you in the neighborhood when the cut-off took place?

A. Yes, I was above there.

Q. Tell the court and jury what you say there?

A. I went up the river Friday night and when I passed up on Friday night the water was all over the country. The next night on coming back when we reached Golden Lake fifteen miles above there, I noticed that the water had fallen, I came on watch after supper and stayed until twelve o'clock; I did not understand this; the river was rising everywhere when we left Memphis. I knew this land was under water when we went up, and the river
64 was rising at *at* all points above there and the water was all over this landing; now there was several inches of the bank out, I could not understand it. The next landing we made was Pecan Point; when we went up this land was all under water, now there were eight or ten inches of the bank out. At this point, the pilot, Tom Foster, came on watch. I said, hellow, Tom, what is the matter with this bank here, the water is a foot lower here than it was last night, look at the bank out there. He gave me the laugh and wanted to know how many drinks I had had. The next landing was Dean's Island at Andrews; when we went in there the pilot called me out and said Capt., "look here something has happened; look at that bank out there." We did not know what it was and went on down the river. We got down to Thomas', and they told us the cut-off had gone through; as we passed on down the river we heard the noise of the water and before we knew what we were about we were drawn almost into it. If we had not had a fine stout boat we would have been swept through it. You see there had been such a change that we did not know our bearings, and had gone down the old channel until we were almost in the place before we know where we were. We turned her head almost directly across the river, and were barely able to pull out. The land was caving there at a great rate and the insuction was something terriffic. We went on down the chute of 37 around the elbow and got to the foot of the cut-off just about day-light, and laid there just to look at it; we were there five or six hours, and called up all the passengers.

Q. How wide was the cut-off at that time?

A. About 150 yards.

Q. Was it caving still?

A. Oh, my goodness, it was caving like everything.

Q. Would it go off in large pieces?

A. Oh, yes, it caved back about 400 yards in about two and a half hours.

Q. Would the land go in large pieces at one time?

65 A. Yes, sir; it would slope back and take in ten or twelve acres of ground at one time?

Q. Was it what you would vall sudden?

A. My goodness yes.

Q. You came back on Monday night, did you?

A. Yes sir.

Q. How wide was it at that time?

A. About three-quarters of a mile, anout the usual width of the river.

Q. Friday night you had gone up?

A. Yes sir.

Q. Sunday morning you came back?

A. Yes sir.

Q. How wide was it then?

A. About 150 yards when we first struck it, but it grew in width very rapidly.

Q. When you came back on Monday night was it still caving?

A. Yes, it was still caving a little, but had reached about the full width of the river.

Q. Did you see any negro houses or other buildings or — in the river?

A. Yes, I saw all the old Trigg negro quarters go in the river.

Q. Just tell what you saw in that particular.

A. Well, the darkies were all there in great trouble trying to get their plunder out and we saw a great many amusing as well as sad things. You would see a darky pick up some of his plunder, such as a bed tick and run off and lay it down *and* about a hundred yards and run back for something else, but before he could get it out of the house he would have to run and the house would go in with all his stuff, and before he could get back to what he had laid down maybe that would go in and he would be in a fix. The darkies were all in great excitement and running about like something wild trying to save their plunder. They lost most all of their stuff and in some instances barely saved the children. It was a terrible sight.

66 Q. Did the land cave in such large pieces that you could see it?

A. Why, whole acres went in at a time.

Q. You could see it then?

A. Yes, I could both see it and hear it; it made a great noise.

Q. Did you have sufficient knowledge of the Trigg place to make an estimate of the number of acres of land that went in the river?

A. We called it twelve hundred acres; eleven or twelve hundred acres farm, it all went in except about a hundred or hundred and fifty acres.

Q. About how much of the land went into the river at the time of the cut-off there?

A. Well, the Massey place went in too, and some of Mrs. Stockley's

and the Ponf place. I suppose that it would aggregate more then fifteen hundred acres all together.

Q. Did that cave into the river between the time when you first saw it on Saturday night and when you next saw it on Monday night?

A. Yes, you understand the cut-off had about reached its full width by Monday night. After it widened out it did not cave so fast, but the river at the upper end has been caving on the Tennessee side and receding ever since.

Q. Will you take Maj. Humphreys' map and point out to the jury about where the cut-off was when you first saw it as you came down?

A. (Witness takes the map.) It was right here; it came right across Trigg's place this way and struck the river below Brown's Landing.

Q. In what direction did it run when you dirst saw it?

A. Northeast to southwest, across the elbow.

Q. About what was the date of the cut-off?

A. In the early spring of 1876. I think it was in March, but don't know the exact date, but as well as I remember it was the 7th.

Q. Were you running that trade the year befor- the cut-off?

67 A. Yes sir.

Q. Had you noticed any indications of the cut-off in the year 1875; if so, state what it was?

A. In the spring of 1875, this water in coming around the elbow was much lower on the lower side of the neck than it was on the upper; the water poured through there and caused it to cave very rapidly until the river got high enough to cover all the land so there was no fall. You see this made it cave very rapid where the water fe-; over the lower bank into the river. After the water fell in 1875 I noticed that it had taken a chute out of there straight across the field, it cut a ditch about twenty feet deep and thirty to thirty-five wide and one hundred and fifty yards long. It was cut out as clean as if you had put a gang og Ireshmen there with spades and wheelbarrows. You could not notice this ditch until after the water fell. We has been expecting a cut-off here for several years.

Q. Did the cut-off make through there where this ditch was?

A. Yes, right there; but the ditch was at the lower end of it.

Q. Was that the commencement of the cur-off?

A. Yes, that was the occasion of the cut-off.

Q. Was the land across there perfectly level?

A. Yes, it was a level field.

Q. You have stated that when the water on the upper side of the neck reached the level of the bank it was lower than the bank of the lower side of the neck?

A. Yes sir.

Q. How much lower would it be?

A. Eighteen inches or two feet until the river rose high enough for the water to pour across in sufficient volume to bring the river to the same level.

Q. Can you explain how it was that the water on the lower side of the neck came to be lower than it was on the upper side?

A. Yes, but that was only true as long as the river stayed in its banks. When it rose high enough for the water to pour in sufficient volume to raise the level of the river below it was
68 just the same. The reason is that the Mississippi River has a fall from two to four inches to the mile, and it was about fifteen miles around the river to the elbow from the upper side of the neck to the lower side. While straight across the field from river to river was just a little over a mile, so, of course, the level of the river below would be lower than that above.

Q. Had the bank on the lower side of the neck been caving much?

A. Yes, it had been caving rapidly ever since I knew it; the river had been going northward and Brandywine Island has been shifting in the same direction. Brandywine Island was just across the river.

Q. Then it had been caving there on the south side of the neck?

A. Yes, very rapidly for several years.

Q. Had it caved any on the shoulder of Dean's Island and in the bend down there by Thomas'?

—. ——.

Q. In what direction from the Huddleston or Trigg east line was Thomas'?

A. It was a mile and a half or two miles up the river in the bend.

Q. What was the width of the river at about the place where Trigg or Huddleston's northeast corner is shown on Maj. Humphrey's map?

A. The river was extremely wide there, probably over a mile at an ordinary stage of the water; it got down towards three-quarters when the river got very low.

Q. How wide was the river up here at the northeast corner of the Trigg 100 acres on Island 37. Stockley's northeast corner now?

A. It was about three-quarters of a mile in a good stage; it came down to nearly a half mile in extremely low water.

Q. When you have given the width of the river did you mean the width of the stream of the water or from high to high bank on either side?

A. I mean the stream of water.

Q. How far was it up there on 37 across the river from the high bank on the Tennessee side to the high bank on the Arkansas side?

69 A. Possibly two miles, but then you know the willow flat and mud bar came in there on the Dean Island side.

Q. Was that a sand bar and mud bar such as you ordinarily find on the bank of the river?

A. Yes, you find it occasionally up and down the river.

Q. Was this flat and mud bar covered in time of high water?

A. Yes, but you understand it did not take high water to cover that, much less than bank full would cover it.

Q. Was this mud flat and river bar a part of the river bed?

A. That depended on the stage of the water, just above a good

ordinary stage would put them under, while in low water they would be a considerable distance from the river.

Q. Describe the vegetation that grew on these flats?

A. On this mud bar nothing but the willows I have mentioned.

Q. What was the size of these willows?

A. They ranged all the way from mere switches where they started to grow near the water, to six, eight or ten feet as you got near the big timber, I mean from six to ten feet high.

Q. Was this big timber back on the main shore of the island?

A. I suppose so, I was never back there, just a line of big timber back there.

Q. How far was it from the water bed that these willows on the mud flat began to grow?

A. You could not tell; that depended on the stage of the water. Sometimes they were as much as fifty yards from the water and then again they were under the water.

Q. Were you present with Maj. Humphreys when he ran this red line as shown on his map?

A. Yes, I was along in the party.

Q. Where would you say that line was run in regard to the bank that marked the limit of the bed of the river on either side? The bed includes the stream of water, the sand bar and the mud flats from high bank to high bank, on either side, as it was just before the cut-off?

70 A. That depends upon what stage of the water. You mean if you take extreme low water it would be nearly to the water's edge on the other side; of course, the higher the stage of the water the wider the river. At something less than bank full the whole flats over there were covered and the line would not be half way.

Q. But supposing the bed of the river to extend from high bank on the 37 side to the high bank on the Arkansas side, that is the bank covered with a heavy growth of timber, to which side would the line marked on Maj. Humphreys' map as the center of the river be nearest to?

A. If anything, it would be nearest to the 37 bank, but I think as near as I can recollect it is about midway between both; but if you count it back to the line of high timber on the Arkansas side that was much further off.

Q. About how far as that line of heavy timber from the Arkansas edge of the water in low water?

A. Maybe something like a mile.

Q. What was the width of that bar?

A. It varied in width, it was from 100 to 200 to 300 yards.

Q. Back there that was a high bank, was it?

A. Yes, away back there was a high bank.

Q. Was there any water over there by it?

A. Yes, Campbell's Lake is over there now.

Q. Will you describe the stream, bed and channel of the river just before the cut-off?

A. In coming up from Shawnee Village we hugged close to

Dean's Island mud bar, then changed over to the Tennessee side. You see over there by Dean's Chute was the main steamboat channel. After we crossed over the channel lay over on the Tennessee side until we passed around above Dean's Island.

Q. How long did you run in that trade after the cut-off?

A. Until 1879.

Q. How long after the cut-off before you quit navigating the main channel of the river around there?

71 A. I am not sure, but it was either the first or second season, you see as soon as the cut-off got well established it became slack water around there and got full of snags and other drift. It shoaled rapidly and we could not find the channel easily, in fact we had no channel, we leaded going and coming every trip. You see after the cut-off was made the government no longer pulled the snags out or kept it cleared out in any way as the main commerce of the river followed the cut-off and only the boats that wanted to make Shawnee Village and the other landings around there tried to go through. It was dangerous on account of the snage, and you were liable to get your boat stuck up because of a shifting channel. There was water enough but there was no channel.

Q. Did you notice the appearance of the made land as it appeared above the water there?

A. Yes, I did.

Q. Can you trace just where the first land you noticed came out. Show it on the Humphreys may there?

A. That sand bar in the flat there on the shoulder of 37 towards Shawnee Village made rapidly up the river along the bank of 37, until it got to what is marked old river here near Centennial Island, then it changed east in the shape of a V, making along the north bank of Sandy Chute towards the east, till it got up here in these sand flats nearly to Dean's Island, where a big sand bar rapidly rose up and spread out towards Dean's Island. This sand bar is that sand flat over there now. This first V-shaped land was just like a levee had been thrown up. This changed the best channel of the water over towards Dean's Island; we would skirt around it and get into the river up there by Captain Andrews'. The channel over there soon got to be very dangerous and we abandoned that part of the river.

Q. When did this tow-head down there appear?

A. It was the first land that appeared after the cut-off. It came up as a lump of blue mud shortly after the cut-off.

72 Q. Was that on part of the old Trigg place that washed away?

A. Yes, sir; it did not all wash away. I think it must have washed off to a very shallow depth because this lump of blue mud was there when we first tried to go around there and appeared the first low water after the cut-off.

Q. Did you notice this land that formed there in the old bed of the river east of 37 and the old Trigg place on the main shore and

on part of the Trigg place, that washed away as it appeared above the water and matured from the mud bar into the soil?

A. Yes, I continued in that trade for two or three years after that.

Q. Describe the appearance of this land as it appeared above the water?

A. Well, there was a tow-head there, separated from this other land by what you have got marked here as Sandy Chute, over here between 37 and Dean's Island, this V-shaped piece come up that I told you about which ended in this big sand blow which spread out up here to Dean's Island, the other land in here appeared above the water in flats with sloughs and ponds scattered about over it, then the willows grew up and the cottonwoods, until you could not keep a track of it.

Q. How long after the cut-off was it before any of this land that Mr. Stockley is suing for appeared above the water?

A. Something like three years, maybe a little longer though it had shoaled over there before that time so that you could not get through there with any sort of a steam boat.

Q. Was this sand formed in the usual manner that said bars and mud flats are usually formed in the Mississippi River?

A. Yes, just like the rest of them, it soon became slack water over there and a sediment and sand was deposited and gradually filled up the river, but it first got full of snags and old trees and all sorts of drift.

Q. Was this land formed gradually and slowly or was it formed in such a way that you could see it as it was being formed?

73 A. Why, of course not; it was formed by the sand and deposits carried by the water.

Q. Was this land formed in such large pieces or so suddenly that you could tell when it was being made?

A. Oh, no, it was just slack water over there, and the mud and sand and sediment held in suspension by the water settled down and made the land gradually. You could not see any land at all until two or three years after the cut-off, or maybe longer, when it first appeared above the water. I don't think much of it had appeared above the water when I quit the trade, still it was fairly out.

Q. State the manner in which it grew or increased in height after it appeared above the water?

A. Well, the willows soon began to grow and covered it and at each high water a little mud would be deposited on it and it gradually increased in height and the cotton wood and willows grew until they are no longer trees.

Q. Is the land still growing in height?

A. Yes, I think after each high water it is a little higher by reason of the mud that is settled on it.

Q. After you quit steamboating there did you go back into the neighborhood frequently?

A. Not so very frequently; my wife's people lived near there and I went back there occasionally.

Q. Do you live near there now?

A. Yes, I live right there at Corona.

Q. Do you ride frequently over this land which Mr. Stockley is suing for?

A. Yes, I ride over there two or three times a week.

Q. From your knowledge of the country, I will ask you if this piece of land marked "B" on Maj. Humphreys' map was on the main shore of Tennessee before the cut-off?

A. Yes, before the cut-off, it was a part of the old Trigg tract on the main Tennessee shore; it extended a little over a half mile up there north of Sandy Chute.

74 Q. Did you see that go into the river?

A. I saw that go into the river myself on that Sunday morning.

A. I will ask you whether or not you know that old river running around there between the Huddleston or Trigg tract on the main shore and 37 on one side and the Dean Island and the main shore on that side was the boundary line between Arkansas and Tennessee.

A. Yes, it was; all the people on 37 and Centennial Island pay taxes in Tennessee.

Q. Do you occupy any official position in the State of Tennessee?

A. Yes, sir; I am a justice of the peace.

Q. Is Island 37 in your district?

A. Yes, sir; I try cases over there.

Q. After the cut-off, which was the main channel of commerce of the river, did it go through the cut-off, or around this old river on Maj. Humphrey's map between 37 and Centennial Island; by this, I mean the boats that carried the trade of the river the usual and ordinary steamboats, coal fleets, grain barges, and all other vessels ascending and descending the river?

Q. There were more large steamboats then than now. They all followed the cut-off; only light draft boats went around old river.

Q. Did the coal fleets go down old river?

A. No, sir; coal fleets and barges went through the cut-off.

Q. After the cut-off how did the boats reach McKenzie Chute from the cut-off?

A. They went through old river as it is marked on this map, only the light draft steamers went around there.

Q. How long after the cut-off did these small boats continue to go through old river and McKenzie Chute?

A. That depended on the stage of the water. In three or four years they had to quit there in a low stage. When the water was up you could go through there up to within eight or nine years ago. You can go through there now in high water unless the willows have grown up so high that they would bother you. I think

75 the "Ed Foster," which drew about eighteen inches of water ran through there for six or seven years after cut-off.

Q. Did you notice the caving of the banks of the river?

A. Yes, sir; I have always noticed that very closely.

Q. State whether or not this old river, just before the cut-off lay next to the high bank on 37. By old river I mean McKenzie Chute,

as Maj. Humphreys has it there or the chute of 37, as you probably knew it?

A. We called it the chute of 37; it lay right there by the high bank of 37.

Q. Is that north bank of 37, still there and is the remains of the old river still by it?

A. Yes, *dir*; they are right there now.

Q. I will ask you if this old river as it is marked on the map of Maj. Humphreys, running along Stockley's east bank of Centennial Island, from the main river to the old chute of 37, was that there before the cut-off?

A. No, sir; that was part of the old Trigg land; some of it was in cultivation and part of it was in woods.

Q. Then this old river, so-called, is really a new river?

A. Yes, sir; it was made at the time of the cut-off. You see the full force of the cur-ent struck the head of Centennial Island and caved rapidly back west to where the bank is there now. This relieved the pressure as soon as the cut-off got wide enough to let the river through, it then quit caving on Centennial Island, and shortly afterwards this tow-head appeared and this place called old river was left between it and Centennial Island here by Stockley's field, it really runs through the Trigg place.

Q. What is the character of this soil down here near the river?

A. It is a sand bar along near the river, after you got back on the tow-head it is good soil. Stockley has a field there in cultivation.

Q. What is the character of this soil here along the bank of Sandy Chute?

76 A. It is sandy, but it is high; the cotton woods on it right along there are not very large, and are scattering.

Q. What is the character of the soil back here on this larger tract of land just east of 37?

A. It is good black loam.

Q. Take old river in its present condition, how long in the year does the water run through there?

A. I think two and a half or three months.

Q. At what stage of the river does the water go through there?

A. At about twenty-four feet on the Cairo gauge; that would be 17 to 20 inches less at the head of Centennial Island.

Q. What is extreme low water mark?

A. It is 51 9-10 at Cairo.

Q. What is it at Memphis?

A. I think it is 36.

Q. That makes a difference of about twenty feet in the two gauges?

A. No, it is 37 feet at Memphis, which makes a difference of less than fifteen feet.

Q. Is there any vegetation growing in old river now?

A. It is all grown up now in cotton wood and willows in spots.

Q. Does not Mr. Stockley use it as a pasture now?

A. Yes, he does.

Q. Were you acquainted with Mr. Smith's place on Island 37, owned by Mr. Stockley now?

A. Yes.

Q. In corssing on the road from Centennial Island to 37, is that a dry crossing in old river?

A. Yes, with the exception of a little stream that runs out of a pond and a little strip of sand there.

Q. Is that a public road represented here on this map of Humphreys?

A. Yes, that is a public road.

Q. In going up the bank is this made land here claimed by Mr. Stockley in sight from the *a* Smith place?

A. Yes, sir; it is.

77 Q. What is that made land covered with?

A. It is covered with trees.

Q. Is there any remains of the old bank there?

A. Yes, sir; the road runs along on top of the bank there; Powell's lake is right there by it.

Q. Is that made land right there next to Stockley's field?

A. Yes, sir; right there by it.

Q. Is it right there against the bank?

A. Yes, sir; you go right down off the bank to it.

Q. What sort of a place is that Powell's Lake?

A. Oh, it is a pond there by the bank maybe two hundred yards long and between fifty and a hundred yards wide in places, and where it is not dried out it all the day from two to eighteen inches deep, the cows walk across it.

Q. Is that a public road on the head of 37?

A. Yes sir.

Q. In entering the Smith place is that made land right there plainly in sight against the bank?

A. Yes, sir; it is right there *bu* the bank.

Q. And Stockley's field run right up to it?

A. Yes, except the road is right there on top of the bank.

Q. I will ask you if this land claimed by Mr. Stockley has made there since the cut-off?

A. Yes, sir; it has made there since the cut-off.

Q. Was this land, that is showed here on Maj. Humphrey's map to the east of the old road or bank there washed away before the cut-off?

A. Yes, sir; the river lay right there against that bank.

Q. Was that old bank the present bank there on 37, the bank of the Mississippi River at the time and before the cut-off?

A. Yes, sir; the river ran along there by it.

Q. Then that present high bank remained as it was and marks the bank of the river before and at the time of the cut-off?

A. Yes sir.

78 Q. Did any of Island 37 wash into the river at the time of the Cut-off?

A. Oh, no; the cut-off relieved 37 and drew the water away from it. You see before that the river had swept around there and struck

the head of 37 and caused it to wash, part of the water going here through the chute and part of it going around by Shawnee Village. The cut-off relieved this and made slack water all in there.

Q. Which was the main channel of the river navigated by the great majority of boats?

A. The main channel was this old river here to the east and north of 37 between it and Arkansas, the general run of boats usually followed that course, but in a good stage of water they could, and sometimes did come through the chute of 37. You see that was nearer and saved time unless you wanted to make the landing around there in Arkansas. The chute of 37 was not good navigation in low water.

Q. Will you describe the north bank of the Trugg Place, and the chute of 37 as it was before the cut-off?

A. It was a gradually sloping sand bar and mud bar. It was covered with woods back to some distance.

Q. Was it a caving bank along there?

A. No, as I have said it was a sand bar there and mud flat, and seemed to be growing out into the chute every year. The bank on the 37 side of the chute was caving and the river was gradually receding northward every year.

Q. Was there a caving bank up there at the northeast corner of the Huddleston or Trigg tract where the chute of 37 went out into the river?

A. No, there was a bar there.

Q. Was it caving anywhere along this east bank of the Huddleston tract?

A. No, after you got up a little ways from the chute the bar and the bank was a bluff or shelving; it may have washed some,
79 but it was not caving to any notable extent as I recollect it. Further up it was caving and up in the bend there it was caving very bad.

Q. You see here on the Humphreys' map this place marked old river here; I will ask you if this last bank of Centennial Island here by Stockley's field was in the same place before the cut-off as it is now; in other words, was that the bank of the Mississippi River?

A. My dear sir, that was away on the other side of the Trigg place there. It was a mile from there due east to the bank of the river. The whole place lay in between there.

Q. About how far was it from this old road marked here on the Humphrey's map as the east boundary of the Stockley place due east to the bank of the main river?

A. I did not know much about that road at that time. I only knew the river, but it was close on to a mile and a half in my judgment.

Q. Has the bank of Centennial on the east here caved any since the cut-off?

A. This bank in old river, no. The pressure on it was relieved as soon as the cut-off got wide enough for the river to go through, and it is fixed about where it is now within a very short time after the cut-off, say in a few days. The pressure was relieved from the

head of Centennial Island by the caving of the Tennessee bank and the river receding southward.

Q. Has the Centennial island south bank caved much since from, say the first year of the cut-off to the present time?

A. Not right there at the head of old river. A small sand bar formed there shortly after the cut-off and is there now, but down there at Corona Landing it has caved back two or three hundred yards in the last four or five years.

Q. That is where this road touches the bank, is it?

A. Yes, right there at the landing.

Q. Before the cut-off, was there any high bluff bank on Dean's Island to the west looking toward the Trigg place?

80 A. If there was it was not in sight from the river, there was a wide sand bar there.

Q. Describe the sand bar as to its width and the trees or other vegetation growing on it?

A. The width depended upon the stage of the water; in low water it was nearly a half mile back there to the woods on the high bank, but the greater part of the bar lay to the south of Dean's Island.

Q. How wide was this bar to the south of Dean's Island before the cut-off?

A. It was much wider to the south than it was any where else; close on to a mile, I reckon, in low water, or quite a mile.

Q. Well, describe the vegetation growing on it?

A. Well, away back there towards Andrews a clump of willows had sprung up my recollection is and maybe some were growing along away back by the bank, but it was mostly simply a wide barren sand bar.

Cross-examination by counsel for defendant:

Q. Are you any connection with Mr. Stockley, the plaintiff in this law suit?

A. Yes, I married his sister.

Q. Do you live up there?

A. Yes, sir.

Q. Have you any interest in this suit?

A. None whatever; but I have taken some interest in it.

Q. Do you know about where the channel of the Mississippi River was in 1823?

A. No, sir; I do not.

Q. You were old enough to run a steamboat in 1875, were you not?

A. Yes, sir; I was born in 1852.

Q. You were 23 years old then?

A. Yes, sir.

Q. You are familiar with the surveys of the river there; do you know what these dotted lines indicate, does it not indicate

81 the channel of the river?

A. I suppose that is what it was intended to indicate.

Q. Was that the channel of the river down there?

A. No, sir; the main channel of the river went around here.

Q. But the man who made this map is a government man you might be mistaken, might you not?

A. No, sir; I made this mark to show where the channel was.

Q. Now if the river ran here at one time as this represents, it might not have run here in 1823?

A. I could not tell you about where it ran in 1823.

Q. By what sort of process was this land in here by Dean's Island made?

A. It was made by this channel here becoming slack water.

Q. How far did it make?

A. From the foot of the south here down the river it made in a narrow strip along here by Dean's chute.

Q. Did it make on any other part?

Q. Yes, sir; It made on that sand bar the blue mud I expect 150 to 200 yards.

Q. Tell us how the channel of the river ran when you commenced to run the river beginning at Pecan Point; and in about the year 1876?

A. Beginning at the head of Dean's Island then we hugged the Tennessee bank around through the bend until we got up here towards the head of 37. Then we cut across to Dean's Island and kept on the Arkansas side of the river down through the bend towards Shawnee Village.

Q. Let me get that exactly right, I am following the river down here, I simply asked you to show me the channel of the river?

A. All right, sir.

Q. Take your pencil and run right around down there?

A. That was a sand bar there, here commenced the channel coming right around in here.

82 Q. The land Mr. Stockley claimed is on the Arkansas side of the channel, is it?

A. No, sir; that is is; it lies right against the Tennessee bank.

Q. The river of which this is the channel went down through in here?

A. Part of it did at a certain stage of the water.

Q. At what stage of the channel in 1876 would this land that Mr. Stockley claimed be under the main channel of the river?

A. At an ordinary stage.

Q. Why was not this the main channel of the river all the time?

A. Yes, it is very plain to me that this is the channel of the river, but — asked me to point out the steamboat channel, which I did.

Q. Well, the land that Mr. Stockley claims is part of it in Arkansas, is it not?

A. Oh, no; the river went all over there; I was only showing you the channel, Mr. Ewing, I was explaining to you that the channel turned over here to Dean's Island.

Q. You have said that this was the main channel of 1823; how did it get to be there?

A. No, I marked on this map the bank of 37 and this river is the old chute of 37.

Q. In 1876, before the cut-off, what was the channel of the river, from this bank?

A. Why, it lay right here.

Q. What was the depth of the water then over there near the left bank where the land is now that is claimed by Mr. Stockley in this law suit?

A. Why, that would be a matter of *guess* work, but I should say about fifteen feet along in here.

Q. The left bank was right here and the Arkansas high bank was right here; the river lay between these two points, did it not?

A. Yes, this was the high land of 37, and here was the high land of Dean's Island.

83 Q. The water coming down here struck here and fell off down there?

A. The water coming down here part of it came through 37 chute and some of it struck here going across here and headed around Dean's Island.

Q. Take this point here, Captain, where was that point with regard to the bed of the river in 1876?

A. My idea is that it was covered with water.

Q. But it was not covered at the time of the original survey, was it?

A. I could not tell you, sir; I think this was near the boundary line.

Q. This being the main channel, the left bank of the river of 1876 would be there, wouldn't it?

A. Yes, sir; you would come along here and here was the bank of 37, the right bank proper was away further over here on Dean's Island.

Q. You would draw that as the Dean's Island bank, would you?

A. This was Dean's Island; the river came around here.

Q. But your mark is here?

A. I tried to make the mark where you told me.

Q. Mr. Joplin, I will ask you to make a pencil mark at the place where the low water mark — on the Dean's island bank in 1876 prior to the cut-off?

A. It would be back in here.

Q. You understood the question, didn't you Captain; I want to know where the low water was in 1876?

A. It was right along here.

Q. I will ask you if you have not marked it further over than you did awhile ago?

A. I can not say what the other mark represented.

Q. Mark the low water on the other side, on the Tennessee side?

A. That was the bank right there.

Q. Across this place between your two low water marks extended the river, did it not?

A. Yes, at medium stage.

84 Q. That is at the ordinary stage?

A. Yes, sir.

Q. Now mark the lower stage as it existed on the Tennessee bank in 1876?

A. All right, sir; (Here witness makes the mark).

Q. I want it positive where the low water was on the Tennessee bank in 1876?

A. Well, I stopped, Mr. Ewing, right where it is.

Q. Is this blue mark here it?

A. Yes sir.

Q. Now, Captain, if you can mark the low water mark on the Arkansas side and the low water mark on the Tennessee side, how wide was the river at this point?

A. It was about three-quarters of a mile at low water.

Q. On last evening you had marked the blue line here as the east boundary line of the Mississippi River at a period of low water?

A. Yes, sir.

Q. Was that a caving bank right there?

A. Yes sir.

Q. From over there this was a caving bank?

A. Yes sir.

Q. At all stages?

A. It caved most at high water.

Q. That is what you call a caving bank?

A. I not only call it so; it is a caving bank.

Q. What do you call a caving bank?

A. A suddenly washing bank.

Q. I will ask you to take this blue pencil and mark over here from this point to the point opposite this point the left bank of the Mississippi River as it existed in 1876?

A. I think your bank there is the bank.

Q. I will ask you to draw the distance from the low water line on the right bank to where you have already drawn down to the river?

(Here witness makes mark.)

85 Q. Now, which is the medium line of low water that you drew last night?

A. This is the medium line.

Q. Down the other bank from this point here on up the river?

A. Well, there is no Tennessee bank, this crosses the chute.

Q. I am asking you to show it as it existed in 1876?

A. (Here witness makes a mark on map.)

Q. The main channel between two low water marks would be between the two lines here and would make the red line here in the channel?

A. There is a great deal of difference between the river and the channel of the river, the channel came in over here on Dean's Island.

Q. The river turned over to the Arkansas side?

A. Yes, sir.

Q. The question I asked was whether the currect of the river

changed from the Tennessee side to the Arkansas side along the curve?

A. I think it did.

Q. Well, you have described the low water mark on both the Tennessee and Arkansas banks in 1876, prior to the cut-off, now I will ask you to show the jury where it broke in——

A. Where I first laid my pencil it came down this way and turned down here a little over this way.

Q. Now what you marked have marked there is your idea of the way ot broke and the way the river was running here in a westerly direction, when it turned in a southwesterly direction?

A. This caved off up here.

Q. Show with the pencil where you have marked the red lines?

A. It is marked with a red pencil on the Humphrey map with double red lines.

Q. Now, Captain, I will ask you if this is the map you made at the right bank of the river in 1876?

A. No, it is the current of the main river.

86 Q. What, didn't you draw it a minute ago?

A. You drew it there yourself a minute ago.

Q. This is the channel line, is it not so?

A. That is the channel line there.

Q. Follow that red line on that way.

A. If I understand you I am trying to draw the channel of 1876.

Q. The river turned right here and made this cut-off and then run around this way and then cut straight off this way?

A. Yes, after it struck the head of this island.

Q. Now, how did the river leave this current here and suddenly turn and run this way?

A. It just cut across this way.

Q. Now mark the high water line along here?

A. If you will allow me to explain, this mark is the channel of the river as I understood it when drawing the Tennessee bank.

Q. Now, I am still asking you about this medium current, where did the river leave this part here.

A. This cut-off commenced on the south side and caved up here further into the river.

Q. Was the cut-off over this way?

A. It struck the head of this point of land drawing the whole course of the current in at the head of this island in here.

Q. This river at some time turned down this way, and the river now runs along over here?

A. The cut-off made the change.

Q. Where did the river turn when it made the cut-off?

A. The main river came in this way.

Q. You have made a mark on this map to show the river in 1876; how did the water get into the cut-off, as you have marked it?

A. As near as I understand that question when the cut-off was made the water lay against the Tennessee bank, before the cut-off below in this Devil's Elbow it had worked up in here.

Q. But the river then turned down here?

A. The river commenced to turn down here.

87 Q. Was the old current and the new the same?

A. You understand that you have asked me for the bank of the river and for the channel of the river. Continuing this on a little further you crossed sandy chute to the bank of the river as it was then.

Q. You have given there the places of the cut-off, the jury must know how the river ran through it; I mean if the current of the river ran where that red line is, how did it get off here where you have marked? I want you to give the bank?

A. I am tracing the bank now.

Q. What is your blue mark?

A. Why you asked me to trace the channel.

Q. Did you make this line yesterday, or to-day?

A. You asked me to mark out the channel of the river?

Q. This blue mark is the channel of the river; didn't you make this line as the low water mark here, and didn't you commence at that bank and run this blue line here; is that where this blue line went, if not, tell me what this blue mark was?

A. Why, this blue mark was the bed of the river.

Q. The question I ask you is what you put that blue mark there for? What do you understand that blue mark to represent?

A. You have interfered with a whole lot of it.

Q. Do you know where the river turned in this way?

A. Here is where it is, right here.

Q. Commence right here, Capt., and mark the current of the river?

A. (Witness indicates as asked.)

Q. Capt., does this red line represent the current of the river after the cut-off?

A. At the time of the cut-off.

Q. Please follow the channel from that point and mark what represents the course of the current just after the cut-off?

A. I am trying to explain to you that this river bank is not out here where this blue mark is.

Q. After the cut-off mark the course of the river within three or four days after?

88 A. Do I understand that you want me to tell you the way the land lay, the river was divided on the head of Centennial Island, part of it came through the cut-off.

Q. What was the course of the current?

A. This water hit the head of this island and the cut-off began right there in this shape while this water began to recede over this way.

Q. The river came right down this way and took a new course right down this way?

A. I have answered this question; you asked me to describe the condition of the cut-off and the course of the water through the cut-off.

Q. And this was the course of it?

A. Yes, sir.

Q. Now, then, if that was the bank down there, what was this red line?

A. This was the channel, Mr. Ewing, that was cut through there when I first saw it.

Q. Haven't you got the bank shifted further to the left than you did previously draw the low water mark?

A. No, sir; I drew the mark you told me to; I have never understood what you were talking about.

Q. What did you have in mind when you drew these two red lines?

A. I had the cut-off in mind.

Q. I will ask what fact you had in mind when you pointed the way the boats run?

A. That is what you asked me.

Q. When you drew that red line what did you mean?

A. That was where the steamboats navigated.

Q. I mean by the channel the way the main current run?

A. The steamboats first run one side and then the other.

Q. This red line that you drew here is what you drew as the channel of the river?

89 A. I drew that as the ordinary channel.

Q. I will ask you now if this is the channel?

A. I drew that, Mr. Ewing, as the route the steamboats run prior to the cut-off.

Q. Now, then give us the route they run after the cut-off?

A. About two days later most of them went through the cut-off and run over in this direction.

Q. That current did not run straight?

A. No, sir; they would pull around north and south.

Q. How long had the water run the way that you have marked this line?

A. I think I told you on yesterday that it changed and widened and after that the water commenced to gradually recede towards the south.

Q. How long had the water run that way?

A. Mr. Ewing, it widened just this way, it crossed this neck to the head of Brandywine Island, which was over there. It now reversed itself and run five miles up the river and struck the bank and commenced to curve south and went through Foggleman's chute.

Q. Now, in backing out around there which way did it go?

A. As I stated, it pulled off in this shape.

Q. There is the Mississippi River in that country there and you have made marks to show which way it went. I ask you why the river ran over there?

A. When this cut-off was made the first direction it took was across this land, it took it about 36 hours to get its full width, this was a caving bank, along this island, at any time.

Q. But after all of that the river settled down?

A. It has never settled down yet, it is coming over south every day. We used the lead there for two months.

Q. After the two months which way was it going? Commence right here and mark the current of the river at the end of the two months.

A. As a steamboat man it would be impossible to tell you exactly.

90 Q. Now, the river ran right down this way?

A. Yes, sir.

Q. That was in 1876?

A. Yes, about that time.

Q. Now then, if the river was over there in 1876, how long has it been over here?

A. It has never quit caving and is still making on one side.

Q. How close would it be to the left bank coming down?

A. That would depend upon the stage of the water, 100 to 150 yards.

Q. The river, as far as you can remember, is along in here?

A. Yes, sir; I think so, it is difficult to draw a line of the river in 1876, it was shifting very rapidly.

Q. Did the water there run through McKenzie Chute in large quantities?

A. It was about a fourth of the size of the other river.

Q. This is along in 1876 when the river cut off it left this country slack water, then it began to fill up slowly, didn't it?

A. Yes, sir; and began to grow up in willows.

Q. Is there a current through there now in high water?

A. No, it is all slack water now.

Q. Are you positive that this land commencing here was the left bank of the river in 1876?

A. The question as I understood it was where the steamboats ran.

Q. Did you draw this blue line right here for the left bank of the river in 1876 on the Tennessee side?

A. That is practically so.

Q. What do you mean by that?

A. I mean that the boats came along and cut right in close to that bank.

Q. At ordinary water the course would be about where this line is?

A. Yes.

(By the Court:)

Q. When did the steamboats cease to go around there?

91 A. It was either the first or second season, I am not positive which, my recollection is that we quit going there at low water season the following fall. You see it soon filled up around there with snags, and got to be dangerous.

Redirect examination by counsel for plaintiff:

Q. You have been speaking of what you understood to be the old channel, have you not?

A. Yes, sir; where the steamboats ran; the steamboat channel

is not the same as the bed of the river to a steamboat man, I was answering Mr. Ewing as to where the steamboats ran.

Q. Now, Captain, you have drawn these two red lines to indicate the cut-off, did you mean this to indicate the banks before the cut-off?

A. I meant that this was the shape of the neck in 1876.

Q. You do not mean to draw any precise line?

A. No; I think that is impossible.

Q. The new channel first appeared here, how wide was it?

A. About 150 yards.

Q. How long did it take to cave west to the present east bank of Centennial Island?

A. Only three or four days.

Q. Did it cave and widen in any other direction?

A. Yes, south; the old channel of the river being unable to turn west had to wash away this point.

Q. Did the water go that way very rapidly?

A. Yes, sir; very rapidly.

Q. Do you know why that cut-off there widened and caved to the west?

A. Yes, I saw it there on Sunday morning, it drew the water from up towards 37 and a great volume poured through and it had to be cut away in order to let this water go through there, that relieved 37.

Q. In drawing this channel marked by the red line did you
92 mean to say that there was no water between there and the bank?

A. No sir; this was the bank of 1876.

Q. Am I correct in understanding you to say that this was the channel of the river after the cut-off?

A. No, sir; it was not, we had to lead through there continually.

Q. In what direction did that V-shaped levee first make up?

A. It commenced up there and made southeast.

Q. Suppose the water extended from the edge of the bank on the northeast corner here what would be the width of it on the Tennessee side?

A. A mile or a mile and a half.

Q. That made the edge fall across and make to that mark?

A. It cut into the bank and straightened out.

Q. Now, I will ask you to point out there the course of the river?

A. It was in this direction.

Q. How long after the cut-off did it take the river to cave back to the east bank of Centennial Island?

A. It receded very rapidly, you see the water was dammed up there, between Dean's Island and 37, it had to find an outlet to the cut-off, this made it tear away the east bank of Centennial Island, it quit caving there in three or four days.

Q. And it now goes through there?

A. Yes, all this country is grown up in willows.

Q. How far was the rater of the river from that bank there?

A. It was right up against it.

Q. Captain, Mr. Ewing, had you to draw low water mark on Dean's

Island at various stages of the water, did you mean to draw the bank making the bed of the river or simply the water mark on the sand bar?

A. Simply the water mark on the sand bar.

Q. What was the nature of that bank over there?

A. It was a sloping sand bar.

Q. How far was the high bank from the low water mark over there?

93 Q. What was the nature of the land there?

A. Just a barren sand bar.

Q. You have spoken about the country around Dean's Island, when was this land made there?

A. It has been made since the cut-off.

Q. Are you acquainted with the timber on that land?

A. Yes, sir.

Q. What sort of timber is it?

A. Just common cotton wood and willows.

Q. Do you know anything of the nature and growth of cotton-woods?

A. Yes, sir; they grow very rapidly.

Q. Is there any timber in that neighborhood that you know the age of?

A. Yes, I am cultivating land that was in the bottom of the chute of 37 at the time of the cut-off. Some of the trees left on the land are two feet in diameter. The land has made and they have grown there since the cut-off.

Q. Now, you have shown repeatedly the channel of steamboat navigation, what do you mean by that?

A. I mean where the steamboats run.

Q. Is there any difference between that and the bed of the stream of the river?

A. Yes, the steamboat channel is generally the deep course of the river and is often very narrow and changes from one side of the river to the other, while the bed of the Mississipppi river is seldom less than three-quarters of a mile wide at any stage of the water, but is not navigable for boats on all sides of it.

Q. You spoke of navigating this chute of 37 six or seven years after the cut-off?

A. Yes, but I said little boats drawing about fifteen inches.

Q. You have stated that the low-water width of the river was about three quarters of a mile?

A. Yes, sir.

Q. Captain, I will ask you whether or not that this whole section of country between 37 and Dean's Island differs from the cleared land on the original banks in the neighborhood and whether it was not a part of the bed of the river?

94 A. It is very different from the land on 37 and Dean's Island mainland. It is lower and is covered in timber and was once a part of the old bed of the river.

Q. What was the width of the chute of 37?

A. I think a quarter of a mile or a little less.

Q. Was that high bank of the chute of 37 left there after the cut-off?

A. Yes.

Q. I wish to ask you how that made land formed, did it form rapidly?

A. Well, yes; it grew from year to year until it became solid.

Q. Was it formed from sediments?

A. Yes, it was.

Q. Did that take considerable time, or was it done suddenly?

A. I think it first appeared above water in about three years.

Q. Was it formed in the usual manner that such land is formed in the Mississippi river?

A. Yes, sir.

Q. Has the Mississippi established for itself a well defined channel south of here?

A. The river is over here now.

Q. About how far is it from Huddleston's northeast corner across there to the middle of the river?

A. Why, it is about two miles, this river has receded south about two miles from the corner.

Q. Where the cut-off first was is dry land, is it not?

A. Yes, sir.

Q. I will ask you about this towhead property of H. W. Stockley's, was that the land that was washed away?

A. Yes, it was and made back.

Q. Is this towhead land entirely out of the bed of the river now?

A. Oh, yes, sir.

Q. Has the land caved there on the south side of Centennial Island since 1877?

95 A. Yes, it has caved all the while below Corona, and for the last several years has been caving at the landing, it has not caved at the head of the island by the old river as yet.

Recross-examination by counsel for defendant:

Q. This line here is the left bank of the river in 1876 when navigation ceased, coming down the river?

A. Yes, sir.

Witness excused.

During the examination of the witness the counsel for defendant frequently requested the witness to draw lines in blue, black and red pencils to show various matters on the map drawn by Maj. Humphreys and introduced by the plaintiff. At each and every time such a request was made the plaintiff, through his counsel objected to any marks being drawn on the map because it tended to confuse the testimony given by the witness with the lines given and drawn by Maj. Humphreys, and thereby impaired the efficiency of the map as evidence introduced by the witness. (2d.) Because every line drawn by the witness being considered in relation to the other lines on the map which he did not understand, would probably convey a mean-

ing he did not intend. (3d.) And because the map was the property of the plaintiff and he had the right to go to the jury as containing the testimony it had been made to express without its force being impaired by its being used as drawing paper by the defendant. These several objections were overruled by the court, to which plaintiff excepted and asked that his exception be noted of record, which was by the court allowed.

The next witness, Plaintiff H. W. Stockley, being deaf, so that he could not be interrogated except by writing or by spelling on the fingers by means of the sign language, it was agreed at the bar between counsel for plaintiff and counsel for defendant, with the permission of the court, that G. J. McSpadden, counsel for the plaintiff, might act as interpreter and propound the interrogatories of both sides by means of the sign language; which was accordingly done throughout the examination.

96 H. W. STOCKLEY, plaintiff in the above case, being first duly sworn, testified as follows:

Direct examination by counsel for plaintiff:

Q. Where do you live?
A. On Centennial Island.
Q. At or near Corona Landing?
A. Right near Corona, about five hundred yards, I suppose, from Corona.
Q. How long have you lived there?
A. Thirty-eight years, right in sight of Corona.
Q. Are you acquainted with the old Trigg place?
A. Yes, I am acquainted with the Trigg place.
Q. Who owned it?
A. It was always known as the Trigg place.
Q. Where did you live in reference to it, before the cut-off?
A. I lived about a half mile from it.
Q. On what place?
A. On my mother's place, joining the Trigg place.
Q. In what direction?
A. West.
Q. What was your mother's name?
A. Mrs. Lucy Stockley.
Q. What distance was it from her east line to the river due east across the Trigg place before the cut-off?
A. Over a mile and a half to the river due east from my mother's east line.
Q. What was the nearest distance across the elbow from river to river?
A. About a mile and a half.
Q. Was there a landing on your mother's place the year before the cut-off?
A. There was a landing on the south line of her land, boats landed there in her field.

Q. How long had it been there?
97 A. Three or four years, several years as well as I can remember.
Q. Was there a landing on the Brown place?
A. Oh, yes, there had always been a landing there. Bed Brown's landing.
Q. Was the land on your mother's place south and west of Trigg's?
A. It was.
Q. Since you have known it has the Trigg land extended north in the chute of 37 by accretions or recessions of the river?
A. It has.
Q. How far?
A. Nearly a mile, about a mile.
Q. Before the cut-off had that land increased in maturity, to such an extent that it was covered in timber?
A. Part of it was covered in timber before the cut-off.
Q. Had any of it been cultivated, how much land on the Trigg place was in cultivation?
A. Before the cut-off, at least a thousand acres.
Q. What became of that land?
A. It was all washed away except about a hundred acres of cleared land was left.
Q. Did it go into the river at the time of the cut-off?
A. It all went in at once, in about three days.
Q. Were you in the neighborhood at the time of the cut-off?
A. Yes, sir.
Q. Tell the court what you saw of the cut-off?
A. The cut-off went through in March, 1876. The night it occurred I had spent with some friends near Thomas' Landing, up the river from where the cut-off made. I did not know of it and early the next morning I started home down the river in a dug out. I noticed the water had fallen considerably, which surprised me, as I had been under the impression that the river was rising. As I got on down the river I saw a crowd of people waving and gesticu-
98 lating at me. I pulled into the shore to see what they wanted, and found they had called me in to keep me from being sucked into the cut-off. I then saw that it had gone through.
Q. Describe its appearance?
A. Then it was between 200 and 300 yards wide and you could see the land.
Q. Is that the place you own on the east end of Centennial Island now?
A. It is.
Q. How far was it from the old levee on the Trigg place as shown on this map to the chute of 37 just before the cut-off?
A. At least one mile.
Q. What was the nature of the bank along Trigg's north line all along in the chute of 37 before the cut-off? Was it a caving bank?
A. No, it was a sand bar along there. There was a wide sand bar all along there in the chute from the main river down to my mother's

place. There came a large tract of woods land before you cross the levee into the field on the Trigg place.

Q. Did the chute of 37 lie up against the high bank of island 37 where it does now at the time of and just before the cut-off?

A. It did.

Q. Did the river run along the present east bank of Centennial island before the cut-off. I mean the bank along the old river here on the map by your field?

A. No, sir; it was at least a mile east of there. The river caved up to the present bank at the time of the cut-off.

Q. What was this place marked old river on the map here, then?

A. The south part is on what was the field on the Trigg place. Up here towards 37 was woods land.

Q. Do you know in what state island 37 is?

A. It is in Tennessee. I own land over there and pay taxes in Tennessee.

Q. Then, this river formerly between island 37 and Dean's island is the boundary line between the states, is it not?

99 A. It is and always has been.

Q. From your knowledge of the lay of the country at that time, was the land larked "B" here the part of the Trigg place just before the cut-off?

A. Yes, that was part of the Trigg place.

Q. Point out how far it extended northward?

A. About along here, before the cut-off there was a big sand bar.

Q. Was there a big sand bar north of the Trigg place?

A. The sand bar was along in here, a mud bar was forming right there along the chute on the north.

Q. Point out the location of the cultivated land on the Trigg tract?

A. All this is here and down here, too.

Q. What land was directly east of the Trigg land between it and the river just before the cut-off?

A. That was what is known as the Walt place.

Q. Was that there just before the cut-off?

A. Yes, it was there just before the cut-off?

Q. What place was south of the Trigg place?

A. The Bed Brown place.

Q. Any other?

A. There was some other place. I don't remember whose, the Bateman place, I believe.

Q. Where was the Massey place?

A. The Massey and the Bed Brown places was the same thing.

Q. Did any of the Massey place go into the river at the time of the cut-off?

A. It all went in.

Q. How much land altogether went into the river at the time of the cut-off?

A. The first three days about fifteen hundred or two thousand acres caved into the river.

Q. How much of the Trigg place went in?

A. Eight or nine hundred acres.

100 Q. About how wide was the river at this northeast corner of the Huddlestons?

A. About a mile and a half wide.

Q. How wide was the river up here at the southeast corner of the Trigg one hundred and fifty-two acres on 37?

A. Nearly two miles wide.

Q. Who was in possession and claimed that Trigg 152 acres at the time of the cut-off?

A. I do not know who was in possession of it at the time of the cut-off.

Q. Describe the place marked old river on this map here, as to width, depth and vegetation in it?

A. This is old river, it is filled up now or very near it, there is no water in it now, the water comes into it at extreme high water, some places in it are fifteen feet deep.

Q. Can it be crossed dry-shod at different places at low water?

A. You can cross dry-shod; it is perfectly dry, no water in it at all now.

Q. What is the stage of the river now?

A. Lowest stage now.

Cross-examination by counsel for defendant:

Q. Was this bank here the left bank of the river prior to the cut-off in 1876?

A. No, sir; it was not,

Q. Where was the left bank of the river in 1876 just before the cut-off?

A. Here was the left bank of the river at the time of the cut-off, this was the bank of island 37 just before the cut-off and this in here was the bank of the river (points them out on the map.)

Redirect examination by counsel for plaintiff:

Q. Do you mean to state that the bank just before the cut-off was the same as that of the old survey?

A. I was not born then and could not know.

101 Q. Was there any caving on island 37 prior to the cut-off?

A. There had been no caving there that I know of just prior to the cut-off.

Q. I will ask you this question do you mean to say that the land marked Trigg's 152 acres and Trigg's 37 acres were out of water at the time of the cut-off?

A. No, sir; they were not.

Q. Is it not a fact that the road shown here on the map commences and runs upon the old bank as it was left upon the bank after the cut-off?

A. Yes.

Witness excused.

C. A. STOCKLEY, witness for the plaintiff, being first duly sworn testified as follows:

Direct examination by counsel for plaintiff:

Q. Please state your name?
A. C. A. Stockley.
Q. Are you a relative of the plaintiff in this suit?
A. Yes, sir; a brother.
Q. Where do you live?
A. At Corona.
Q. Do you live on Centennial Island?
A. Yes, sir.
Q. How long have you lived in that country?
A. Off and on all my life.
Q. Did you live there prior to 1876, when the cut-off occurred?
A. I was there when it was made.
Q. Were you acquainted with the place known as the old Trigg place?
A. Yes, sir.
Q. Can you go to this map and point it out as it lies there?
A. Yes, sir (here witness refers to Humphreys' map).
Q. Is that land marked Huddleston the same or part of the Trigg tract?
102 A. The Huddleston tract is part of the Trigg tract.
Q. Did any of that land go into the river at the time of the cut-off?
A. Yes, a great deal of it.
Q. How much?
A. Seven or eight hundred acres, probably more, I could not say exactly.
Q. Are you a son of Mrs. Lucy Stockley?
A. Yes, sir.
Q. Was there a landing on the south boundary of your mother's place?
A. There was.
Q. Did the river lay in front of it?
A. Yes, sir.
Q. How far was it across from the river northeast to the Huddleston boundary before the cut-off?
A. About a mile and a half.
Q. What was the distance from Mrs. Stockley's line due east to the river?
A. About a mile and a quarter.
Q. What was the distance from the Southwest corner of the Trigg place to the northeast corner?
A. Between one and two miles, nearly two miles.
Q. What is the present condition of the land where the landing was on your mother's place?
A. Part of it went into the river, the river runs over it.
Q. What part?

A. The southwest part of the old field, a great deal of it was left dry land, the upper part of Centennial island.

Q. Is that map a correct representation of the present lay of the river, these blue lines?

A. Yes, sir.

Q. Was any of that Trigg place left as dry land?

A. Yes, a little on the west bank.

103 Q. Is that a part of the west bank?

A. Yes, sir (points it out on the Humphreys map).

Q. Will you state whether or not since you have known the Trigg place it had made any accretions prior to the cut-off?

A. It has made between 37 and northward, in the chute of 37.

Q. Was the north boundary of the Trigg place in woods or field?

A. It was in woods.

Q. Now, I will ask you from your knowledge of the Trigg Place if this tract marked "B" here was part of the Trigg place before the cut-off?

A. Yes, the Trigg place extended that far.

Q. How far beyond sandy chute did the Trigg place extend?

A. About a mile north.

Q. Are you acquainted with the old river as it is now, this stream with the old river that goes out between Centennial island and the tow head?

A. Yes, sir.

Q. About what is the depth of the bank of old river?

A. It varies from three to five to ten feet.

Q. Take right over here about where the south line of 37 comes to, say about half way from where Sandy Chute comes out to the road, how deep is the bank?

A. I should say about three to four feet deep.

Q. What is the nature of the soil in the bed of old river?

A. Sandy, very sandy, right in the bed.

Q. Is there any vegetation growing there?

A. Yes, willows.

Q. The main bed, how is that?

A. It is sand.

Q. I will ask you whether or not this tract of land marked "A" on the map lies east of and in front of the land owned by H. W. Stockley on the east end of Centennial island and 37?

A. Yes, it does.

Q. Were you living in that country just after the cut-off?

A. Yes, sir.

104 Q. Will you describe how it made, whether it made slowly or rapidly?

A. It made very fast.

Q. What do you mean by fast?

A. Well, you could not see it growing, of course; it was about 3 years between the cut-off and the time the land began to appear.

Q. How was it made back there?

A. It was made by sediments, just a gradual increasing.

Q. You were speaking of the made land marked on Maj. Humphrey's map and claimed by the plaintiff, are you?

A. Yes, sir.

Q. In what condition did the land first appear above the water?

A. When it first came out it was mud flats with sand knolls in places. And there were low places filled with water like sloughs and ponds.

Q. Go on and tell how the land grew and developed?

A. Well, in a year or so willows began to grow on it and then cotton woods. They kept on growing and the land kept getting higher and higher at every high water. It still gets higher now at every high water.

Q. How long after the land appeared above the water was it before it got firm enough for men and horses to go on it?

A. I don't know exactly. Several years though. It was too miry to ride on for a good many years after, until it got high enough to be above the water long enough during the year to dry out.

Q. State whether this land made in such a rapid fashion that you could see it grow or increase in height?

A. Why, no. It only made in high water and you could not see it at all then, because it was under the water. Only after every overflow you could know that it had made a little by the mud and sand left on it.

Q. Was it made in chunks of earth large enough to be
105 seen or was it made by the small particles held in solution by the water?

A. It was just made by the sediment held by the water. The muddy water would just settle and leave the mud and sand that the water had held. There were no chunks of earth in it as I ever heard of.

Q. State whether or not it was formed in the same manner common to mud and sand bars in the Mississippi river?

A. Yes, just like all the rest of them. As soon as it got above the water the willows began to grow. The tow head came out first and grew the fastest.

Q. Does this made land lie right against the land owned by your brother, H. W. Stockley, the plaintiff, on 37 and Centennial Island?

A. Yes, it begins right there by the bank and extends east to Dean's island.

Q. Were you in that neighborhood when the cut-off was made?

A. Yes, sir.

Q. How far from the cut-off did you live?

A. About three-quarters of a mile from where it first went through. It soon caved much nearer our house.

Q. Describe the cut-off as to the suddenness with which it was made?

A. It was made in one night. When we went to bed the water was all over the land, and when we got up the next morning it was all off. It was then about two hundred yards wide and the land was rolling in rapidly.

Q. Go on and tell the court any other facts that will show how rapidly the land caved?

Mr. Ewing: If the court please there is no need of any more testimony as to the suddenness of the cut-off. We admit that it was sudden, that it was an avulsion.

Mr. McSpadden: Then, we will rest with that admission and not go into that question any further.

106 Q. What tract of land, if any, was there between the Trigg or Huddleston and the river on the east just prior to the cut-off?

A. To the east of the Trigg.

Q. Yes, between that place and the river?

A. There was a tract that belonged to Mrs. Walt. She was the daughter of Green Bateman, and the tract there was known as the Bateman land.

Q. Then there was a tract of land between Trigg on the east and the river just before the cut-off was there?

A. Yes, it washed away in the cut-off or just after.

Q. What was the nature of the bank along Trigg's north line in and along the chute of 37, just before the cut-off?

A. It was in woods.

Q. I mean was the bank a bluff one or was it a sand bar?

(Sic.)

melting into it all up and down it from one end to the other. The water was rushing through at a terrible rate. The negroes were very excited, and it looked like the whole country was going to be washed away. You would see large slices of land go in at one time containing whole acres. We had to keep moving back all the time. Shortly after I got there we got some cotton stalks and pieces of wood and started a fire back about 200 yards from the cut-off, as it was cold. Before it got to burning good it was caved in. All that morning it caved awfully after it got well through, but when it was about a half mile wide it did not cave so fast that evening. By the next morning, it was the full width of the river. Then it quit caving on the Trigg place, but has caved ever since on the south bank on the Tennessee main shore. When I got home I found most all the Trigg place and the south half of my mother's place had been washed away.

Q. Was the Trigg place the same as the Huddleston place marked here on Maj. Humphrey's map?

107 A. It was.

—. ——.

A. There was a sand bar there. It began at the main river on the east and extended down the chute. All along there was a sand bar and mud flat.

Q. Was it caving there along Trigg's or Huddleston's north line in the chute before the cut-off?

A. No, sir; there was a bar all along there in the chute. I think the bank on the 37 side had caved some but on the Trigg side there was a sand bar.

Q. Was the Trigg land caving on the east before the cut-off?

A. Not to my knowledge. There was no bar there but my recollection is that it was not a caving bank. It may have washed some but it had not caved that I recollect of. Up above there in the bend by Thomas', it caved a great deal, and down on the west and south side of the place in the river down here it always had caved tremendously. It caved there all the time down here by the Bed Brown place.

Q. How wide do you estimate the river to have been at the northeast corner of the Huddleston grant before the cut-off?

A. Right here, I reckon it was a mile wide there.

Q. How wide was it up here on 37, across from the northeast corner of Trigg's 100 acres?

A. It was very wide there. It was one of the widest places on the river. It must have been a mile and a half there.

Q. Just before the cut-off?

A. Yes, sir.

Q. Was the present east bank of Centennial island, shown here on Humphrey's map, along Stockley's field, the bank of the Mississippi river before the cut-off?

A. Oh, no. The bank of the river was about a mile further east. That was in the field here till you got across the levee there then it was woods until you got to the chute of 37.

Q. How was it from the old levee here to the chute of 37 before the cut-off?

108 A. About three-quarters of a mile.

Q. Do you know what state island 37 is in?

A. It is in Tennessee. The people over there pay taxes in Tennessee, vote in Tennessee, and the schools are kept up by Tipton county, Tennessee, everybody knows it is in Tennessee.

Q. Then, do you know the river which was commonly reputed in the neighborhood to be the west boundary of the state of Tennessee?

A. This main here between 37 and Dean's island.

Q. Do you know in what state Dean's island is?

A. It is in Arkansas.

Q. I will ask you if you have frequently ridden over this land in dispute?

A. Yes, sir.

Q. Have you frequently ridden over the land further to the east towards Dean's island?

A. Yes, sir.

Q. Did you notice there any elevation or bank which was formerly the bank of the river?

A. No, sir.

Q. Is there any old bank of the river over there that is well marked that you know of?

A. Not that I know of.

Q. Did you ever before the cut-off notice the opposite bank of Dean's island in Arkansas?

A. I did not pay a great deal of attention to it.

Q. State whether or not that was a bluff bank or sand bar?

A. My recollection is that it was a sand bar.

Q. What is the width from the road up there to the old bank of the river prior to the cut-off across the northeast corner of 37.

A. About a mile and a half.

Q. Now, as to that road there that runs north, is that a public road?

109 A. Yes, sir.

Q. What sort of a crossing is that?

A. Perfectly dry.

Q. After crossing the river bank there, is that the original bank of 37?

A. That is the old bank on the 37 side.

Q. Has Centennial island extended to where old river is marked?

A. Centennial island has extended entirely to 37.

Q. Does this road lie on the top of the bank of 37?

A. Yes, sir.

Q. Is it right close to the bank there?

A. It is right up against it.

Q. Is there a pond right down in there?

A. Yes, there is a pond right near that road.

Q. Tell us what sort of a pond that is?

A. It has a dry bed nearly a half mile long and about 25 yards wide.

Q. What is the depth of it?

A. About knee deep.

Cross-examination by counsel for defendant:

Q. This old road was the left bank of the river in 1876 before the cut-off coming down stream, was it not?

A. I think it was; island 37 was on the left hand side.

Q. What was the left bank of the river before the cut-off, will you please point out on this map about where the left bank of the river ran?

A. This old road was the left bank coming down stream, and this is the left bank of the river.

Q. I want to know what was the left bank of the river in 1876, before the cut-off?

A. My recollection is that the river came down this way; this here was the left bank of the river, and this is the left bank of Centennial island, going down this way this would be the left bank of island 37 right along this way.

110 Q. Then Capt. Joplin was right?

A. I think he was.

Q. Was the road right on the left bank?

A. I think it was.

Q. Will you follow that left bank with this pencil so as to give us an idea as to where it was?

A. There might not have been any road right here, it might have been a little ways back from the bank in here, but it went right on the bank along here.

Q. You seem to know about the bank of the river in 1876, now trace for us the left bank of the river in 1876?

A. I guess it came right along here in this way.

Q. Now, then, according to your estimate this big tract of land claimed as the Huddleston grant was in 1876 entirely under the waters of the Mississippi river, was it not?

A. No, sir.

Q. If this was the left bank in 1876 where was the right bank?

A. This must have been the right bank certainly.

Q. Now, if Capt. Joplin put the right bank here he was mistaken, was he?

A. I do not know where Capt. Joplin put the right bank.

Q. If this was the right bank and this was the left bank, was not this land here under the waters of the Mississippi river?

A. This land in here was not under the waters of the Mississippi river, it was a kind of made land.

Q. Well, you stated that you knew where the river ran in 1876?

A. In 1876 the river came in around this way.

Q. Now tell us where in 1876 the left boundary of the river was?

A. Here it is marked right here, this is the river, the left bank must have been over in here.

Q. Now, then, if that is *ture*, did not the river necessarily go over all this property in here?

A. No, I do not think it did.

Q. I am just asking you where you would put the left
111 bank of the river of 1876?

A. Right at this mark here, and this is the bank of 37.

Q. I will ask you if this is not the correct way the river ran in 1876; here is Pecan Point, right on around Dean's island down McKenzie chute that you have right here; here is island 37, and there is McKenzie chute; now is that right?

A. It looks too large for me.

Q. Well, assuming that the government passed on that part of it, is this McKenzie chute in here?

A. This is McKenzie chute right here.

Q. Well, now, in 1874 did not the greatest volume of water go right through here?

A. Yes, sir.

Q. How wide was this point down here?

A. I don't know exactly; I reckon it must have been a half or three-quarters of a mile at the lower end of it.

Q. Now, you have gotton the left bank of the river right here in 1876?

A. Yes, sir.

Q. Now, this water in here first stood as dead water and the channel of the river changed?

A. When the river went over here this ground jumped up dry.

Q. It came up; in other words, the water gradually left old channel and that was what you called jumped up dry?

A. Yes, it filled up and remained dry.

Redirect examination by counsel for plaintiff:

Q. I will ask you if this is the remains of the original high bank of island 37 at the present time?

A. Yes, sir; that was there before the cut-off.

Q. Does that old river lie right where the public road crosses; I am speaking of the old river back from that public road going on 37, was that the chute of 37 there just prior to the cut-off?

A. Yes, right where that road is.

112 Q. That, as a matter of fact, is dry?

A. Yes, sir.

Q. Does the road on 37 run along the bank of 37?

A. Yes, the road on 37 runs along on the high bank of 37.

Q. Just to the one side of the road is the made land?

A. Yes, the made land is the northeast of the road.

Q. How far from the road is the made land?

A. Right along by it, fifteen or twenty feet.

Q. Look at this piece of land marked "B"; I will ask you whether or not that was part of the old Trigg place north of Sandy chute?

A. Yes, as I remember the Trigg place extended out and up east from the head of island 37 and extended back in here.

Q. The Trigg place had extended greatly north then at that time?

A. Yes, sir; back next to island 37, on the northwest corner of Trigg's land was all in timber and up in here was cleared land.

Q. That piece marked "B" was still out of the water and part of the Trigg tract?

A. Yes, sir.

Q. Does that correctly represent old river as it lies there now?

A. This is old river that runs around Centennial island; yes, that is a correct representation of the shape of old river now.

Cross-examination by counsel for defendant:

Q. You have found this old river for the first time; now tell us if it is not a fact that in 1876 old river ran in here?

A. No, old river went around this way.

Q. What do you mean by old river; like it is to-day or the old bed where the river used to run?

A. Here is where it used to run, but after the cut-off all this land was dried up, it left all this land in here.

Q. Did any river ever run around that way?

113 A. Part of it ran around that way for the steamboats went down that way; the cut-off went right through here; here is a little stream there has always been a little water in here.

Q. Did the Mississippi river ever run through here?

A. It ran around there in this direction and over there; the main river never did run in here.

Q. What separates Centennial island from island 37?

A. In 1876 there was a stream of water.

Redirect examination by counsel for the plaintiff:

Q. Is it not a fact that at the time the cut-off was made all this land included here in the Huddleston lines was in cultivation?

A. Yes, that was all in cultivation; there was some woodland here.

Q. I will ask you if the river at that time was over in here?

A. Of course not, the river came up this way.

Q. As a matter of fact where McKenzie chute is laid down on Maj. Humphreys' map has been in cultivation for many years?

A. Yes, I am working land right along in here just about the middle of the river.

Recross-examination by counsel for defendant:

Q. Did McKenzie chute run from the Mississippi river?

A. It run from the head of 37 to the foot of 37.

Redirect examination by counsel for plaintiff:

Q. Was that the bank of the main river over there on Centennial island or the bank of old river?

A. There was a fill in there; here was the chute.

Q. How far did the land extend in that way?

A. Up in here to the best of my knowledge, about a mile.

Q. How much woods were north of Trigg's?

—. ——.

Q. Have you attempted to say that that was not land in here before the cut-off?

A. No, this was land in here.

Q. Was Mr. Stockley's field on Centennial island in the Water?

114 A. Certainly not.

Witness excused.

At this point counsel for plaintiff introduced a certified copy of certificate of survey from the Register's office of Tipton county, Tennessee, of the survey of Green B. Bateman 400 acre tract, dated November 6th, 1845; also a certified copy of the survey of Green B. Bateman 155 acre tract, dated 7th of March, 1836. Both copies being admitted as evidence, were accordingly marked for identification and became part of the record. Plaintiff here offered the deposition of E. W. Massey, taken on the 12th of February, 1901, before N. B. Doss, notary public, at Corona, Tipton, county, Tennessee, in the case of W. A. Cissna vs. Enos White and H. W. Stockley, then pending in the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas. The copy offered by the plaintiff being a certified copy from the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas, sitting at Helena, Arkansas, certified by the clerk and judge of that court, according to the Act of Congress. (Clerk will here please insert the deposition.)

Depo. of E. W. Massey.

In the Circuit Court of the United States for the Eastern Divisior. of the Eastern District of Arkansas.

W. A. CISSNA
vs.
ENOS WHITE and H. W. STOCKLEY.

Certified copy of deposition of Mr. E. W. Massey. Filed Dec. 25, 1901, in the U. S. Cir. Ct., W. D. Tennessee.

Be it remembered, that on the 12th day of February, in the year of our Lord 1901, I, N. B. Doss, a notary public, duly appointed, commissioned and qualified in and for Tipton county, Ten-
115 nessee, did call and cause to be and personally appear before me, at the store of Charles A. Stockley, at Corona Landing, Tipton county, Tennessee, W. E. Wright, E. W. Massey, Chris. Trigg and N. D. Borders, to testify and the truth to say on the part and behalf of the defendant, W. H. Stockley, in a certain civil cause or matter of controversy now depending and undetermined in the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas, at Helena, Arkansas, wherein W. A. Cissna is plaintiff and Enos White and W. W. Stockley are defendants. And the said witness, E. W. Massey, being about the age of seventy-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did cause said witness to be carefully examined by counsel for the defendant and counsel for the plaintiff, and the said witness thereupon did depose, testify and say as follows:

Direct examination.

By Mr. McSpadden for plaintiff:

Q. State your name, age and place of residence?
A. E. W. Massey; I will be seventy-four years old the 16th of March; I live on Island Thirty-seven, in Tipton county; it is really a tow head; they call it Island Thirty-seven.
Q. How far do you live from Corona Landing, the place where we are taking the depositions?
A. It is five or six miles.
Q. In what direction is it?
A. North.
Q. How far is this Corona Landing from Memphis?
A. I believe it is thirty or forty miles. I forget which now.
Q. Do you know the distance from Memphis to Helena, Arkansas?
A. No, sir; I do not.
Q. Are you acquainted with a certain tract of land on the

Tennessee main shore known as the Jesse Benton's heirs and J. Benton's 1436½ acre tract?

116 A. Yes, sir; I know it—every bit of it.

Q. Did you ever live near it; if so, how long?

A. Yes, sir; I lived adjoining of it a good many years; I can't tell you how many.

Q. When did you first become acquainted with it, or move into that neighborhood?

A. I don't recollect, it has been so long ago; it has been twenty odd years ago, I reckon, or maybe more; I don't remember exactly without having time to study it—count it up.

Q. How long have you been acquainted with that tract of land?

A. The Jesse Benton tract; I have been acquainted with it twenty odd years or more, I think.

Q. Do you know the location of the corners of that Jesse Benton tract?

A. Yes, sir.

Q. Do you know the exact location of the northwest corner of that tract?

A. Yes, sir.

Q. State how it was you came to know its location?

A. I own land right adjoining of it. I bought Bedford Brown's land right adjoining of it.

Q. Did any one ever point it out to you?

A. Yes, sir.

Q. Do you recall who it was ever pointed it out?

A. Old man Hardin W. Bateman showed me the corners; he bought a part of it.

Q. I will ask you to state whether or not the location of that northwest corner is generally known to the people in its vicinity?

A. Yes, sir; it is an old established corner.

Q. I will ask you to state whether or not you have recently pointed out that northwest corner of the Jesse Benton 1436½ acre tract to any one at the request of the defendant, H. W. Stockley?

A. Yes, sir.

117 Q. Who was it you pointed it out to?

A. It was a surveyor from Memphis; I have forgotten his name.

Q. Was it Maj. Humphreys?

A. Maj. Humphreys, I believe; I am not sure about the name.

Q. Were you present when that surveyor began his survey?

A. Yes, sir; well, let's see; I believe I was; I don't know whether I was present or not when he began it.

Q. Were you present at any time that day on which he surveyed?

A. Yes, sir.

Q. I will ask you to state whether or not you pointed out the exact location of that corner to this surveyor, at the instance of Mr. Stockley?

A. Yes, sir, I showed him an old stump. It was an ash tree stooping, and it blowed down.

Q. About how long ago was it he made that survey?

A. I can't tell you, sir; I have been so sick; it has been several weeks ago.

Q. Who else was present at that time?

A. Tony Bateman, I believe.

Q. Do you recollect any others?

A. No, sir; I can't recollect. I have been very sick; I don't remember exactly.

Q. Was Mr. H. W. Stockley present—Walter Stockley?

A. Walter Stockley was present.

Q. What tract of land, if any, separated that Benton northwest corner from the old Trigg tract?

A. Well, the Jenkins entry and the Potter land, both of which ran to the Trigg land—the old line.

Q. I will ask you whether or not both of those tracts, the Jenkins and the Potter, cornered at that northwest corner?

A. No, sir; I don't think the Jenkins land did. The Potter land cornered there, but the Jenkins land, I think, though, I don't remember exactly, run south—that is south of the Benton tract; I think it does, but I am not right sure; I can't recollect.

118 Q. I will ask you whether or not the Shelby county line crosses that Benton tract at any place?

A. Well, all I know about that is what old man Bateman told me; he told me it crossed it.

Q. You don't know the location of the Shelby county line through there.

A. No, sir; I don't know where it is exactly; I know pretty near where it is, but I don't know exactly.

Q. I will ask you if you are acquainted with the old Simon Huddleston and John Trigg tract of land?

A. Yes, sir; somewhat acquainted with it.

Q. How long have you known that tract?

A. Well, I remember it has been ever since the war; I don't know how long that has been. I know there was a public road from Covington.

Q. I will ask you Mr. Massey to state whether you ever owned that Potter tract?

A. Yes, sir; I owned all the Potter land.

Q. By what name was that old Huddleston or Trigg tract known when you first got acquainted with it; what was the name of the place; I speak of this tract of land part of which is now owned by the defendant Stockley?

A. Well, it was called the Trigg place down to this road there, I think.

Q. I will ask you to state, Mr. Massey, in what State and county was that Trigg tract of land when you first came here?

A. It was in Tennessee and Tipton county.

Q. State whether it was on the main shore of Tennessee?

A. Yes, sir.

Q. What, if anything, separated that tract and the State of Tennessee from Arkansas at that point?

A. The cut-off.

Q. I am talking about the time you came here?

A. Oh, I didn't understand you.

119 Q. The question is, what separated the State of Tennessee and this Trigg place on the one hand, from the State of Arkansas on the other?

A. Let me get it right.

Q. In other words, what was the boundary of the State of Tennessee?

A. The Mississippi River.

Q. State whether or not that Mississippi River ran between the Trigg tract and Dean's Island?

A. Yes, sir.

Q. About how wide was that river?

A. About a mile wide. Well, it was from over yonder next to Arkansas, and it was called two miles wide over there. That was the widest part of it over there where it ran around against the Arkansas shore around Dean's Island.

Q. Well, state whether or not, any part of the river, at that time, ran between this Trigg place and Island 37 and what it was called, if it had any particular name?

A. Well, it was the chute of 37.

Q. About how wide was that chute of 37 between the Trigg place and Island 37 at the time you came here?

A. It was nearly a mile wide, something near a mile.

Q. At the time you came here which river was the steamboat channel, that to the north of Thirty-seven or that between Thirty-seven and Trigg place?

A. One was about the same as the other.

Q. State whether or not Island Thirty-seven extended as far east as the Trigg tract, or if there was any difference between their east lines, state what it was?

A. Island Thirty-seven.

Q. That is, did it come as par east *and* the Trigg east line?

A. No, sir; not by a long ways. There was nearle a mile difference. The Trigg place extended nearly a mile, or quite a mile east of Thirty-seven, further east than Thirty-seven.

120 Q. I will ask you to state the name of the owner of the body of land that was just east of the Trigg tract and between it and the river, if there was any such, when you first came here?

A. East of the Trigg tract?

Q. Yes, sir; the name it went by.

A. Well, there was a little island there.

Q. Just east?

A. There was nobody owner of it.

Q. Nobody the owner of the land?

A. No, sir; not that I ever heard.

Q. Did the river at that time run along the whole east boundary of the Trigg tract?

A. The whole east boundary of the Trigg tract.

Q. Yes, sir; from its south boundary line to its north boundary line?

A. I am not sure, but I believe it did; I am not sure, unless I had time to think about it.

Q. Did Mr. Green Bateman, or any of his heirs, own any land in that neighborhood; that is, on the east or southeast of the Trigg tract?

A. Let's see how that was now; their land was all south of it, I think, but I don't remember; I can't think right at the moment. Let's see. East of the Trigg tract, you say?

Q. Yes, sir.

A. Yes, sir; they owned last east of it, I think, as well as I remember.

Q. At the time you first came here, in what direction was Dean's Island from the Trigg tract?

A. Dean's Island was northeast of it I think, a little east.

Q. I will ask you to state whether or not Dean's Island extended far enough south to be east of any part of the Trigg place?

A. I believe it was pretty near even. There was the Trigg tract, this high part of the land, and then Dean's Island. I don't
121 believe any of it was east of it; I am not sure, but I don't believe it was.

Q. About how large was Dean's Island at that time?

A. I can't tell you, sir. Dean's Island was a small place when I first knew it.

Q. Could you make an estimate of how many acres were in it?

A. I could not, sir.

Q. Were there any cultivated acres of land on it?

A. Yes, sir.

Q. Could you make an estimate of how many?

A. No, sir; but I knew the parties that cultivated it; they didn't cultivate much land.

Q. Who were there?

A. Old man Bob Dean and his brother, and let me see what was the other's name; old man Dave Wright; the widow Dean, and Jake Eldridge.

Q. That makes five.

A. Yes, sir.

Q. Was there as much as one hundred and fifty acres of land in cultivation on that island, as near as you can estimate it?

A. I don't think there was. Dean's Island was a very small place, they all lived right there close together.

Q. I will ask you to state whether or not the main body of the river ran along by Mrs. McGavock's place, which is on the Arkansas bank, and extends up and down Dean's chute?

Q. Yes, sir; Mrs. McGavock's place, the Eldridge place and all that where John McGavock lived—that is the widow's now. His land extended right down north of Dean's chute, down to Shawnee Village. I think Eldridge lived on the lower part of it.

Q. State whether or not they had a landing ever there, the McGavocks.

A. Yes, sir; Mrs. McGavock had a landing at the head of the

chute, or a little below it. Well, right at the head of it they all had a landing there.

122 Q. Do you mean Thirty-seven?

A. No, no; not opposite Island Thirty-seven. John McGavock's landing was in front of his house, and Mrs. McGavock's is a little lower down.

Q. Lower down towards Dean's chute?

A. Nearly to Dean's chute, toward the head of Dean chute.

Q. Was that landing down the river from Dean's Island as the river ran at that time?

A. No, sir; it was above. Dean's Island ran right by Mrs. McGavock's house.

Q. Well, it is the Elkridge place I had in mind.

Witness: The Elkridge place is away down toward Shawnee Village, and adjoining it. I knew Elkridge mighty well.

Q. At the time you first knew Dean's Island, state whether or not the island had begun to make to the west of it?

A. No, sir.

Q. About when did the bars or lands first begin to form along it, to the west of it.

A. That was after the cut-off made in 1876?

Q. What was this section of the country down east, in which this old Trigg tract was situated known as when you first came here; did this neighborhood have any peculiar name?

A. Let's see; I don't remember.

Q. Do you recollect ever hearing it called the Devil's Elbow?

A. Oh, yes, sir; it was the Devil's Elbow all around.

Q. Will you describe the river as it ran around and made this Devil's Elbow, as to how long the elbow was?

A. The elbow was thought to be thirty or thirty-five miles around. The cut-off made through my place, and that cut it all off.

Q. About what was the width of the strip of land that cut through in 1876, the Centennial cut-off?

A. That made right down through my place. Well, a few days made a difference, you know. In about a week it was three-quarters of a mile wide.

123 Q. I mean the width of the strip of land before it was cut off, the part that joined the island to the main shore over there; what was the width from river to river?

A. I could tell pretty nearly exactly. Well, I would just say rough something near a mile. I could calculate it exactly. I believe between half and a mile, somewhere along there.

Q. State what change in the river has taken place since the war down there; what great change in the river has taken place?

A. You mean the Elbow?

Q. I just mean for you to call its name; in other words, state whether or not there has been any cut off?

A. Yes, sir; there has been a cut off; it shortened the distance about twenty-five or thirty miles.

Q. When did that cut off take place?

A. In 1876.

Q. Do you recollect the month?
A. March.
Q. Do you recollect the date?
A. The 7th; I think that was it exactly.
Q. Just tell us what you recollect about the occurrence on that day?
A. Well, it cut right through my place.
Q. Did you see it?
A. Yes, sir; let's see. Yes, sir; I saw it, and like to have fell in it. I liked to have caved off with it.
Q. I will ask you to state whether or not the cut-off took place slowly or rapidly, or how?
A. Very rapidly.
Q. About how much land caved into the river on that day, if you can estimate it?
A. On that first day?
Q. Yes.
A. I can't say; well, there was one hundred acres or so; can't tell without thinking a good while.
124 Q. About how wide did the cut-off become on that day?
A. It became nearly a half mile wide.
Q. The whole length?
A. The whole length.
Q. Did it cave in much of the old Trigg place on that day?
A. It caved in a good deal of it on that day.
Q. I will ask you to state whether or not within the next few days after the cut-off the bank caved much?
A. Yes, sir.
Q. How long did it take the cut-off to reach the average width of the river, about how many days?
A. I couldn't tell you. The caving was west on the Trigg land, and on the Stockley place. Let's see. This was the Stockley place down here, and that was the Trigg place, but it caved on until it got to the Stockley place, and got pretty wide.
Q. Did it continue to cave rapidly for the next few days after it went through.
A. For two or three days it caved rapidly.
Q. I will ask you what part of the Trigg tract it went through at that time?
A. The east part of it, and caved off the Stockley land on the southeast corner.
Q. Did it touch the Bed Brown place?
A. Yes, sir; it washed nearly all of that away; I owned it.
Q. How — acres of land on that place did it take in?
A. I don't know. I can't tell you. I had to get away from there. My house was gone and everything else.
Q. I will ask you to state whether or not any houses of colored or white people caved in on that day?
A. I think there was some on the Trigg place, and cotton houses full of cotton, at that, caved in.

Q. I will ask you to state if you recollect whether your gin house was caved in, or had to be moved, or what about it?

A. It caved in.

125 Q. Were you able to save anything out of it?

A. I hauled some cotton away, and saved some cotton, because Capt. Andrews came along with his boat and took it off that night and the boiler, I believe, and some machinery.

Q. Did you have time to get your machinery out of your gin?

A. Not all of it, I don't think.

Q. When you first noticed that the water had gone through, about how far was it from your gin house?

A. I couldn't tell you, it wasn't very far though.

Q. Was it as much as a quarter or a half mile?

A. It might have been about a quarter, I don't remember exactly without thinking.

Q. Did your gin house go in that day?

A. I don't recollect.

Q. State whether or not it went through what was known as the old quarters on the Trigg place that day?

A. I can't tell you unless I could study about it for a while.

Q. You can have time to think.

A. I don't think it did, but I don't remember unless I could study awhile.

Q. You know the location of Walter Stockley's present house, don't you?

A. Yes, sir.

Q. About how far out on the east side of his house did the cut-off come; that is, how far did the caving take place?

A. Oh, it was some distance above that.

Q. As much as a quarter of a mile?

A. Yes, sir. Let's see. I lived right plumb south of the quarters. Walter's house is west of where the quarters were.

Q. His house now is west of where the quarters were?

A. Yes, sir; the quarters were east of his house, over on that little island over there.

Q. Am I correct in understanding you to say that the quarters were about where that little towhead island is now?

126 A. Somewhere on that island.

Q. They stayed, then, up to the time of the cut-off, did they not?

A. Yes, sir; I believe they stayed there.

Q. I will ask you whether or not there has been much caving on the east end of Centennial Island; that is, the east bank of the place now owned by Mr. Stockley, which is a part of the old Trigg tract, and on which his house now stands, since the cut-off?

A. I think it caved a good deal west.

Q. Since the cut-off?

A. Yes, sir; since the cut-off.

Q. Say take the next low water after the cut-off, the summer of 1876, about how far east of his house was the river, or the water, whatever water was left there?

A. East of his present house?
Q. Yes, sir.
A. I couldn't tell you.
Q. Was it as much as half a mile?
A. I don't think it was that far. I am not sure, though, unless I had time to look at it. I would have to tell from the other side of the river, you see.
Q. About how much of the old Trigg tract went into the river at the time of and just after the cut-off?
A. There was a thousand acres, I believe, in the Trigg tract.
Q. How much was left out, do you recollect?
A. The Trigg tract, I believe, run right along this road, and it has not caved a great deal since the cut-off; it has caved a little, but not much, I don't think.
Q. Then, this field of Mr. Stockley's that is now here on the east and on Centennial Island is the part of the Trigg tract that was left after the cut-off?
A. Yes, sir; the balance of it is all across that way, and a little east.
127 Q. The balance of it is south and east of it?
A. Yes, sir; south and east of it.
Q. Are you acquainted with the towhead on which the piece of land that Mr. Walter Stockley has now under fence, just east of this field on the head of Centennial Island is situated?
A. Yes, sir; I am well acquainted with that. I know when it first started.
Q. Describe how it first appeared in relation to the shores, and how it grew after that, the first time you saw it as it came under your observation?
A. The first time I ever saw it was on the northeast corner of that little island over there; I was on it; I went there; I saw some bumps, lumps up, and it was cakes of Bermuda grass piled up along, two or three or four acres of it, and I went on it.
Q. About how far from the Tennessee main shore was it at that time?
A. It was a good ways.
Q. How far from Centennial Island of H. W. Stockley's field was that?
A. H. W. Stockley's field over here?
Q. Yes?
A. It was the width of the river.
Q. Was it on the Arkansas side of the river, on the Tennessee side of the river?
A. Well, it didn't join Arkansas, and didn't join Tennessee.
Q. Which was it the nearest to?
A. It was nearest to Arkansas, nearest to Dean's island?
Q. Which way did that tow head grow after that?
A. It grew southwest. I know exactly how it growed; I was on it and looked at it.
Q. Did it grow towards Mr. Stockley's field, on the east head of Centennial island, or in another direction?

A. Yes, sir; this island here?

Q. Yes, this is Centennial island?

128 A. Yes, sir; it growed in this direction. Well, it came on down; I never noticed it all the way, but the head of it I noticed how it started off, it started off rather in the shape of a fish.

Q. I will ask you to state whether it grew rapidly or slowly?

A. I don't remember. Well it didn't grow so rapidly, I don't think. Yes, sir, in a year or two it was an island.

Q. How long did that body of water between it and Dean's island continue?

A. Well, for some time.

Q. For a number of years?

A. Yes, sir; several years; I don't remember how many; I never noticed particularly, but several years, but kept filling.

Q. How long did the water between it and Stockley's field, on Centennial island continue?

A. Stockley's field or Centennial island?

Q. Yes, sir; Stockley's field on Centennial island and that towhead?

A. Stockley's field on Centennial island?

Q. Yes, sir; this present piece of the old Trigg tract that was left out of the cut-off, and the towhead, as it formed, how long did the body of water between those two pieces continue to be?

A. It has always continued.

Q. Is there any water between those two places now?

A. I think there is; I don't know; I believe there is between there and the island.

Q. Didn't you cross over that old river this — in the wagon?

A. Yes, sir.

Q. Was there any bridge there?

A. No, sir.

Q. You crossed over dry shod, did you?

A. Yes, sir; I crossed over a lot of laid down poles on the ground.

129 Q. Then there is no water at the present time at that place in that old river?

A. Old river around here?

Q. Yes, sir?

A. I think there is some in it.

Q. Is that running water, or is it just a pond?

A. It is standing water, I think, sir; about in ponds; I never noticed it particularly.

Q. State whether or not the old river bed between Island Thirty-seven and Dean's island has filled up since the cut-off?

A. Nearly all of it.

Q. Hasn't that old bed now grown over with timber and small trees?

A. Yes, sir; if there had been none of it cut off there would have been trees there; some of the oldest would have been saw logs there now.

Q. Is there anything to distinguish that towhead at the present time from Dean's island, and the made land north of it; that is any land that is marked, any sand bar, pools of water, or anything of that sort?

A. Well, there is land over there with timber on it. You mean this towhead over there?

Q. Yes, sir.

A. Yes, sir; that has always been open; they never have joined.

Q. The towhead?

A. And the little island.

Q. The towhead and the made land?

A. Yes, sir; the towhead island has never joined Dean's island. This little island up here has never joined Dean's island. That chute through there is still there, but it is built up higher that it was; it has filled up.

Q. Are there any ponds in that chute?

A. I haven't been through it in a long while; I don't know whether there are or not.

130 Q. Could you see it as you came along the road this morning from Thirty-seven?

A. No, sir; I didn't come far enough. That is not far from here; that is too far south; I didn't come in a mile or so of it.

Q. I will ask you at the time the cut-off was made, whether or not it caved so rapidly that you could see the land going into the water at the moment the cut-off was being made?

A. Yes, sir; we could see it.

Q. Did large or small chunks of land go in at one time?

A. Sometimes two or three acres would go in.

Q. Did it make any noise?

A. Yes, sir.

Q. You could both see it and hear it, then?

A. Yes, sir; could both see and hear it. It liked to have caught we walking along on the bank; it came mighty near it. It went in very fast on this side, on the island side—the Trigg land.

Q. The Trigg land caved in very rapidly at that time?

A. Yes, sir; it caved in very rapidly, and caved down and caved off a part of Mrs. Stockley's land; this tract right here.

Q. That old river, as you have stated, that ran between the Trigg place and island Thirty seven on one side, and Deans island and Arkansas on the other, was the boundary of the State of Tennessee, wasn't it?

A. Yes, sir; that was as far as Tennessee came, and there is where it belongs yet. It never has crossed there. That is as far as Arkansas comes. North of that chute over there is as far as Arkansas comes, or has ever come this way, I have been here ever since before the war.

Q. Supposing the old state boundary line to have been in the middle of the river, where it was when you first came down here; was the towhead at the time you first saw it on the Tennessee side or the Arkansas side?

131 A. It was on the Tennessee side, south of Arkansas. Tennessee never did join it.

Q. Never did join Arkansas?

A. Never did join Arkansas. That little island over there is as far as Tennessee ever went. They call it Tennessee; I don't know whether it is in Tennessee or where it is. It is between the main shore and Arkansas, I know, Deans Island.

Q. Was it east and south, or on the Tennessee side of the middle of the river as the river was when you first saw it?

A. Yes, sir; it is south and east of it; south of Deans Island, I think.

Q. From what you know of the country at that time, and the location of the lines of the old Trigg place, I will ask you to state whether or not, in your opinion, the piece of land that Mr. Stockley has under fence on the towhead, of which we have spoken, is within the lines of the old Trigg tract?

A. I think that is on the old Trigg tract. I can tell exactly from the other side over yonder where I showed them that corner, because that land right across run to the south boundary of the Trigg line, or the Trigg land. It is on the Trigg land, I think. Well, I know; well, because I was right close to it for years.

Q. How much of the old Trigg tract was in cultivation at the time you first got acquainted with it, about how much?

A. I can't tell you, I don't know how much there was; a thousand or twelve or thirteen hundred acres; something like that at the time I first knew it.

Q. I will ask you whether or not, after the cut-off there was an island left out of the old Devil's elbow, and what this island is called? I am talking about the spot of land we are on now; did the cut-off make Centennial island?

A. Yes, sir.

Q. I will ask you whether or not this Centennial island is now recognized as a part of Tennessee?

A. Yes, sir.

Q. In what direction is Tennessee from here, the main shores of Tennessee?

132 A. Right south.

Q. Isn't it also due east of here?

A. South and east; yes, sir.

Q. I will ask you whether or not this towhead is on a line running east from this spot on which we are now sitting towards the Tennessee shore?

A. It is towards the Tennessee shore, on the Tennessee side.

Q. In other words, it is nearer the Tennessee side, isn't it?

A. Yes, sir.

Q. I will ask you to state in what direction Island Thirty-seven is from here?

A. North.

Q. Is that towards Arkansas or Tennessee?

A. Towards Arkansas.

Q. Is that part of the State of Tennessee now?

A. Yes, sir.
Q. In what state do you vote and pay your taxes now?
A. Tennessee.
Q. Did you ever live on the old Trigg place?
A. I lived right adjoining to it. It lay between us. I lived in Tennessee then.
Q. You voted then and paid your taxes in Tennessee?
A. Yes, sir; I lived on the main county road from Covington, down into Devil's Elbow.

Cross-examined.

By Mr. Norton for plaintiff:

Q. How long ago did you say you first became acquainted with this country?
A. About 1861 or 1862; I have been here ever since.
Q. You say then the Deans island place was a small place?
A. Yes, sir.
Q. And the island, itself, was small as compared with its later size?

A. Yes, sir; the island was a great deal smaller than it is
133 now. The island made south down to that towhead there and never has made any further. It was a very small place when I first knew it; I was over there every week.

Q. But it gradually, from the time you first knew it, made south to the towhead?
A. Yes, sir; down to the towhead.
Q. Then it was gradually making south towards the towhead from 1862 on?
A. Yes, sir. It was a good long ways through to that towhead where it stopped at. That has made up a great deal, and keeps building up higher, and does yet at every overflow, and fills up at places.
Q. Well, had the island made up down as far as the towhead when the cut-off was made when all that Trigg land went into the river?
A. No, sir; it hadn't made that far then. The river run around there then. The river was on Deans island at that time.
Q. You mean the river was on what since has become attached to Deans island?
A. Yes, sir; on part of it.
Q. At the time of that cut-off in 1876, how much would you say Deans island had broadened toward the south from what it was when you first knew it?
A. Well, I couldn't tell you; a right smart though; Deans island is pretty long north and south now. It is a big island now to what it was when I first knew it in 1862. It was very small then.
Q. As the original Deans Island broadened toward the south was the clearing on it and the fields extended towards the south also?
A. The fence was built the last time Davy Wright—he married a Dean; his fence was built right out on the edge of the bar a long

ways up towards the head of the island, up towards Pecan Point; somewhere in 1862 or 1863.

134 Q. Well, as the island extended south, was the clearing extended south, too—the fields?

A. The bar extended south; that made south; and made a little west. It began on Dean's chute and made southwest, and might have made a little east probably.

Q. When you first knew it, about how much cleared land was there on the Deans Island place?

A. I think there were fifty or sixty acres; I can't tell you, but I don't think there was over 50 or 60 acres. Four or five families lived on it, and they all lived right in a huddle.

Q. How much of it is now cleared?

A. I can't tell you. Deans Island has made terribly since then, but it has made more west, down towards Thirty-seven. There is a big make there. From this main side here to Deans Island was called two miles. It was a mighty wide river there; from the place up here called the Smith place, it was very wide there.

Q. Deans Island now is a farm of several hundred acres isn't it, open?

A. I don't know, indeed. I haven't been there in several years. They say they have got a good big farm over there.

Q. Have you not been there in several years?

A. No, sir; I haven't been there in several years.

Q. You have not been on the towhead in several years?

A. I have come through the towhead.

Q. How many years would you say since you had been on Deans Island?

A. I have been there nearly every year; pretty near every year.

Q. On Deans Island?

A. Yes, sir; on Deans Island. Let's see, I wasn't there this year, I don't think, but I have been there nearly every year on Deans Island.

135 Q. Where was it you meant, then, that you hadn't been for several years?

A. Across over yonder where they have cleared; I am on Deans Island, but not where the clearing is.

Q. You mean you have not been about the open plantation for several years?

A. No, sir; I have not been on there for several years. I know the last time I was along there though, whether the last year or the year before that, they had cleared down all the old bottom land, and had got in the island west, into the higher land. I never noticed it particularly, but it looked like a pretty big farm opened in there from where Capt. Andrews used to have it.

Q. You have stated now about what was the size of Deans Island in the way of clearing in 1862; now can you tell me about what was on Deans Island in the way of a farm in 1876, when the cutoff was made; how much farm did they have then?

A. I don't think they had much more; I don't remember though. I don't know whether I was over there about that time or not, because there was a good many years—I know Andrews cleared up the

land there, most of it; Capt. Andrews begun right above this towhead chute. He had a boat yard there, building steamboats. I was over there often then, but I don't think they had cleared much, unless it was right along on the bank, and that caved off, the most of it; it caved terribly on the east side.

Q. Deans Island caves, then, on the east side?

A. It caved then, I don't know whether it does now or not. I know Horace Andrews was up there, and he had to move back all the time.

Q. You have testified about giving some surveyor a starting point; that starting point wasn't on Deans Island, was it?

A. I don't know, sir; I don't recollect.

Mr. McSpadden: He means to Maj. Humphreys the other day?

A. Oh, yes. Well, that is over on the main shore.

136 Q. You mean that is the other side of the main Mississippi river as it runs today?

A. Yes, sir.

Q. On the other side of the river from where we are now?

A. Yes, sir; and always was east of the river, since I have known the country, southeast from the river.

Q. In connection with that survey, did you mean me to understand that you were also upon the towhead island?

A. Over on that side?

Q. Yes.

A. No, sir; I wasn't over there. I went over home across it, but I never went back over there. The surveyor came over on this side. He took his bearings and had a flag up on this side, and came over. I don't know what he done on towhead island there; I suppose he was running out Walker's line.

Q. You were on the towhead island though that day; went across it?

A. Oh, yes, sir; I went across that morning.

Q. Was that the first time you had been there in a good while?

A. Well, every year I am across there; I go across it, this west part of it; the east part I don't.

Q. You testified you crossed old river this morning in a wagon?

A. Yes, sir.

Q. How far from the head of old river chute, from where we are at present, how far as it up there?

A. I don't know, two or three miles, I suppose.

Q. In that old river bed there is yet water at a great many places, isn't there?

A. Yes, sir. When I first knew Thirty-seven and the river, the river was up here close to the church yonder. Here years ago that road was a levee, this road up here this side of the church, what they call a road there was a levee. The river came along and

137 notched in here so it came close to the corners.

Q. How far is it from where we are now to where you say the river used to be up yonder at the church?

A. I don't know, sir, exactly how far. The church is right yonder; it is three or four hundred yards.

Q. That is where the river ran at the time of the cut-off, wasn't it?

A. Yes, sir; in 1876. That is the time it came right down this here chute here.

Q. You say it is three or four hundred yards to the church?

A. You can see the church through there; yonder it is on the right hand side up yonder; I judge it to be three or four hundred yards.

Q. How far is that church now from old river, as we call it now?

A. Oh, it is five or six miles. Old river now is by Shawnee Village.

Q. Well, you misunderstood me. You say the river chute run right there.

A. Yes, sir; when I first knew it.

Q. By the church?

A. In 1862, along there.

Q. And it did run there when the cut-off was made in 1876?

A. No, sir; it didn't run there then. It was a mile nearly of that; it kept making; it kept going west, that way, towards Shawnee Village, Arkansas, and the bend caved very rapidly. I recollect it well.

Q. Now, where you crossed this morning I believe you said was two or three miles from here?

A. Yes, sir.

Q. Where you cross- the old river this morning there was a road?

A. Yes, sir.

Q. Well, the water gets in the old river there until you can't cross it, don't it?

138 A. Yes, sir.

Q. And little boat ran up there?

A. Yes, sir.

Q. And do do it?

A. Yes, sir.

Q. They do it without river being up very high, don't they?

A. No, sir; I think the river has got to be up right smart.

Q. Well, it need not be an overflow?

A. No, sir; not an overflow, but something like the bank full.

Q. There is nothing in the way of riding on dry land from where you crossed it up to the original Dean's Island place, is there?

A. No, sir; I reckon not. Well, right above where I crossed it there is a very low place there; I don't know whether you can, but I suppose you can ride across it.

Q. Is the water in the old river bed on both sides of where you crossed it this morning?

A. Only in places—sort of ponds.

Q. Up here near Mr. Stockley's residence it is quite deep yet, isn't it?

A. I don't know, sir; I don't think it is. If it is it is mighty narrow.

Q. Did you go along the bank of old river after you crossed it?

A. No, sir; I came this road, right straight.

Q. You got off at the bank?

A. Yes, sir. The bank goes right around there by Walker's house, the old bank. In old river up here there are some deep holes around Walker's house.

Q. When you went across the towhead island, were you on the Dean's Island side of the towhead chute also?

A. Not far.

Q. Well, you were on there, were you?

139 A. Yes, sir.

Q. Were you horseback or afoot?

A. Horseback.

Q. You rode right across from Deam's Island on to the towhead island, didn't you?

A. Which? This towhead island here?

Q. Yes.

A. Yes, sir; rode through the sand here.

Q. In testifying some minutes ago you said the towhead had never joined on to Dean's Island?

A. Well, the towhead hasn't. The water runs through there. This is the bottom of it I crossed on. It has never joined. It has never made up level. This towhead over here, the water runs through there.

Q. It has to be quite high to do it, don't it? There is no water in there now, is there?

A. I think there is some right above the old bed.

Q. Do you know what has been called Dean's Island chute?

A. Yes, sir.

Q. How much of that now, that strip that you know as the towhead chute, is there that you couldn't ride across during the most of the year?

A. You can ride across all of it except away up adjoining the Smith place. There is something singular about that; several years ago it throwed up like a road, just about wide enough for a wagon to pass, like a man had put up a high levee. It is right there now; you can see it. It has just throwed up a level place for two or three miles long, right north and south, about the width of so two wagons can pass each other.

Q. It is sand, is it?

A. Yes, sir; it has made a perfect road. I saw it shortly after it was done; I was along there.

Q. Right up and down Dean's Island chute?

140 A. Yes, sir.

Q. I mean towhead chute.

A. No, not up and down towhead chute, from the foot of towhead chute down north to Island Thirty-seven; right north it has throwed up and made a perfect road just about wide enough for two wagons to pass.

Q. But that don't touch the land we are talking about?

A. No, sir.

Q. I was inquiring about the towhead chute?

A. Oh, yes. This towhead chute over here?

Q. Yes, the chute between what you call towhead island and what you call Dean's Island?

A. Oh, yes, sir.

Q. Now, then, is there any place in that chute as it used to be—I don't know how much chute is left there now, but if there is any place in there how much place is there that you can't ride across any time in the summer, off of Dean's Island onto what you call towhead Island?

A. There are a good many places that you can't ride across.

Q. What are they? Ponds?

A. Yes, sir; small ponds, and a few of them are in sight from this side, but the sand is so soft and so much water, you can't ride it at all.

Q. Dry sand?

A. Yes, sir; I rode across when the surveyor was up here surveying that land; you can hardly get across the soft sand. I don't know how it is on the east end.

Q. Is there any sort of growth of young willows, or cottonwoods, or sprouts coming up in that soft sand?

A. Yes, sir; I noticed some sprouts scattered, and it looked like some way up east.

Q. Can you look up and down towhead chute?

A. Oh, yes, sir; you can look up and down it and see most
141 anything up and down it yet.

Q. But it is growing up in an undergrowth of cottonwood from each side, is it?

A. Yes, sir; I saw a few cottonwood switches up on this end of it, some up as high as my head; I don't know how it is further east.

Q. Do you know where Mr. Stockley's field is over there on towhead island?

A. Yes, sir.

Q. Do you know where there is another field on towhead island?

A. Well, up there where the island first commenced making, there was somebody came there once; I don't know whether the field is there yet or not.

Q. How far is that from Mr. Stockley's field?

A. A mile or so, I reckon.

Q. What direction from Mr. Stockley's field?

A. It is a little northeast.

Q. A little north of east?

A. Yes, sir; a little north of east.

Q. About a mile?

A. I suppose so.

Q. Do you know how much clearing is there?

A. No, sir; I don't. When I saw it, I was there once when the man first settled there and built a house. It was a very small place then.

Q. How long ago was that?

A. Let's see, when was that? Somewhere in the seventies, I believe, or the first of the eighties, somewhere in the seventies, I believe. It has been a good while ago. It may have been in the

eighties, by George. The last of the eighties, I don't recollect, I have forgotten who he was. It was an old man.

Q. In your judgment, how many years ago was that when he first went in there?

142 A. It seems to me like it was seventy-seven or eighty-eight, somewhere in there.

Q. Do you mean 1887 or 1888?

A. No, '77 or '88, sometime in that period.

Q. May be you could come nearer if you would say about how many years ago you think it was?

A. I would have to study. I think it was in the seventies, I am not positive.

Q. The towhead didn't appear until several years after the cut-off, did it?

A. No, sir; there was no towhead there.

Q. For several years after the cut-off?

A. No, sir.

Q. Well, the cut-off was in 1876?

A. That has been thirty-four years ago; well, it was several years after that. The cut was made the 7th of March about sun up.

Q. Now, that field you say that man commenced on, that, you think, was in the seventies, and you haven't been there since?

A. No, sir; I never have been there since. It seems to me it was about 1884, since I come to think about it.

Q. That would be only eight years after the cut-off?

A. Well, it seems to me like it was 1884. It was a very small place. There was not but a few acres of it, and he built a house on it, but he left there, whoever it was, and then Andrews, after that, put a family there. The island got a little bigger and he put a family over there.

Q. Who owned Dean's Island at the time?

A. He did, and he was building boats right over on the southeast corner of Dean's Island, next to that chute.

Q. Building boats?

A. Yes, sir; steamboats. He had a dockyard, or something of the sort, and built some boats there, and had a good man- men there at work. That is right in the northeast corner of Dean's

143 Island. Dean's Island then, though, was making east, that opposite side, I don't know how it is now. Well, I was along there I believe it was the first of this year, and I see it is caving mightily on the head of Dean's Island.

Q. On the east?

A. Yes, sir, on the east side, right along from Mrs. McGavock's.

Q. Dean's Island has gradually made towards the south, hasn't it?

A. Yes, sir. Well, I think down towards the lower part of it it is making east, too, isn't it?

Q. Well, the towhead, after it sprung up, it made towards the south, too, didn't it?

A. Yes, sir; the towhead island made south, and I believe it is making east.

Q. And then later it also became attached to Dean's Island, so you could ride across from one end to the other?

A. Well, you could always ride across when the water was down.

Q. You could?

A. Yes, sir. It used to be very deep. There was not many places you could cross, you would mire up.

Q. But from an early time in the history of the towhead you could ride across from it to Dean's Island?

A. Yes, sir; from away late in the fall.

Q. And the longer it stands there the less water goes through that towhead chute?

A. I suppose so.

Q. I mean the bottom gets higher and sand fills in there.

A. Yes, sir; the sand is higher; I noticed on the foot here it is higher than it was.

Q. And the cottonwood sprouts encroach on the sand in there?

A. There are a few cottonwood sprouts in there, some of them are up and sprinkled around as high as my head. I noticed that some time ago. I don't know how it is up on the other end. I
144 just came across the foot of it. You can see through them. There is nothing there to interfere with anything; just a few sprouts.

Q. From Mr. Stockley's present field on the towhead chute how far can you ride towards the south?

A. You can't ride far, not on the lower end.

Q. Before you come to the sand of the river.

A. Yes, sir; on this end you can't ride far, on the southwest corner. On the northeast corner it is a good long ways to the water's edge. But there is no trouble to ride from that towhead field of Mr. Stockley's up on to Dean's Island, clear to the head of the original Dean's Island.

A. I don't know how far it is up above. Right across the lower end there is no trouble, except the sand is mighty loose; your horse will go down nearly to his belly in the sand.

Q. That sand doesn't lack a great deal of being as high as the ground on each side, does it?

A. Yes, sir; it lacks five or six feet. I will tell you what that does sometimes, though; that washes out sometimes. I was just thinking when I came across there when the next overflow comes whether this will wash out or put more on it. If it puts more on it will close it up. I have known it to wash it out clean, pretty deep from away up. I never went clear through it, but this end has a tendency to wash on the right, coming through it north. It seems that the water draws that way. It don't come this way. It will run out here and go yon-way. I noticed that since the water. It has a tendency to wash off the northwest corner of the chute. Low water will put it pretty full, like it is, but a big overflow will wash it out at the foot here. I don't think it does, though, at the head, but I am not certain.

Q. Well, of course you can't tell what any overflow will do very well?

145 A. No, sir; you can't tell. I have known it to wash out places, and then go and make it up higher than it was at first with sand.

Q. About what is the present stage of the river, do you have any idea?

A. No, sir; I don't; about twenty feet, I suppose, to the water from the top of the bank.

Q. Mr. Massey, when the cut-off of 1876 put all of that Trigg land in the river you have testified about, did it leave any of it on the east side of the cut-off as it was made? Was any of the Trigg land left on the other side?

A. No, sir. On the east end? East side?

Q. Yes; was any of the Trigg tract left on the other side of the present river, or on the other side of the river the way it stood then?

A. No, sir; it never cut through it.

Q. There was nothing left over there, then, on the Trigg land?

A. I don't think there was, nor south either, because there was a Carr tract of land, and then my land, and it took most of the land that was left.

Q. All of the Trigg land that was left, then, in 1876 was the land we are now on, and known as Corona?

A. Yes, sir; it caved on the east side there right smart after the cut-off, but I think it has quit now.

Q. Well, this towhead land is now, then, where the Trigg land first was?

A. Yes, sir; part of it.

Q. And where the river later was?

A. Yes, sir.

Q. And then it commenced to build up?

A. Yes, sir; the Trigg land run up, I couldn't tell you how far. I could tell you from the other side of the river. The Trigg land run up, I think, about to where Walker's line crossed.

146 Redirect examination by McSpadden, for defendants:

Q. In your cross-examination you have spoken of the Smith place; I will ask you if that is not the Island Thirty-seven?

A. Yes, sir.

Q. In your cross-examination you spoke of the church, and stated that the river ran along there, and pointed out a window here to it; I will ask you if that is north of here?

A. It is a little north of this house.

Q. The river that you spoke of then wasn't that the river between Trigg and Thirty-seven?

A. Yes, sir; that was the chute of Thirty-seven.

Q. It was not the main river?

A. No, sir; the main river run around east of the tract and the Smith place, too.

Q. So from this spot of which we now are, about how far was it east of here to the main river when you first came here?

A. East of here?

Q. Yes, sir; just roughly; right straight out that window?

A. Let's see. Well, it was near a mile; about a mile, something like that.

Q. You have spoken of what we call the towhead chute; that is the chute that bounds this towhead on the north, and is between it and Dean's Island and the made land over there on one side?

A. Yes, sir.

Q. I will ask you if it isn't a fact that the high water comes through there?

A. Comes through the chute?

Q. Yes.

A. Yes, sir.

Q. Isn't that about as navigable in high water times as this old river betwen Stockley's and the towhead?

A. After the cut-off made, that was the main channel. The boats all came up the point there, and took right down this old river, and then took through that chute. That was the main way
147 the boats run.

Q. After the cut-off for awhile?

A. For several years.

Q. They ran through what we call the towhead chute?

A. Yes, sir; it was a great deal nearer than to take that yonder way. They could come across here and it wasn't but two or three miles, and around the other way it was fifteen miles. They did it invariably, all boats.

Q. They ran between Dean's Island and the towhead?

A. Yes, sir.

Q. That was after the cut-off?

A. Yes, sir; that is the way they ran.

Q. I will ask you if it isn't a fact that a great many people on Island Thirty-seven do all their shipping from this, Corona, landing, and gin a great deal of cotton at Mr. Stockley's gin, here at Corona Landing?

A. Yes, sir.

Q. Is it not a fact that for at least eight months in the year they haul dry shad across this old river between here and Thirty-seven?

A. Yes, sir.

Q. Which is the same old river between here and the towhead?

A. Yes, sir; it keeps filling up. That is all filling up.

Q. Corona Landing, then, is the principal landing for thirty-seven, isn't it?

A. Yes, sir; it is the main landing for Thirty-seven.

Q. I will ask you whether or not the towhead chute, between towhead and Dean's Island, isn't navigable for small boats in high water, at the present time?

A. It will do for any boat. The further up you go the deeper it is, the further east you go.

Q. About how many months in the year does the water go around in this old river, around between here and Thirty-seven?

148 A. I can't tell you sir; some times it don't go around at all and sometimes it is a good long while.

Q. It depends on the stage of the water?
A. Yes, sir; on the water entirely.
Q. You have lived around the bank of the Mississippi river here a long while?
A. Yes, sir.
Q. About how long does the high water last?
A. Generally lasts five or six weeks.
Q. I will ask you this; isn't it a matter of common knowledge that the river banks cave principally and almost only in times of high water?
A. Some cave worse when the water is down. For instance, this bank out here will cave worse when the water is down than it did before.
Q. This bank in front of Corona?
A. Yes, sir; and west of here. After the water is gone it commences caving and when it is on the rise; but when it is up, bank full, it caves, but not near as much.
Q. Isn't this bank here at Corona an unusually high one?
A. Yes, sir; this is a high bank here.
Q. I will ask you to state whether or not, before this levee was built in Arkansas, did this land here overflow?
A. I don't think it did; I think Mr. Stockley's place here never did overflow, nor the Trigg part, up that way, either.

Recross examined.

By Mr. Norton, for plaintiff:

Q. Does what you call the towhead island go under in high water?
A. I don't think all that goes under; I know after it first made, I went across there, and I got stuck on top of it in a skiff with some colored fellows. I went up pretty high; I thought I would go up high and wait and I could drop across easier—the wind
149 was blowing so—and it would not be like pulling square across when the wind was blowing, and I got stuck on it. I think the further east you go the higher it gets. It was very narrow when I crossed it.
Q. Isn't the highest part of it where the towhead first appeared?
A. I think so, but I am *bot* sure. That is where I got stuck, anyhow, up near the head of it; I had gone up there; it was nearly night and the wind was blowing, and to pull right square across the river to my house I would be sure to drop below it; I had five or six colored people coming from my place below here, and I waited there until nearly dark, and I got stuck on it. I think it is higher east than on this end, the towhead, judging from that, I have never been there since.
Q. Where do the little boats go to when they come into what we called river here by Mr. Stockley's?
A. They go around by Shawnee Village, and then to different landings along on the place, but Shawnee Village is the main place.
Q. How far is that from Mr. Stockley's?
A. It is about five miles by land, and when they go from there

either out through Dean's chute, or come and go out through that chute there, or come out here.

Q. You say you have been, about once a year, over on the towhead?

A. Yes, sir; I think about once a year; sometimes oftener than that.

Q. But that is just to ride across from Deans island to the towhead?

A. Yes, sir; ride across the foot of it here. I didn't go over the island at all.

Q. No, you didn't go up and down what they call the towhead chute?

150 A. No, sir; I haven't been up there for years.

Q. You don't know whether or not, in places, the undergrowth isn't entirely across from Deans Island to the towhead island?

A. No, sir. Let me see. I was up there, I think, about four or five years ago was the last time I was up there; I wasn't across then, but there was some bunches of it about four or five years ago.

Redirect examination.

By Mr. McSpadden:

Q. You have spoken of a field on this towhead, the first field that was cleared there; I will ask you if a man by the name of Seth Woodall didn't occupy that about 1884 or 1885?

A. Yes, sir; Seth Woodall went there. There was a man living there before he was.

Q. But didn't that man go off and Seth occupy that?

A. Yes, sir; Seth Woodall lived there a little while.

Q. He lived there until his wife died, didn't he?

A. No, sir; his wife died last year.

Q. But I mean his first wife; don't you recollect he first married Miss Wright?

A. Yes, sir. I don't recollect whether his wife died there or not, but there was a man living there before Seth Woodall.

Q. Did he own or claim to own the land, if you know?

A. No, sir; nobody claimed it.

Q. Isn't it a fact that just anybody who came along settled there on that place and lived there without owning it?

A. Yes, sir; there was several lived there.

Q. Isn't it a fact that last fall some parties lived there who were in no way connected with Mr. Cissna?

A. Yes, sir; Woodall lived there a little last fall. He is not there now, he left. He lived there a while.

And further deponent saith not.

151 Signature of the witness waived by consent.

____ ____,
For Plaintiff.

____ ____,
For Defendants.

Sworn to before me, this the 12th day of February, A. D. 1901.
[SEAL.] N. B. DOSS,
Notary Public.

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas.

No. 105.

W. A. CISSNA, Plaintiff,
vs.
ENOS WHITE and H. W. STOCKLEY, Defendants.

I, N. B. Doss, a Notary Public, duly appointed, commissioned and qualified, do hereby certify that the reason for taking the foregoing depositions of the said Chris Trigg, E. W. Massey, N. D. Borders and W. E. Wright is and the fact is that the said witnesses live more than one hundred miles from Helena, Arkansas, where the said United States Circuit Court will be held, where the said cause will be tried; the said Chris Trigg and the said W. E. Wright live near Corona Landing, Tipton county, Tennessee, about one hundred and twenty-five miles from Helena, Arkansas, and the said N. B. Borders lives on Centennial Island, in Tipton county, Tennessee, about four miles from Corona Landing, and about one hundred and twenty-five miles from Helena, Arkansas; and the said E. W. Massey lives on Island Thirty-seven, in Tipton County, Tennessee, about five miles from Corona Landing, and about one hundred and thirty miles from Helena, Arkansas; and that the testimony of said witnesses is
152 material and necessary in said cause stated in the caption.

And I further certify that due and legal notification of the time and place of taking said depositions, signed by J. J. and E. C. Hornor and G. J. McSpadden, counsel for H. W. Stockley, was made out in writing and served on Norton & Prewett, counsel for plaintiff, W. A. Cissna, to be present at the taking of the aforesaid depositions, and to put such interrogatories as they might think proper. Service of said notice was duly accepted in writing by the said Norton & Prewett, and is hereto affixed. I further certify that on the 12th day of February, in the year of our Lord one thousand nine hundred and one, I was attended at the store of G. A. Stockley, at Corona Landing, in Tipton county, Tennessee, by G. J. McSpadden, counsel for defendants, H. W. Stockley and Enos White and H. W. Stockley in person, and by N. W. Norton, Esq., counsel for plaintiff, W. A. Cissna, and by W. A. Cissna in person, and by the said witnesses, Chris Trigg, E. W. Massey, N. D. Borders and W. E. Wright, who were all of sound mind and lawful age, and the said witnesses were all by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth and nothing but the truth, and it having been agreed in writing by the counsel for all the parties, which agreement is hereto affixed, the said depositions were taken down in shorthand by S. A. Person,

Esq., a competent stenographer, who afterwards transcribed the same in typewriting, and transmitted the same to me through the post-office. And I further certify that it was agreed to by the counsel of both parties, both the said Cissna and the said Stockley being present, that the said S. A. Person might carry his shorthand notes of the evidence of the said witnesses to his office in Memphis, and transcribe the same in typewriting, without either myself or the said witnesses being present, and return the same to me through
153 the mail. I also certify that it was agreed by the counsel of both parties, that the signature of the said witnesses be waived, and that the reading of the depositions by the witnesses themselves or by me to them, be omitted and waived, it being agreed that the depositions as furnished me by said Person are true, faithful and accurate reports of the testimony of said witnesses. And I further certify that when the said parties and their said counsel and the said witnesses had assembled, it was found that Charles Montague, a magistrate and notary public for Tipton county, Tennessee, the officer named in said notice, could not be present. It was thereupon agreed by the counsel of both parties that I, N. B. Doss, a Notary Public in and for said State and county, might act in his stead in every way as if I had been named in the notice. And I further certify that I duly received the foregoing depositions from the said Person through the United States mail, and that I put them in an envelope and sealed the same and addressed the same to Emerson R. Crum, Esq., clerk of the United States Circuit Court for the Eastern Division of the Eastern District of Arkansas at Helena, Arkansas, and I put the same in the postoffice at Corona, Tennessee, properly stamped, without the same having been out of my possession or altered after I received them. And I do further certify that I am not of kin or counsel, or attorney for either of the parties named in the caption, nor in any way interested in the event of the cause named in the caption.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at office, on this 23d day of February, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth year.

[SEAL.] N. B. DOSS,

Notary Public in and for Tipton County, Tennessee.

154 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas.

No. 105.

W. A. CISSNA, Plaintiff,
vs.
ENOS WHITE and H. W. STOCKLEY, Defendants.

To the above-named plaintiff or his attorney- of record, Mess. Norton & Prewitt:

You are hereby notified that depositions of witness- in the above entitled cause will be taken at the store of C. A. Stockley, at Corona Landing, Tipton county, Tennessee, on the 12th day of February, 1901, between the hours of 8 A. M. and 5 P. M., before Charles Montague, a Magistrate and Notary public, said depositions to be read in evidence on behalf of the defendants. If the taking of said depositions is not completed on said day the said taking will be adjourned from day to day until completed.

G. J. McSPADDEN,
JNO. J. & E. C. HORNER,
Attorneys for Defendants.

January 31, 1901.

We hereby accept service of the foregoing notice and agree that the same may be taken by a stenographer, transcribed by him in typewriting and then subscribed by the witnesses.

NORTON & PREWETT,
Attorneys for Plaintiff.
G. J. McSPADDEN,
Attorney for Defendant Enos White.

2/3/1901.

Endorsed: In the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas. W. A. Cissna vs. Enos White and H. W. Stockley. No. 105. Deposition of Chris Trigg (colored), E. W. Massey, N. D. Borders (colored), and W. E. Wright. Filed February 25th, 1901. Emerson R. Crum,
155 Clerk.

UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas:

I, Emerson R. Crum, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern District of Arkansas, do hereby certify that the above and foregoing forty-two typewritten pages contain a true and compared copy of the deposition of E. W. Massey, filed in said court in the cause wherein W. A. Cissna was plaintiff and Enos White and H. W. Stockley

defendants, the same having been a case on the law docket of said court, and pending at the time said deposition was taken and filed in said court in the cause wherein W. A. Cissna was plaintiff and Enos White and H. W. Stockley defendants, the same having been a case on the law docket of said court and pending at the time said deposition was taken and filed therein, as the same appears on file in my office with the depositions of Chris Trigg, W. D. Borders and W. E. Wright, taken at the same time, and under one filing cover.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court at office in the city of Helena, this the 24th day of October, A. D. 1901.

EMERSON R. CRUM, *Clerk.*

Attest:

——— ———. [L. S.]

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Jacob Trieber, District Judge of the United States, for the Eastern District of Arkansas, hereby certify that none of the other judges authorized by law to preside over the Circuit Courts of the United States for said district, are in the state, or preside over said courts, and that I am the sole judge authorized by law to
156 preside over said courts now in the district and presiding over said courts. I further certify that Emerson R. Crum, whose genuine signature is attached to the foregoing attestation, was at the time he signed the same, the duly commissioned and acting clerk of the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas, and that the foregoing attestation by him is in due form of law and entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand as such judge, this the 25th day of October, A. D. 1901, and of the Independence of the United States the one hundred and twenty-sixth.

JACOB TRIEBER,
U. S. District Judge, Eastern District of Arkansas.

UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas:

I, Emerson R. Crum, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern District of Arkansas, certify that Honorable Jacob Trieber, whose genuine official signature appears to the above and hereto annexed certificate, is, and was at the time of signing the same, sole and presiding judge of the United States Circuit Court for the Eastern Division of the Eastern District of Arkansas, duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Circuit Court, at office in the city of Helena, this the 26th day of October, A. D. 1901.

[L. S.] EMERSON R. CRUM, *Clerk.*

157 Plaintiff also introduced the agreement of counsel waiving proof of the death of E. W. Massey, filed in this cause.

(Clerk will please here insert the agreement.)

Agreement of Counsel as to Death of E. W. Massey.

Filed Nov. 19, 1901.

3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

In this case it is agreed that E. W. Massey, who gave his deposition on February 12th, 1901, in the case of W. A. Cissna vs. Enos White and H. W. Stockley, then pending in the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas, at Helena, Arkansas, is dead, he having died in the month of April, 1901, since his said deposition was taken, and that the fact of his death shall be considered as proved in this case without the introduction of any witness to testify thereto. But the defendant, Cissna, reserves the right to object to the introduction of said deposition as evidenced in this case upon every and any other ground, except that of the proof of death, hereby agreed to.

This November 15th, 1901.

G. J. McSPADDEN,
Attorney for H. W. Stockley.
PIERSON & EWING,
Att'ys for Cissna.

The deposition was objected to by counsel for defendant upon the ground that in the case in Arkansas there was another party, Enos White, involved, and Stockley was defendant in that case and W. A. Cissna was the plaintiff, while in the case at bar the parties are reversed and H. W. Stockley is plaintiff and W. A. Cissna is defendant, and that there is nothing to show that the subject

158 matter is the same in this suit as that in which the deposition purports to have been taken, and that as a matter of fact the subject in the two suits is not the same.

Ruling of the Court.

The court stated that the objection of defendant's counsel was not well taken, but he was of the opinion that the fact of the deposi-

tion being taken under the orders of a court and in the trial of a case in a court outside of the state of Tennessee rendered it inadmissible as evidence in this cause. Whereupon, he sustained the objection of the defendant to the deposition and refused to admit it — evidence.

Exception by Plaintiff.

To which ruling of the court the plaintiff then and there excepted, and asked that his exception be noted in the record.

O. K. JOPLIN, the witness for the plaintiff, being recalled testified as follows:

Direct examination by counsel for plaintiff:

Q. I will ask you, captain, if in marking out the lines of low water to Mr. Ewing you assumed that that is a correct representation of the bank of 37?

A. I assumed that Mr. Ewing was talking to me of 37, the head of 37.

Q. Do you mean to say that the old river bank of 37 just before the cut-off was away out there?

A. I was assuming the bank of the river to be where he pointed out.

Q. As a matter of fact that old road over there is on the bank, is it not?

A. I do not know much about the road.

Q. Are there any remains of the bank of old river here?

A. Oh, yes, of course, there is.

Q. That was the bank of the river there just before the cut-off?

159 A. Yes, the water came right up against the head of the island.

Q. You will notice here where Maj. Humphreys has got the old river marked, have you intended to put it south of this or was it over there?

A. In answering that question I assumed that Mr. Ewing was asking me about the bank of the river here and that this map was correct.

Q. Do you know now where the high bank is?

A. I think it is further bank.

Q. Assuming that bank as you have stated to have been the bank of 37 where did the chute of 37 begin?

A. At the head of the island.

Q. I will ask you if it is not a matter of fact that this is the head of the island?

A. I think so.

Q. Then you intended to locate the head of the island as here?

A. He was asking about the field and I was simply answering him on the same theory that he was asking me about.

Q. Now, I will ask you who owns the place next to Mr. Stockley's?
A. My wife owns it, but she lets me collect the rents.

Cross-examination by counsel for defendant:

Q. When I asked you to tell me the right bank of the river why did you put it in the middle of the river?
A. You were asking me about the head of the island?
Q. I asked you for the right bank of the river and you marked it in the middle of the stream?
A. I don't remember doing it, here is the blue line that represented it. I was not putting it in the middle of the river.
Q. At that time you think this was the right bank; then, the left bank is over here now, is it?
A. I think it is here.
Q. Didn't I ask you to draw me the right and left bank of the river and didn't you commence right here and draw right in
160 the middle of the river and then awhile ago draw this line right here?
A. Mr. Ewing, I drew these lines here based on the true conditions of the river, and tried to explain to you and did the best I could. I quit steamboating four or five years ago.
Q. Will you please follow that left bank out to the current of the river?
A. I think this is the true condition of the bank today.
Q. But this is not the river of today?
A. In here it is not.
Q. Did it go off over there?
A. It headed against this bank, then it became water.
Q. You have made yourself just as clear as you can as to this left bank, have you?
A. I have tried to, as you have asked me.

Redirect examination by counsel for plaintiff:

Q. Mr. Ewing ran his finger down in here, have you ever stated that the bank of the river was down here?
A. No, sir.

Witness excused.

J. H. HUMPHREYS, witness for the plaintiff, being recalled, testified as follows:

Direct examination by counsel for plaintiff:

Q. Major, I want to call your attention to this place marked old river and ask you if you ran this north line of the Huddleston tract?
A. Yes, sir; I did.
Q. When you cross- old river to come down in here did you have to cross water?
A. No, sir.

Q. Is there any water in McKenzie chute?
A. No.
Q. Is the land different from the made land?
A. No, I don't think there is any difference.
Q. Is it higher than the Centennial bank?
161 A. I do not know that it is.
Q. I will ask you if you found any high bank on 37, if so where?
A. That on the northeast part is a high bank, it is the original ground, has never been washed away.
Q. Did you find any indications of McKenzie chute?
A. No, sir.

Recross-examination by counsel for defendant:

Q. And so you have marked old river commencing right at the present river?
A. Yes, I have seen it right there.

Redirect examination by counsel for plaintiff:

Q. Did you run those lines by compass and chain?
A. Yes, sir.

Witness excused.

The plaintiff introduced in evidence the following instruments in writing:

1. A certified copy of Grant No. 21,206, made by the state of Tennessee to Simon Huddleston for two thousand acres of land, and dated January 22, 1824, said copy being from the office of the Register of the Land Office for the District of Middle Tennessee, and certified by John H. Bullock of said office. (The clerk will here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Copy Grant No. 21206.

Filed Dec. 2, 1901.

No. 21206.

Recorded 3d March, 1824.

[L. S.]

The State of Tennessee, to all to whom these presents shall
162 come, Greeting:

Know ye, that by virtue of certificate No. 1364, dated the 31st day of March, 1820, issued by the Board of Commissioners for West Tennessee, to the heirs of James Mebance, Sen'r., for 2000 acres and entered on the 2d day of July, 1822, by No. 722. There is granted by the said state of Tennessee unto Simon Huddleston, assignee of the said heirs of James Mebane, Sen'r., a certain tract or parcel of land, containing two thousand acres, by survey bearing date the 26 day of December, 1823, lying in the eleventh district in range nine, sections five and six, and bounded as follows, to wit: Beginning at a willow marked S. S., Stephens Slades' northeast corner on the bank of the Mississippi river; thence south with his line one hundred and fourteen chains to a mulberry marked S. H., thence east two hundred chains to a mulberry marked S. H., thence north seventy-eight chains to a white oak marked S. H., on the bank of the Mississippi river; thence down said river with its meanders north 41 degrees west thirty-five chains, south 82 degrees west thirty chains, north seventy-one west thirty-two chains, south 70 degrees west sixty-two chains; thence north 72 degrees west fifty-two chains to the beginning, with the hereditaments and appurtenances, to have and to hold the said tract or parcel of land, with its appurtenances, to the said Simon Huddleston and his heirs forever.

In witness whereof, William Carroll, Governor of the State of Tennessee, hath hereunto set his hand, and caused the great seal of the state to be affixed, at Murfreesborough, on the 22d day of January, in the year of our Lord 1824, and of the Independence of the United States the 48.

WM. CARROLL.

By the Governor,
DANIEL GRAHAM,
Secretary of State.

Endorsed: Copy.

163 Grant No. 21206 to Simon Huddleston, Assignee of Heirs of James Mebane, Sen'r., for 2,000 Arces Land in 11th District, inRange 9, Sections 5 and 6. .

I, John H. Bullock, Register of the Land Office for the District of Middle Tennessee, do hereby certify that the foregoing is a true copy of Grant No. 21206, of the state of Tennessee, to Simon Huddleston, assignee of heirs of James Mebane, Sen'r, as the same stands recorded in my office, Book W, page 745.

Given under my hand, office at Nashville, this 7th day of December, 1901.

JOHN H. BULLOCK,
Land Register for Middle Tennessee.

The defendant objected to this copy of the above grant because it did not contain an impression of the great seal of the state of Tennessee, and was, therefore, void. The court overruled this objection, holding that the scroll in the upper left hand corner denoted the seal, to which ruling the defendant excepted.

2. A certified copy of the deed of Simon Huddleston to John Trigg, dated March 13th, 1837, and conveying the east fifteen hundred acres of the two thousand acre tract of land granted by the state of Tennessee to Simon Huddleston by Grant No. 21206, said copy being certified to by I. R. Calhoun, Register of Tipton County, Tennessee.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

164 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 1,500 *Acres.*

Filed Dec. 3, 1901.

Simon Huddleston
to
John Trigg.

Deed to 1,500 Acres. Registered December 16, 1845.

This indenture made this 13th day of March, one thousand eight hundred and thirty-seven, by and between Simon Huddleston, of the county of Overton, and state of Tennessee, on one part, and John Trigg, of the county of Madison and state aforesaid, of the other part.

Witnesseth; That the said Simon Huddleston for and in consideration of the sum of seven hundred dollars, to him in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said John Trigg, his heirs and assigns forever, a certain tract or parcel of land, situate, lying and being in the county of Tipton and state aforesaid, on the Mississippi river, in the 11th District, range 9, sections 5 and 6, and bounded as follows, to wit: Beginning at a willow marked S. S. Stephen Slades' northeast corner, on the bank of the Mississippi, running thence south with his line one hundred and fourteen chains to a mulberry marked S. H.; thence east 200 chains to a mulberry marked S. H.; thence north 78 chains to a white oak marked S. H., on the bank of the Mississippi river; thence down with the meanders of said river to the beginning. Granted to Simon Huddleston by grant No. 21206, excluding a part deeded to the locator by said Huddleston of five hundred acres leaving a balance of fifteen hundred acres, with all and singular the hereitaments and appurtenances thereunto belonging or in any-
165 wise appertaining, and all the estate, right, title, claim and demand whatever of time, the said Simon Huddleston of, in and to the said lands and premises and every part and parcel thereof, to have and to hold the said land and premises above mentioned and every part and parcel thereof with the appurtenances unto the said John Trigg, his heirs and assigns to the only proper use and behoof of the said John, his heirs and assigns forever, and said Simon for himself and heirs, the said lands and premises, and every part and parcel thereof, against himself and his heirs and all and every other person whatever, will warrant and forever defend to the said John, his heirs and assigns. In witness whereof the said Simon Huddleston has hereunto set his hand and seal the date above written.

[SEAL.] SIMON HUDDLESTON.

Signed, sealed and delivered in presence of witnesses:
WILLIS HUDDLESTON.
ROBERT MARTIN.

STATE OF TENNESSEE,
Overton County:

Personally appeared before me, William Gore, clerk of the county court of said county, Willis Huddleston and Robert Martin, the subscribing witnesses to a deed of conveyance from Simon Huddleston to John Trigg, for 1500 acres of land in the county of Tipton in said state, held by grant No. 21206 from said state, who being duly sworn, upon their oaths say they are acquainted with the said Huddleston, the conveyor, and that he signed the said deed in their presence, and also acknowledged the signing of the same to be his act and deed for the purposes therein contained, on the day the same bears date.

Witness my hand at office this 13th day of March, 1837.

WILLIAM GORE, *Clerk.*

The foregoing is a perfect transcript of the office record
166 made on the proving of the foregoing subjoined deed of conveyance.

Attest:

WILLIAM GORE, *Clerk.*

Rec'd the state tax on this deed, $2.25.

R. H. MUNFORD,
Clerk of Tipton County Court.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, 16" December, 1845.

I, James Overall, Register of said county, hereby certify that the within and foregoing instrument was filed with me on the 27th November, 1845, at 10 o'clock a. m., and noted in entry Book A, page 22, for registration, and that the same, together with the certificates, are this day duly recorded in my office in Book G. pages 221 and 222.

JAMES OVERALL, *Reg'r.*

Copied from the entry of the original deed, recorded in Book G, pages 221, 222 and 223, in the office of the Register of Tipton County, Tennessee.

SUE E. MURPHY.

Oct. 19th, 1901.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is true and correct copy of this instrument now of record in my office, in Deed Book G, page 321, et seq.

I. R. CALHOUN, *Register.*

Defendant objected to this grant because it did not have any great seal of the state, nor impression thereof, and was void; the objection was overruled, and defendant excepted.

3. A certified copy of the will of John Trigg from the office of the clerk of the county court of Shelby county, Tennessee.

(The clerk will here please insert it.)

167 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Copy Will John Trigg.

Filed Dec. 3, 1901.

Will of John Trigg, Deceased. Filed and Probated July 3d, 1865.

I, John Trigg, of the county of Shelby and state of Tennessee, being of weak body, but of sound mind and disposing memory, do this tenth day *day* of July, in the year of our Lord one thousand eight hundred and sixty-one, make this, my last will and testament hereby revoking all former wills and part- of wills or codicils made by me, and declaring the same null and void. Item 1st. I give and bequeath to my son, Thomas B. Trigg, my plantation in the county of Lafayette and state of Arkansas, the tract of land containing four thousand acres more or less, fourteen hundred of the same is cleared and in cultivation, also eighty acres of land in the same county and state, on which there is a valuable grist mill; also a tract of land in the same county and state containing one hundred and twenty acres, more or less, and about one mile and a half from the grist mill tract. I also give and bequeath to my son, Thomas B. Trigg, a tract of land in the same county and state called the "Hill Place", and containing five hundred and sixty acres, more or less, and about seven miles west of the four thousand acre tract.

Item 2d. I also give and bequeath to my son, Thomas B. Trigg, all the negroes now on said four thousand acre tract and on the "Hill Place", or which may be on them at the time of my death, with the exception of two other negroes otherwise disposed of by me, the number now supposed to be one hundred and twenty or thirty.

168 Item 3d. I give and bequeath to my daughter, Lucy Jane Stockley, a tract of land lying in Tipton County, Tennessee, on the Mississippi River, containing five hundred acres, more or less, the same tract she *how* has possession of, on which she has the fifteen negroes heretofore given to her by me.

Item 4th. I also give to my daughter, Lucy Jane Stockley, thirty-five acres of land in the County of Shelby and State of Tennessee, lying below Fort Pickering, and which is the same lot of land on which she now resides, and lying east of Horn Lake Road, also thirty-five acres more or less on the east on which her residence is, and being the balance of the land between her residence tract and the Mississippi and Tennessee Railroad.

Item 5th. I also give to my daughter, Lucy Jane Stockley, two

brick tenements on Front Row in the City of Memphis, commencing twenty feet from the corner of Adams Street and Front Row, and running back sixty-eight feet, all the foregoing property given to my daughter, Lucy Jane Stockley, I give to her and her heirs forever, with- being subject to the control or disposition, in any manner of her husband, Mr. Charles A. Stockley.

Error see original will. One item left out.

Item 7th. I give to my son-in-law, Henry C. Walker, and to my daughter, Lizzie, his wife, five thousand acres of land in Crittenden County, Arkansas, more or less lying north and south of the Memphis and Little Rock Railroad, commencing somewhere about seventeen miles from the Mississippi River on both sides of said railroad. I also bequeath to them all my interest in the lots and land in and around the own of Madison, S. Francis County, Arkansas, also one-twelfth, or whatever my interest is, in a tract of land lying a few miles from the town of Madison, containing three hundred acres more or less. If the said land has been sold by the company they are to have my interest in the amount of the sale.

169 Item 8th. I also give and bequeath to my son-in-law, Henry C. Walker, and to my daughter, Lizzie, his wife, thirty acres of land more or less lying in the County of Shelby and State of Tennessee and adjoining on the west the lot of thirty-five acres, heretofore given to my said son-in-law, Henry C. Walker, my gift to my son-in-law, H. C. Walker, and my daughter, Lizzie, is intended to embrace all the land from the plank fence, which is the eastern boundary of the Walnut Hill tract given to my son-in-law, William W. Trigg, to the Hernando Plank Road, and to the junction of the lot of seven acres now owned by Henry C. Walker.

Item 9th. I also give and bequeath to Henry C. Walker and to my daughter, Lizzie, his wife, two brick houses or tenements in the City of Memphis fronting fifty feet, on Front Row and running back one hundred and forty-eight feet, and lying north of the two houses or tenements given to my daughter, Lucy Jane Stockley.

Item 10th. I also give and bequeath to Henry C. Walker and to my daughter, Lizzie, his wife, all my stock in the Memphis and Ohio Railroad Company, in the Tennessee and Mississippi Railroad Company and in the Mississippi and Little Rock Railroad Company.

Item 11th. I give and bequeath to my son, James B. Trigg, one hundred and twenty acres of land, more or less, in Shelby County, Tennessee, and lying between the Horn Lake Road and the Mississippi River, and west of the land given to Lucy Jane Stockley.

Item 12th. I also give and bequeath to my son, James B. Trigg, eight hundred acres of land, more or less, lying in Tipton County, Tennessee, in Old River, being the same tract of land on which my son, Thomas B. Trigg, formerly resided.

Item 13th. I also give and bequeath to my son, James B. Trigg, five hundred acres of land, more or less, in Tipton County,

170 Tennessee, and lying on Island No. 37, on Mississippi River, and being the same place on which my son, John A., formerly resided.

Item 14th. I also give and bequeath to my son, James B. Trigg,

my interest, being three-fourths of three hundred and twenty acres of land, more or less, lying in Burree County, Texas, the other fourth of said three hundred and twenty acres being owned and belonging to the heirs of James Trigg, deceased.

Item 15th. I give and bequeath to my son, William W. Trigg, my residence known as "Walnut Hall," with the land attached thereto, containing about 80 acres, more or less, with all the improvements thereon and bounded as follows, viz: East by plank fence commencing at McLemore avenue, running south about four hundred and forty yards to a plank fence, thence west to Latham avenue, thence north to McLemore avenue, and thence east on McLemore avenue to the beginning, also the negroes belonging to the Walnut Hall place.

Item 16th. I give and bequeath to my son, William W. Trigg, all the household and kitchen furniture, of every description, belonging to Walnut Hall. Also all the stock of every kind, mules, horses, cows, hogs, &c., except my carriage horses and my riding horse.

Item 17th. I also give to my son, William W. Trigg, my plantation in Tipton County, Tennessee, containing thirteen hundred acres, more or less, and I also give and bequeath to him all the negroes on said plantation, now ninety in number, more or less, and also the mules, horses, cattle, sheep, hogs, plantation utensile, &c.

Item 18th. I give and bequeath to my nephew, John Henry Trigg, three hundred and twenty acres of land lying in Crittenden County, Arkansas, and south of the Memphis and Little Rock Railroad, and adjoining the land of H. R. Austin, Esq.

171 Item 19th. I give and bequeath to my grandson, John Trigg, Jr., the son of Thomas B. Trigg, three hundred and twenty acres of land in Crittenden County, Arkansas, and to join the land given to my nephew, John Henry Trigg.

Item 20th. I give and bequeath to my grandson, John Trigg Stockley, three hundred and twenty acres of land in Crittenden County, Arkansas, and to join the eleven hundred acres (more or less) I have heretofore deeded to my wife, Martha Trigg.

Item 21st. I give and bequeath to my son-in-law, Henry C. Walker, my riding horse named Bird.

Item 22nd. It is my wish and desire that my faithful servant, Nat, shall be allowed the privilege of selecting out of my following named heirs, viz.: Thomas B. Trigg, Lucy Jane Stockley, Henry C. Walker and Lizzie, his wife, James B. Trigg and William W. Trigg the one he chooses to be his master, and whoever he chooses of the said names shall own him for life.

Item 23rd. All the property, real and personal, that I may own at my death and which I have not given specially to my five children by this will, I give and bequeath to Thomas B. Trigg, Lucy Jane Stockley, Henry C. Walker and Lizzie, his wife, James B. Trigg and William W. Trigg, to be equally divided between them.

Item 24th. I will and bequeath my son-in-law, Henry C. Walker, and Lizzie, his wife, all the remaining lands and all the interest I may have in my lands or town lots in Crittenden County, Arkansas, after the bequests I have made in this will.

Item 25th. It is my will and desire that all my just debts should be paid by my executors as soon as possible.

Item 26th. I hereby appoint Henry C. Walker and Thomas A. Nelson my executors to carry out this will, and I request and desire that the court shall not require them to give any bond or security, as I have full confidence in them.

172 Given under my hand this, the tenth day of June, A. D. eighteen hundred and sixty-one.

J. TRIGG.

Test:
E. McDAVITT.
C. KORTRECHT.
D. A. SHEPHERD.

STATE OF TENNESSEE,
Shelby County:

I Garland P. Ware, Clerk of the County Court of said county, certify that the foregoing is a correct copy of the will of John Trigg, dec'd, the original will being on file in my office.

G. P. WARE, *Clerk,*
By J. WEAVER, *D. C.*

STATE OF TENNESSEE,
Shelby County, ss:

I, R. A. Speed, Clerk of the County and Probate Courts of said county, do hereby certify that the foregoing 12 pages contain a full, true and perfect copy of the last will and testament of John Trigg, deceased, as the same appears of record in Will Record 4, pp. 121, &c., now on file in my office. In testimony whereof I have here-unto set my hand and affixed the seal of said court, at office, in the City of Memphis, this 26th day of Oct., 1901.

[L. S.] R. A. SPEED, *Clerk,*
By A. S. CUNNINGHAM, *D. C.*

The defendants objected to this will, because there is nothing to show that the will was ever probated. The objection was overruled, and defendant excepted.

4. A certified copy of the decree of Chancery Court of Shelby County, Tennessee, in the case of T. A. Nelson, ex't'r, v. M. L. Trigg, et al., vesting title in Sledge McKay & Company; said copy being from the office of the Register of Tipton County, Tennessee. (The Clerk will here please insert it.)

173 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Decree Vesting Title in Sledge, McKay & Co.

Filed Dec. 3, 1901.

Chancery Court.

Decree Vesting Title in Sledge, McKay & Co.

Filed 31st of March, and Registered April 2d, 1881.

Chancery Court of Shelby County.

STATE OF TENNESSEE,
Shelby County:

Pleas Before the Honorable W. W. McDowell, Chancellor of the Chan-ery Court of Shelby County, Held in Memphis and State and County Aforesaid and at the October Term Thereof, 1879.

Be it remembered, that heretofore, to-wit: December 4th, 1879, a decree was entered in a certain cause in the words and figures following, viz:

775.

T. A. NELSON, Ex't'r,
vs.
M. L. TRIGG et al.

N. R.

On this 4th day of December, 1879, before the Honorable W. W. McDowell, Chancellor presiding, it appears from the Report of the Master filed herein on July 10th, 1879, that Sledge McKay & Co., a mercantile partnership, purchased the two tracts of land in Tipton County, State of Tennessee, one containing 33.75 acres and the other 305.75 acres, belonging to the estate of John Trigg, deceased, sold under the former decrees of this court herein described as follows: (6) Portions of a certain tract of about 1,300 acres of land situated in Tipton County, Tenn., which has been surveyed by C. C. Burke, who reports that the Centennial cut-off has
174 placed nearly 1,000 acres under the X of the Mississippi river and which is in Range 9, Sec. 5 on said river, the said

cut-off leaving 33.75 acres on the main land and 305.75 acres on the island. (a) The tract containing 33.75 acres begins at a stake on the bank of the Mississippi river, thence down said river with its meanders north 75 degrees west 16 chains, north 76½ degrees west 32 chains, south 50½ degrees west 3 chains and 8 links, south 43 degrees, west 11 chains and 50 links, thence east 56 chains and 80 links to the point of beginning, all open land, &c.

(B) The tract containing 305.75 acres begins at a stake on the bank of the Mississippi River on Centennial cut-off at the dividing line between C. A. Stockley's and John Trigg's land, thence north 97 chains and 14 links to a small cottonwood marked T. on the bank of old river, thence up old river south 71 degrees, east 11 chains, south 50 degrees east 13 chains, south 40½ degrees east 12 chains, south 22 degrees east 17 chains, south 10 degrees east 7 chains and 60 links, south 9 degrees east 9 chains, south 18½ degrees east 9 chains, south 7 degrees east 2 chains, south 12 degrees east 6 chains and 44 links, south 30 degrees east 6 chains, south 7½ degrees west 6 chains and south 28½ degrees east 5 chains and 29 links, south 3 degrees east 5 chains and 30 links to a point of entrance of Centennial cut-off, thence down said cut-off north 86¾ degrees west 8 chains, south 83 degrees west 8 chains, north 85 degrees west 9 chains, south 84¾ degrees west 11 chains and 60 links, south 69 degrees west 5 chains and 13 links, south 69½ degrees, west 9 chains and 30 links to the point of beginning, of which there is 175 acres open land and in cultivation, with 8 tenant houses, fencing moderately good, &c. Has complied with the terms of the sale by the payment of the purchase to the Master. It is ordered and decreed that all the right, title and interest of the parties to this suit in said tracts of 175 land be and the same is hereby divested out of them and vested in the said partnership of Sledge, McKay & Co. The Master will furnish a certified copy of this decree for registration to said partnership on the payment of the fee therefor.

STATE OF TENNESSEE,
Shelby County:

I, Robert J. Black, Clerk and Master of the Chancery Court of Shelby County, do hereby certify that the foregoing 4½ pages comprise a full, true and perfect copy of decree vesting title had in a certain cause lately pending herein, wherein Thomas A. Nelson, Ex't'r, is complainant and M. L. Trigg, et al., are defendants as the same appears of record in my office M. B. 25, 345. In witness whereof, I hereunto set my hand and affix the seal of said court at office in Memphis, this 25th day of March, A. D. 1881.

[L. S.] R. J. BLACK,
Clerk and Master.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, April 2nd, 1881.

I, J. N. Harris, Register of said county, do certify that the within decree and plat was filed in my office at 9:10 o'clock A. M. on the

31st day of March, 1881, and entered for registration in Entry Book C, page 30, and together with this and the foregoing certificates is this day duly registered in Deed Book 29, pages 179, 180, 181 and 182.

J. N. HARRIS, *Register.*

Copied from the entry of the original decree recorded in Deed Book 29, pages 179, 180, 181 and 182 in the office of the Register of Tipton County, Tennessee, November 23d, 1901.

SUE E. MURPHY.

176 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, December 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 29, page 179, et seq.

I. R. CALHOUN, *Register.*

The defendant objected to the introduction of this copy of the decree because it did not show upon its face that the court had jurisdiction of the parties. The court sustained the objection and refused to admit it, to which ruling the plaintiff excepted and asked that his exception be noted of record, which the court ordered done.

5. A certified copy of the deed of Norfleet R. Sledge, William D. Sledge, Oliver D. Sledge and Catharine E. Sledge and William M. Sledge and Caroline V. Sledge to A. N. McKay, dated July 20th, 1883:

(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 2 Tracts Land.

Filed Dec. 3, 1901.

Heirs and Executors of N. R. Sledge.
to
A. N. McKay.

Deed 2 Tracts.

Filed 27th July and Registered Aug. 24th, 1883.

Whereas, A. N. McKay, surviving partner of the late firm of Sledge, McKay & Co., and Norfleet R. Sledge, Jr., William D. Sledge,

Oliver D. Sledge and Catharine E. Sledge, executors of the
177 last will and testament of Norfleet R. Sledge, Sr., a deceased partner of said firm, and William M. Sledge, Jr., and Caroline V. Sledge, heirs at law and widow of William M. Sledge, Sr., another deceased partner of said firm, having made a settlement of the business of said partnership firm and division of the real estate belonging to it.

Now in order to carry out and effectuate their said agreement in part, witnesseth: That the said Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catharine E. Sledge, executors of the last will and testament of said Norfleet R. Sledge, deceased, and the said William M. Sledge and Caroline D. Sledge heirs at law and widow of said deceased partner, William M. Sledge, for and in consideration of the premises, and of the sum of one dollar to them in hand paid by said A. N. McKay, *due* hereby release, relinquish, convey and forever quit claim of, in and to the following described two tracts of land in Tipton County, State of Tennessee: One containing 33 75-100 acres, more or less, and the other 305 75-100 acres, more or less, formerly belonging to the estate of John Trigg, dec'd, sold under decree of chancery court of Shelby County, Tenn., in the case of T. A. Nelson, Extr., vs. M. L. Trigg et al., No. 775, N. R. D. Partitions of a certain tract of about 1300 acres of land which by the survey of C. C. Burke, County Surveyor of Shelby county (which survey is attached to decree and here referred to for particular description) is reported to have about 1000 acres thereof cut off by the Mississippi under the bed of said river, and which is in range 9 section 5 of said river, the said cut-off leaving 33 75-100 acres on the main land and 305 75-100 acres on the island made thereby. The said tract of 33 75-100 acres beginning at a stake on the bank of the Mississippi river, thence down said river with its meanders north 75 degrees, west 16 chains, north 76½ degrees,
west 32 chains, south 50½ degrees, west 3 chains and 8 links,
178 south 43 degrees, west 11 chains and 50 links, thence east 56 chains and 80 links to the point of beginning, all open land. The said 305 75-100 acres tract begins at a stake on the bank of the Mississippi river on Centennial cut-off at the dividing line between C. A. Stockley and John Trigg's land, thence north 97 chains and 14 links to a small cottonwood marked "T" on the bank of old river, thence up old river south 71 degrees, east 11 chains, thence south 50 degrees, east 13 chains, thence south 40½ degrees, east 12 chains; thence south 22 degrees east 17 chains; thence south 10 degrees, east 7 chains 60 links; thence south 9 degrees, east 9 chains, south 18½ degrees, east 9 chains; thence south 7 degrees, east 2 chains; thence south 12 degrees, east 6 chains and 44 links; thence south 30 degrees, east 6 chains; thence south 7½ degrees, west 6 chains; thence south 28½ degrees, east 5 chains and 29 links; thence south 3 degrees, east 5 chains and 30 links to the point or En. of Centennial cut-off; thence down said cut-off north 86¾ degrees, west 8 chains; thence south 83 degrees, west 8 chains; thence north 85 degrees, west 9 chains, thence south 84¾ degrees, west 11 chains and 60 links, thence south 69 degrees, west 5 chains 13 links; thence

south 69½ degrees, west 9 chains and 30 links to the point of beginning. To have and to hold the same with the appurtenances to the said A. N. McKay, his heirs or alienees fully and forever free and quiet from the right, title, interest, claim and demand of said firm of Sledge, McKay & Co., and the individual members thereof and their heirs, and all and every person claiming by, through or under them, or either of them. Save and except a lien is hereby declared and reserved on said foregoing described lands to secure the payment of a promissory note of said A. N. McKay for the sum of seventeen hundred eighty-five and 36-100 dollars of even
179 date herewith payable to the order of N. R. Sledge, W. D. Sledge, O. D. Sledge and Catharine E. Sledge, executors, on 1st Jany., 1884.

Witness our signatures and seals as executors of Norfleet R. Sledge, dec'd, and as heirs at law and widow of William M. Sledge, dec'd, this 20th July 1883.

N. R. SLEDGE, [SEAL.]
O. D. SLEDGE, [SEAL.]
C. E. SLEDGE, [SEAL.]
W. D. SLEDGE, [SEAL.]
Executors of N. R. Sledge, Deceased.
WM. M. SLEDGE, [SEAL.]
CAROLINE V. SLEDGE, [SEAL.]
Heirs at Law and Widow of Wm. M. Sledge, Dec'd.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, James E. Temple, a Notary Public, duly appointed, qualified and commissioned according to law in and for the said county of Shelby and State of Tennessee, Norfleet R. Sledge, Oliver D. Sledge, William D. Sledge, Catharine E. Sledge, William M. Sledge and Caroline V. Sledge, the within named bargainors, with each of whom I am personally acquainted, and who acknowledged, respectively, that they and each of them executed the within and hereto attached deed or instrument of writing for the purposes therein contained.

In witness whereof, I have hereunto subscribed my name and affixed my notarial seal at Memphis, this the 23d day of July, A. D. 1883.

[L. S.] JAMES E. TEMPLE,
Notary Public of Shelby County, Tenn.

180 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Aug. 24th, 1883.

I, J. N. Harris, Register of said county, do certify that the foregoing deed was filed in my office at 1:30 o'clock P. M. on the 27th day of July, 1883, and entered for registration in Entry Book C,

page 107, and together with this and the above certificate is this day duly registered in Deed Book 32, pages 41, 42 and 43.

J. N. HARRIS, *Register.*

Copied from the entry of the original deed recorded in Deed Book 32 on pages 41, 42, 43 in the office of the Register of Tipton county, Tennessee.

Oct. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,

Tipton County:

REGISTER'S OFFICE, Decr. 7th, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is true and correct copy of the instrument now of record in my office in Deed Book 32, page 41 et seq.

I. R. CALHOUN, *Register.*

The defendant objected to this deed because it showed no title in the grantors; objection was overruled and the deed admitted.

6. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of Norfleet R. Sledge, William D. Sledge, Oliver D. Sledge and William M. Sledge and Caroline V. Sledge to Mattie A. McKay, Rebecca McKay and A. Ramelle Vancleet, dated June 29th, 1886.

(The clerk will here please insert it.)

181 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Quit Claim Deed of N. R. Sledge et al. to Mattie A. McKay et al.

Filed Dec. 3, 1901.

N. R. Sledge et al.
to
Mattie A. McKay et al.

Quit Claim.
Deed.

Filed 19th and Registered 30th March, 1888.

This deed of quit claim made the 29th day of June, 1886, between Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge,

surviving executors of the last will and testament of Norfleet R. Sledge, deceased, and William M. Sledge and Caroline V. Sledge, as heirs at law and widow of William M. Sledge, deceased, late partner of Sledge, McKay & Co., for and in consideration of one dollar to them in hand paid and the payment of a note described as a lien on certain lands described in a deed of said parties of date July 20, 1883, registered in Deed Book, pages 541, 542 and 543 in Register's Book of Tipton county, Tennessee, to A. N. McKay in his life time but now deceased, do hereby release, relinquish, convey and forever quit claim of, in and to the lands lying in said Tipton county described by metes and bounds in said deed, and to which reference is now made for a more particular description whereof to Mattie A. McKay, Rebecca McKay, A. Ramell, Vanvleet, heirs at law of A. N. McKay, deceased. To have and to hold the same with the appurtenances to the said Mattie A. McKay, Rebecca McKay and A. Ramelle Vanvleet and their heirs or alliences fully and forever free and quiet
182 from the right, title, interest, claim and demand of the first named parties and their heirs, and of all and every person claiming by, through or under him or them.

Witness our signatures and seals as executors of Norfleet R. Sledge, dec'd, and as heirs at law and widow of William M. Sledge, deceased, the day and year first above written.

N. R. SLEDGE, [SEAL.]
W. D. SLEDGE, [SEAL.]
O. D. SLEDGE, [SEAL.]
Executors of N. R. Sledge, Deceased.
C. V. SLEDGE, [SEAL.]
WM. M. SLEDGE, [SEAL.]
Heirs at Law and Widow of Wm. M. Sledge, Dec'd.

THE STATE OF MISSISSIPPI,
Panola County:

Before me, J. E. Heath, N. P. of Como of said county, this day personally appeared the above named N. R. Sledge, W. D. Sledge and O. D. Sledge, executors, personally known to me, who acknowledged that they signed, sealed and delivered the foregoing quit claim on the day and year therein mentioned as their voluntary acts and deeds.

Given under my hand and seal of office, at office, in Como, Miss., this 29th day of June, 1886.

[L. S.] J. E. HEATH, *N. P.*

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Hunsdon Cary, a Notary Public in and for said state and county, at Memphis, duly commissioned and qualified, Mrs. C. V. Sledge and Wm. M. Sledge, the within named bargainors, with whom I am personally acquainted and who

acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand and notarial seal at Memphis aforesaid, this 15th day of March, 1888.

[L. S.] HUNSDON CARY,
Notary Public.

183 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, March 30th, 1888.

I, M. A. Misenheimer, Register of said county, do certify that the foregoing quit claim deed was filed in my office at 7:45 o'clock A. M. on the 19th day of March, 1888, and entered for registration in Entry Book D, page 73, and together with this and the above certificate is this day duly registered in Deed Book 38, page 519.

M. A. MISENHEIMER, *Register.*

Copied from the entry of the original deed recorded in Deed Book 38 on pages 519 and 520 in the office of the Register of Tipton county, Tennessee.

Oct. 26th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 38, page 519 et seq.

I. R. CALHOUN, *Register.*

Same objection and ruling as above as to deed numbered 5.

7. A certified copy from the office of Tipton county, Tennessee, of the deed of Mattie McKay Carroll and her husband, William H. Carroll, Ramelle Van Vleet and her husband, P. P. Van Vleet, and Rebecca McKay to Thos. H. Allen, Jr., dated Jan. 2d, 1888.

(The clerk will here please insert it.)

184 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 2 Tracts.

Filed Dec. 3, 1901.

Wm. H. Carroll and Wife et al.
to
Thos. H. Allen, Jr.

Deed 2 Tracts.

Filed and Registered January 23d, 1888.

Know all men by these presents, that we, Mattie McKay Carroll and her husband, William H. Carroll, Ramelle Vanvleet and her husband, P. P. Vanvleet, and Rebecca McKay, as heirs at law devisees under the will of A. N. McKay and executors, all of Shelby county, Tennessee, for and in consideration of $9705, one-fourth cash in hand paid by Thos. H. Allen, Jr., and three notes in equal amounts made by the firm of Thos. H. Allen & Co. payable respect*ful*-y 1, 2 and 3 years from date, with six per cent interest, have this day bargained and sold unto the said Thos. H. Allen, Jr., that farm on Centennial Island called the McKay place, which embraces the following tracts of land in Tipton county, State of Tennessee, one containing 33.75 acres, more or less, and the other 305.75 acres, more or less, and all accretions thereto as follows: Portions of accretion tract of about 1300 acres of land situated in Tipton County, Tenn., which has been surveyed by C. C. Burke (who reports that the Centennial cut-off has placed nearly 1000 acres under the bed of the Mississippi river), and which is range 9, section 5 on said river, the said cut-off leaving 33.75 acres of the main land and 305.75 acres on the island. The tract containing 33.75 acres, more or less, begins at a stake on the bank of the Mississippi river, thence down said river with its meanders
185 north 75 degrees, west 16 chains, north 76½ degrees, west 32 chains, south 50½ degrees, west 3 chains and 8 links, south 43 degrees, west 11 chains and 50 links; thence east 56 chains and 80 links to the point of beginning, all open land, etc. The trac*k* containing 305.75 acres, more or less, begins at a stake o*f* the bank of the Mississippi river or Centennial cut-off at the dividing line between C. A. Stockley's and John Trigg's land; thence north 97 chains and 14 links to a small cottonwood marked "T" on the bank of the old river; thence up old river south 71

degrees, east 1 chain, south 50 degrees, east 13 chains, south 40½ degrees, east 12 chains, south 22 degrees, east 17 chains, south 10 degrees, east 7 chains and 60 links, south 9 degrees, east 9 chains, south 18½ degrees, east 9 chains, south 7 degrees, east 2 chains, south 12 degrees, east 6 chains and 44 links and south 30 degrees, east 6 chains and 29 links, south 3 degrees, east 5 chains and 30 links to the point or entrance of Centennial cut-off; thence down said cut-off north 86¾ degrees, west 8 chains, south 83 degrees, west 8 chains, north 85 degrees, west 9 chains, south 84¾ degrees, west 11 chains and 60 links, south 69 degrees, west 5 chains and 13 links, south 69½ degrees, west 9 chains and 30 links to the point of beginning, or which there is about 175 acres of open land and in cultivation.

To have and to hold the same, together with all and singular the rights and emoluments and hereditaments thereto appertaining to him, the said Thos. H. Allen, Jr., his heirs and assigns forever.

And the said Mattie McKay Carroll, Wm. H. Carroll, Ramelle Vanvleet, P. P. Vanvleet and Rebecca McKay, for themselves, their heirs and representatives, do covenant and agree to and with the said Thos. H. Allen, Jr., that they are lawfully seized in fee of said bargained premises; that they have a good right to
186 sell and convey the same; that they are unencumbered and the title thereto and to every part thereof they will forever warrant and defend to him, the said Thos. H. Allen, Jr., his heirs and assigns forever, against the lawful claims and demands of all persons and all parties hereto, do hereby assign and transfer to whomsoever—for the consideration above recited, to wit: $9,705, the accounts and notes due from the persons now tenants on the said lots or parcels of land to the estate of the late Maj. A. N. McKay and to them as the personal representatives and legatees thereof, which said accounts are fully set forth on schedule hereto annexed and with said accounts and notes do transfer all the personal property, the title to which is in them, and all liens which they hold to secure the payment of them, on the crops gathered and to be gathered, including corn on said plantations guaranteed to be 1200 bus*b*els at 60 cents per bushel; all cotton seed guaranteed to be 35 tons at $10 per ton, and the cotton baled and unbaled of the guaranteed valuation $1530. And in the event the true valuations of them exceed the above stated guaranteed valuations, the excess thereof is to be paid by Thos. H. Allen, Jr., but in the event of not reaching the guaranteed valuations or either of them, the deficit or deficits shall be paid in cash to the said Thos. H. Allen, Jr., by the parties of the first part or if presently ascertained then retained out of the cash payment.

In witness whereof the said parties have hereunto set their hands at Memphis, Tennessee, this 2d day of Jan., 1888.

WILLIAM H. CARROLL.
REBECCA McKAY.
MATTIE McKAY CARROLL.
RAMELLE VAN VLEETE.
P. P. VAN VLEETE.

187 STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Hunsdon Cary, a notary public, in and for said state and county, at Memphis, duly commissioned and qualified, Mattie McKay Carroll, and Wm. H. Carroll, her husband; Ramelle Van Vleete and P. P. Van Vleete, her husband, and Rebecca McKay, the within named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained, and the said Mattie McKay Carroll, wife of said Wm. H. Carroll, and Ramelle Van Vleete, wife of said P. P. Van Vleete, having appeared before me, privately and apart from their husbands, the said Mattie McKay Carroll and Ramelle Van Vleete, acknowledged the execution of the said deed to have been done by them freely, voluntarily and understandingly, without compulsion or constraint from their said husbands, and for the purposes therein expressed.

Witness my hand and notarial seal, at Memphis aforesaid, this 19th day of January, 1888.

[L. S.] HUNSDON CARY,
Notary Public.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, January 23, 1888.

I, M. A. Misenheimer, register of said county, do hereby certify that the within deed was filed in my office at 8:10 o'clock a. m., on the 23rd day of January, 1888, and entered for registration in entry Book D, page 57, and together with this and the above certificate is this day duly registered in Deed Book 38, page 328.

M. A. MISENHEIMER, *Register.*

188 Copied from the entry of the original deed recorded in Deed Book 38, pages 328, 329 and 330, in the office of Register of Tipton County, Tennessee.

October 26, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, December 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is true and correct copy of this instrument now of record in my office, in Deed Book 32, page 41, et seq.

I. R. CALHOUN, *Register.*

Same objection and ruling as above as to deed marked 5.

8. A certified copy from the office of Register of Tipton county, Tennessee, of the deed of Thos. H. Allen, Jr., and his wife, Floy G. Allen, to H. W. Stockley, dated January 2d, 1888.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY,
VS.
W. A. CISSNA.

Deed 2 Tracts.

Filed Dec. 3, 1901.

Thos. H. Allen and Wife
to
H. W. Stockley.

Deed 2 Tracts.

Filed 23d and Registered 24th January, 1888.

This indenture made this 2d day of January, 1888, between Thos. H. Allen, Jr., Floy G. Allen, of the county of Shelby,
189 state of Tennessee, of the one part and H. W. Stockley, of the county of Tipton and state of Tennessee, of the other part. Witnesseth: That the said Thos. H. Allen, Jr., and Floy G. Allen, for and in consideration of the nine thousand and eigthy-three 40-100 dollars, payable as follows: One thousand dollars 00/100 cash, the balance in four notes due respectively one, two, three and four years after date, for two thousand and twenty 85/100 dollars, each dated at Memphis, Tenn., Jan. 2d, 1888, bearing interest after maturity, signed by H. W. Stockley and payable to Thos. H. Allen & Co., to them in hand paid by H. W. Stockley, the receipt whereof is hereby acknowledged hereby sells and conveys unto the said H. W. Stockley, his heirs, and assigns forever that certain tract of land or farm on Centennial Island called the McKay place, which embraces the following tracts of land in Tipton county, state of Tennessee, one containing 33.75 acres, more or less, and all accretions thereto as follows: Portions of a certain tract of about 1300 acres of land situated in Tipton county, Tennessee, which has been surveyed by C. C. Burke (who reported that the Centennial cut-off has placed nearly 1000 acres under the bed of the Mississippi river), and which is in range 9, section 5, on the said river, the said cut-off leaving 33 75/100 acres on the ma-n land and 305 75/100 acres, on the island. The tract containing 33 75/100 acres, more or less. Begins at a stake on the bank of the Mississippi river, thence down said river with its meanders north 75 degrees west 16 chains, north 76½ degrees west 32 chains, south 50½ degrees west 3 chains and 8 links, south 43 degrees west 11 chains and 50 links, east 56 chains and 80 links to the point of beginning, all open land, more or less. The tract containing 305 75/100 acres, more or less. Begins at a stake on the bank of the Mississippi river on Centennial cut-off at

the dividing line between C. A. Stockley's and John Trigg's
190 land, thence north 97 chains and 14 links to a small cottonwood marked T, on the bank of the old river; thence up old river south 71 degrees east 11 chains, south 50 degrees east 13 chains, south 40½ degrees east 12 chains, south 22 degrees east 17 chains, south 10 degrees east 7 chains and 60 links, south 9 degrees east 9 chains, south 18½ degrees and 9 chains, south 7 degrees east 2 chains, south 12 degrees east 6 chains and 44 links, south 30 degrees east 6 chains, south 7½ degrees west 6 chains, south 28½ east 5 chains and 29 links, south 3 degrees east 5 chains and 30 links, to the point of entrance of Centennial cut-off then down said cut-off north 86¾ degrees west 8 chains, south 83 degrees west 8 chains, north 85 degrees west 9 chains, south 84¾ degrees west 11 chains and 60 links, south 69 degrees west 5 chains and 13 links, south 69½ degrees west 9 chains and 30 links to the point of beginning, of which there is about 175 acres of open land and in cultivation. A specific lien is hereby expressly reserved upon the land hereinbefore conveyed to secure the payment of the notes for purchase money as above set out and in case of failure of second party to pay any one of said notes or any part of same at maturity, then all of the unmatured notes shall become due and payable at once for the purpose of enforcing this lien. To have and to hold the same together with all and singular the rights, emoluments and hereditaments thereto appertaining to him, the said H. W. Stockley, his heirs and assigns forever and the said Thos. H. Allen, Jr., and Floy G. Allen for themselves, their heirs and representatives to covenant and agree to and with the said H. W. Stockley that they are lawfully seized in fee of said bargained premises; that they have a good right to sell and convey the same; that they are unencumbered and that the title thereto and to every part
191 thereof they will forever warrant and defend to him, the said H. W. Stockley, his heirs and assigns forever against the lawful claims and demands of all persons claiming same through or under them, but it is understood that the said Thos. H. Allen, Jr., and Floy G. Allen, does not make any further warrants.

In testimony whereof, the said Thos. H. Allen, Jr., and Floy G. Allen, have hereunto set their hands and seals at Memphis, Tenn., this 2d day of January, 1888.

THOS. H. ALLEN, JR. [SEAL.]
FLOY G. ALLEN. [SEAL.]

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Hunsdon Cary, a notary public in and for said state and county, at Memphis, duly commissioned and qualified, Thos. H. Allen Jr., and Floy G. Allen, his wife, the within named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained. And the said Floy G. Allen, wife of the said Thos. H. Allen, Jr., after having appeared before me privately and apart from her husband, the said Floy G. Allen acknowledged

the execution of the said deed to have done by her freely, voluntarily and understandingly, without compulsion or constraint from her said husband and for the purposes therein expressed.

Witness my hand and notarial seal, at Memphis aforesaid, this 20th day of January, 1888.

[L. S.] HUNSDON CARY,
Notary Public.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, January 24, 1888.

I, M. A. Misenheimer, Register of said county, do certify
192 that the within deed was filed in my office at 8:10 o'clock a. m., on the 23 day of January, 1888, and entered for registration in entry Book D, page 57, and, together with this and the above certificate, is this day duly registered in Deed Book 38, page 331.

M. A. MISENHEIMER, *Register.*

Copied from the entry of the original deed recorded in Deed Book 38, pages 331, 332 and 333, in the office of the register of Tipton county, Tennessee.

November 6th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, December 2d, 1901.

I, I. R. Calhoun, register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 38, page 331, et seq.

I. R. CALHOUN, *Register.*

9. A certified copy from the office of the register of Tipton county, Tennessee, of the deed of Mrs. Narcissa E. Trigg, Lizzie T. Shelton and her husband, S. C. Shelton, and William H. Trigg to H. W. Stockley, dated March 1st, 1897.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

193 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 1,500 *Acres.*

Filed Dec. 3, 1901.

Narcissa E. Trigg et al.
to
H. W. Stockley.

Deed 1,500 Acres. Filed 2 and Registered 15 March, 1897.

Know all men by these presents, that we, Mrs. Narcissa E. Twigg, Lizzie T. Shelton, and her husband, S. C. Shelton, all of the county of Tipton, state of Tennessee, and William W. Trigg, of the county of Shelby, state of Tennessee, being all of the heirs of W. W. Trigg, deceased, Mrs. Narcissa E. Trigg, being his widow, and Mrs. Lizzie T. Shelton and Wm. W. Trigg, being his only surviving children, for and in consideration of the sum of one hundred and fifty dollars to us in hand paid by H. W. Stockley, of the county of Tipton, and state of Tennessee, do hereby bargain, sell, release, remise, quit claim and convey unto the said H. W. Stockley, all our right, title and interest in and to the following described lots and parcels of land, to wit: That tract or parcel of land containing about fifteen hundred (1,500) acres, more or less, conveyed to John Trigg by Simon Huddleston by deed, dated March 13th, 1837, and recorded on pages 221 and 222, in Book Y in the office of the Register of Tipton county, Tennessee, to which reference is hereby made for a fuller description, and devised by the said John Trigg to his son, W. W. Trigg, deceased, the husband and ancestor of the grantors herein as aforesaid, and which tract of land is more particularly described as follows: Beginning at a willow marked S. S., Stephen Slades' northeast corner on the bank of the Mississippi river; thence
south with his line one hundred and fourteen (114) chains
194 to a mulberry marked S. H.; thence east two hundred (200) chains to a mulberry marked S. H.; thence north seventy-eight (78) chains to a white oak marked S. H., on the bank of the Mississippi river; thence down with the meanders of said river to the beginning; together with all the accretions thereto which now exist or may hereafter be formed by the waters of the Mississippi river, all situate, lying and being in Tipton county, Tennessee, on the Mississippi river, in the eleventh (11th) district, range nine (9), sections (5) and (6). To have and to hold the aforesaid land with all and singular the hereditaments and appurtenances of and to same be-

longing, or in any wise appertaining, to the said H. W. Stockley, his heirs and assigns in fee simple forever. And we will warrant and forever defend the aforegranted land against the lawful claims of all persons whomsoever, claiming same by through or under us, but not against the claims of any other persons.

In testimony whereof we have hereunto set our hands on this the 1st day of March, 1897.

W. W. TRIGG.
NARCISSA E. TRIGG.
S. C. SHELTON.
LIZZIE T. SHELTON.

STATE OF TENNESSEE,
Tipton County:

Personally appeared before me, R. W. Sanford, notary public for said county, duly commissioned, qualified and acting, W. W. Trigg, Narcissa E. Trigg, S. C. Shelton and Lizzie T. Shelton, the within named bargainors, with whom I am personally acquainted and who acknowledged that they executed the within instrument for the purposes therein contained, and Lizzie T. Shelton, wife of the said S. C. Shelton, having appeared before me privately and apart from her husband, the said Lizzie T. Shelton acknowledged the execution of the said deed to have been done by her freely, voluntarily and
195 understandingly, without compulsion or constraint from said husband and for the purposes therein expressed.

Witness my hand and seal at office, this the 1st day of March, 1897.

[L. S.] R. W. STANFORD,
Notary Public.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, March 15, 1897.

I —— Misenheimer, register of said county, do certify that the foregoing instrument was filed in my office at 7:45 o'clock a. m., on the 2d day of March, 1897, and entered for registration in Entry Book F, page 73, and together with this and the above certificate is this day duly registered in Deed Book 55, page 441.

M. A. MISENHEIMER, *Register.*

Copied from the entry of the original deed recorded in Deed Book 55, pages 441, 442 and 443, in the office of the Register of Tipton county, Tennessee.

Nov. 7th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, December 2, 1901.

I, I. R. Calhoun, register of Tipton county, do certify that the above and foregoing is true and correct copy of the instrument now of record in my office in Deed Book 55, page 441, et seq.

I. R. CALHOUN, *Register.*

Same objection and ruling as to deed marked 5.

196 10. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of John Trigg to Lucy J. Stockley, dated May 7, 1862.
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed of Gift.

Filed Dec. 3, 1901.

John Trigg.
to
Lucy Jane Stockley.

Deed of Gift. Filed and Registered 4th January, 1871.

I, John Trigg, of Memphis, Tennessee, for and in consideration of my love and affection for my daughter, Lucy Jane Stockley, wife of Charles A. Stockley, of the same place, do hereby give, quit-claim, transfer and convey unto the said Lucy Jane Stockley, wife of the said Charles A. Stockley, for her sole and separate use, separate and apart from her said husband, a certain tract or parcel of land situate, lying and being in Tipton county, state of Tennessee, on the Mississippi river, near the line of Shelby county, and in what is called the "Devil's Elbow," containing originally about five hundred acres, but to which some additions have been made by accumulations on said Mississippi river, making now probably over five hundred acres, being bounded west by the Mississippi river, and above on the river by my plantation, and below by lands claimed by Miles W. Kerr, and back opposite from the river by the plantation known as "the Brown plantation," heretofore sold by Wm. T. Brown to Henry C. Walker, and by him to C. G. McCrory, or to

some person under whom McCrory claims the land; the tract
197 and parcel of land hereby intended to be given being the same now and for some time heretofore occupied by my daughter, said Lucy Jane Stockley, as a plantation.

To have and to hold to the said Lucy Jane Stockley for her sole and separate use and apart from her husband and apart from said Charles A. Stockley and in no manner liable or subject to his debts, contracts or liabilities, but the land with all its rents, profits and crops and income to be for the sole and inclusive use of my said daughter the same as if she were feme sole and unmarried, for use during her natural life and at her death to ge and belong to her children, in equal portions, share and share alike in fee and forever, but power and authority is hereby reserved and given to said Lucy Jane Stockley to sell or otherwise dispose of said land or any part of it in her discretion either by deed or other mode of conveyance, or last will and testament, but if not disposed of by her, to belong in remainder at her death to her children as above directed. Witness my hand and seal this 7th day of May, A. D. 1862.

J. TRIGG. [SEAL.]

Witnesses:
EMMETT MISE,
C. HERTRECHT.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before James Reilly, Clerk of the County Court of said county, C. Hertrecht (?) one of the subscribing witnesses to the attached deed of gift, who being duly sworn deposes and says that he was personally acquainted with J. Trigg, the bargainor to said deed, and that he acknowledged before him that he executed the same for the purposes therein contained. Witness my hand at office this 7th of June, A. D. 1870.

[L. S.] JAMES REILLY, *Clerk.*

198 STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, James Reilly, Clerk of the County Court of Shelby County, Wm. S. Morris, and being first sworn, deposes and said that he is acquainted with Emmett Mise (?), subscribing witness to the within deed; that he is now a non-resident of the State of Tennessee and a resident of the State of Texas; that he is acquainted with his handwriting, having been a long time acquainted with him in business, and that the signature to said deed is in his genuine handwriting. Witness my hand at office this 17th day of October, 1870.

[L. S.] JAMES REILLY,
County Court Clerk of Shelby County.

STATE OF TENNESSEE,
Tipton County:

I, George A. Taylor, Register of said county, do certify that the within deed of gift was filed in my office at 10 o'clock A. M. on this 4th day of January, 1871, and is entered for registration in Entry Book B, page 1.

GEO. A. TAYLOR, *Register,*
By R. H. MUNFORD, *D. R.*

Copied from the entry of the original deed recorded in Book S, pages 423 and 424 in the office of the Register of Tipton County, Tennessee, Nov. 26th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, December 2, 1901.

I, I. R.Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book S, page 423, et seq.

I. R. CALHOUN, *Register.*

199 11. Certified copy from the office of the Register of Tipton County, Tennessee, of the deed of William T. Brown to Harry C. Walker, dated June 4th, 1853:
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 500 *Acres.*

December 3, 1901.

Will T. Brown
to
Henry C. Walker.

(Deed 500 Acres.)

Registered 18th July, 1853. Deed.

This indenture made and entered into this 4th day of June, A. D. 1853 between William T. Brown of the one part and Henry C.

Walker of the other part and both of Shelby County in the State of Tennessee, Witnesseth: That the said William T. Brown for and in consideration of the sum of seventy-five hundred dollars to him in hand paid by the said Walker, the receipt of which he hereby acknowledges, hath granted, bargained and sold, conveyed and confirmed and doth now grant, bargain and sell, convey and confirm unto the said Henry C. Walker, his heirs and assigns a certain tract or parcel of land containing five hundred (500) acres, be the same more or less, situated, lying and being in the County of Tipton and State of Tennessee in the 11th Surveyor's District, Range 8, Section 526, fronting on the McKenzie chute on the Mississippi and bounded as follows: Beginning at a mulberry marked S. S., Stephen Slade's northeast corner on the bank of the Mississippi river and the northwest and beginning corner of Grant No. 21,206 to the Simon Huddleston, Sr., for 2,000 acres (of which the aforesaid 500 acres is a part) running thence south 114 chains to a mulberry marked S.H., said Huddleston's southwest corner, thence west with said
200 Huddleston's south boundary line 190 poles to a stake, thence north 370 poles to a stake on the bank of the Mississippi river, thence down said river with the meanders thereof north 72 degrees east to the beginning, being the same tract of land conveyed by Adam R. Alexander to the President, Directors and company of the Farmers and Merchants' Bank of Memphis, and the same sold by said bank to Alanson Trigg and by him to James Trigg and by him to said Browne and the same this day conveyed by said bank to said Walker and the same now occupied by said Browne as a plantation in Tipton County, Tennessee. To have and to hold the afore said tract of land and all and singular its tenaments, hereditaments and appurtenances unto him, the said Henry C. Walker, his heirs and assigns, executors. And the said Browne for himself, his heirs, executors and administrators shall and will warrant and forever defend the aforesaid tract of 500 acres of land and every part thereof to him, the said Henry C. Walker, his heirs and assigns against all manner of all persons legally claiming the same. It is agreed, however, that said Brown shall retain possession of said farm until the 1st day of January next, when he shall deliver the same to said Walker or his order in the same repair it now is. And, further, the said Browne warrants the tract to contain 500 acres and if it does not that he will deduct from the purchase money for the deficiency according to the price of the whole tract estimating that 500 acres. And if it should contain an excess over the 500 the said Walker will pay said Browne for the excess after the like ratio. It is further agreed that the same shall be surveyed immediately as soon as practicable by the County Surveyor of Shelby County in the absence of the parties, both of whom will abide the result. In witness whereof the parties have here set their hands and seals the day and date above written.

W. T. BROWNE, [SEAL.]
H. C. WALKER, [SEAL.]

201 STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, Jno. T. Trezevant, Clerk of the County Court of said County, the within named bargainors, William T. Brown and H. C. Walker, with whom I am personally acquainted, who acknowledged that they executed the deed hereto attached for the purposes therein contained, this 10th day of June, 1853.

JOHN P. TREZEVANT, *Clerk,*
By B. R. TREZEVANT, *D. C.*

Received State tax on this deed, 75cts.

H. H. MUNFORD, *Clerk.*

STATE OF TENNESSEE,
County of Tipton:

REGISTER'S OFFICE, 18 July, 1853.

I, Thomas Ralph, Register of said County, do certify that the foregoing deed was this day at 9 o'clock A. M. filed with me and noted for registration in Entry Book A, page 80 and that the same is duly recorded with the certificates thereto in Book K, pages 372 and 373.

THOS. RALPH, *Register,*
By NAT TIPTON, *D. R.*

Copied from the entry of the original deed recorded in Book K, pages 372 and 373 in the office of the Register of Tipton County, Tennessee, Nov. 25th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said County, do certify that the above and foregoing is true and correct copy of this instrument now of record in my office in Deed Book K, page 372, et seq.

I. R. CALHOUN, *Register.*

202 12. A certified copy from the office of the Register of the Land Office for West Tennessee of Grant No. 3,271 of a hundred acres by the State of Tennessee to John Trigg, dated November 10th, 1837.
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 3271. 100 acres Tipton County.

Filed Dec. 3, 1901.

No. 3271.

The State of Tennessee to all whom these presents shall come, Greeting:

[L. L.]

Know ye, That by virtue of Certificate Warrant No. 3073, dated 13th day of Oct., 1832, to William Christian, and by virtue of Entry No. 10 in the name of John Trigg, there is granted by the said State of Tennessee unto John Trigg, assignee of William Christian, a certain tract or parcel of land containing 100 acres situate, lying and being in the County of Tipton, State of Tennessee, in Range 9, Section 6, on island No. 37, in the Mississippi river, beginning at the N. W. corner of Entry No. 8, for one hundred and fifty-two acres in the name of said Trigg on a cottonwood, running thence south with the west line of said entry one hundred poles to a sycamore marked J. T. & N. P., thence west one hundred and sixty poles to a box elder, thence north one hundred poles to an elder marked J. T., thence east one hundred and sixty poles to the beginning, with the hereditaments and appurtenances. To have and to hold the said tract or parcel of land with its appurtenances to the said John Trigg and his heirs forever.

203 *I*t witness whereof, Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, on the 10th day of November, in the year of our Lord one thousand eight hundred and thirty-seven and of the Independence of the United States the 61st.

NEWTON CANNON.

By the Governor:

LUKE LEA,
Secretary of State.

Endorsed: Grant No. 3271. 100 acres. Tipton County.

I certify that this is a true copy of Grant No. 3271, issued by the State of Tennessee to John Trigg as the same appears of record in my office in Book No. 4, page 538.

Witness my hand and private seal (there being no seal of office) at office in Jackson, Tenn., this 11th Oct., 1901.

JOHN W. GATES, [L. L]
Register Land Office for West Tennessee.

The defendant objected to this grant because it did not contain the great seal of the State of Tennessee, alleging that it was therefore void. The court overruled the objection, holding that the scroll in the upper left-hand corner denoted the seal; to which ruling the defendant excepted.

13. A certified copy from the office of the Register of the Land Office for West Tennessee of Grant No. 3270 of thirty acres by the State of Tennessee to John Trigg, dated November 10th, 1837:
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

204 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 3270. 30 acres. Tipton County.

No. 3270.

The State of Tennessee to all whom these presents shall come, Greeting:

[L. L.]

Know ye, That by virtue of Register of West Tennessee, certificates, one to W. W. Woodfork for 20 acres, No. 7098, dated 2nd April, 1826, the other to Greenberry Taylor for 10 acres, No. 2963, dated 9th June, 1818; and by virtue of Entry No. 11, dated 13th Oct., 1837, and by virtue of assignments on small warrants to John Trigg. There is granted by the said State of Tennessee, unto John Trigg, assignee of W. W. Woodfork and Greenby Taylor a certain tract or parcel of land containing 30 acres, situated, lying and being in the county of Tipton and State of Tennessee, in Range 9 and Section 6, on Island No. 37 in the Mississippi river, beginning at the southeast corner of an occupant entry in the I. Barney assignee of Zephannah Doane on two small cottonwoods marked I. B. standing on the bank of McKenzie's chute, running north Barney's line 68 poles to two persimmons; then east 85 poles to a large cottonwood; then south 48 poles to a hickory marked J. T. on said chute; thence down the chute south 65 degrees west 90 poles to the beginning. With the hereditaments and appurtenances, to have and to hold the said tract or parcel of land, with its appurtenances to the said John

Trigg and his heirs forever. In witness whereof, Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the state to be affixed, at Nashville, of the 10th day of November in the year of our Lord one thousand eight hundred and thirty-seven, and the Independence of the United States the 61st.

N. CANNON.

By the Governor.
LUKE LEA,
Secretary of State.

205 Endorsed: Grant No. 3270. 30 acres. Tipton County.

I certify that this is a true copy of Grant No. 3270, issued by the State of Tennessee to Jno. Trigg, as the same appears of record in my office in Book No. 4, page 537. Witness my hand and private seal (there being no seal of the office) at office in Jackson, Tenn., this 11th day of Oct., 1901.

JNO. W. GATES, [L. L.]
Register of the Land Office for West Tennessee.

The defendant objected to this grant because it did not contain the great seal of the State of Tennessee, and was therefore void; the court overruled this objection, holding that the scroll in the upper left hand corner denoted the seal; to which ruling defendant excepted.

14. A certified copy from the Register of the Land Office for West Tennessee of Grant No. 3292 of thirty-seven acres by the State of Tennessee to John Trigg, dated November 13th, 1837:
(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 3292. 37 Acres. Tipton County.

Filed Dec. 3, 1901.

No. 3292.

The State of Tennessee to all to whom these presents shall come, Greeting:

[L. L.]

Know ye, That by virtue of entry in Tipton Co., No. 7, dated 5th Sept., 1837, in the name of John Trgiss for 37 acres, founded on 2

Register of W. T. Warrants, one to W. W. Woodfork for 2 acres, No. 7087, dated 2d April, 1836, one to W. W. Woodfork for
206 5 acres, dated 2d March, 1836, No. 7073, also one on Commissioner's warrant, No. 3699, to James E. Breton for 30 acres, dated 2d March, 1836, and transferred to John Trigg. There is granted by the said State of Tennessee, unto John Trigg, assignee of W. W. Woodfork, a certain tract or parcel of land containing 37 acres by survey, bearing date 14th day of October, 1837, lying in said county, in Range 9 and Section 6, on Island No. 37, in the Mississippi river, beginning at the head of said island, about 400 poles, north 50 degrees west from L. Hunnelston's northeast corner, running thence down the main or north chute north 10 degrees west, 60 poles to a sycamore marked J. T., then west 90 poles to a hackberry marked J. T., then south 80 poles to a hackberry on McKinsey's chute marked J. T., then up said chute east 20 degrees north 95 poles to the beginning, with the hereditaments and appurtenances, To have and to hold the said tract or parcel of land, with its appurtenances to the said John Trigg and his heirs forever. In witness whereof, Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, on the 13th day of November in the year of our Lord one thousand eight hundred and thirty-seven, and of the Independence of the United States the 61st.

By the Governor:

NEWTON CANNON.

LUKE LEA,
Secretary of State.

Endorsed: Grant No. 3292. 37 acres. Tipton County.

I certify that this is a true copy of grant No. 3292, issued by the State of Tennessee to John Trigg, as appears of record in my office in Book No. 4, page 559.

Witness my hand and private seal (there being no seal of office), at office in Jackson, Tenn., this 11th Oct., 1901.

JNO. W. GATES, [L. L.]
Register Land Office for West Tennessee.

207 The defendent objected to this grant because it did not contain the Great Seal of the State of Tennessee, and was, therefore, void. The court overruled the objection, holding that the scroll in the upper left hand corner denoted the seal; to which ruling defendant excepted.

15. A certified copy from the Register of the Land Office for West Tennessee, of grant No. 3269, of one hundred and fifty and one-half acres by the State of Tennessee to John Trigg, dated November 10th, 1837.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant 3269. 151½ Acres. Tipton County.

Filed Dec. 3, 1901.

No. 3269.

The State of Tennessee to all to whom these presents shall come, Greeting:

Know ye, That by virtue of entry No. 9, dated 5th Sept., 1836, founded on Register of West Tennessee, certificate No. 7106, dated 28th day of Jan'y, 1833, to Wesley and George Nixon for 151½ acres, entry in the name of John Trigg for 151½ acres and by survey bearing date 14th Oct., 1837. There is granted by the said State of Tennessee unto John Trigg, assignee of Wesley and George Nixon, a certain tract or parcel of land containing one hundred and fifty-one and one-half acres, situated lying and being in the county of Tipton and State of Tennessee, in range 9 and section 6, on island 37 in the Mississippi river; beginning at the N. E. corner of entry
No. 8 in the name of said Trigg on a mulberry and sweet
208 gum marked J. T. on the main chute in Old river, running thence west 150 poles to a mulberry and cottonwood marked J. T.; then north 220 poles to an elm and sycamore marked J. T.; then east 40 poles to a sycamore on the bank of the Mississippi river; then south 48 degrees, east 60 poles; then with the river south 25 degrees, east 170 poles to the beginning.

With the hereditaments and appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances to the said John Trigg and his heirs forever.

In witness whereof, Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the Great Seal of the State to be affixed, at Nashville, on the 10 day of November in the year of our Lord one thousand eight hundred and 37, and of the Independence of the United States the 61st.

By the Governor:

NEWTON CANNON.

LUKE LEA,
Secretary of State.

Endorsed: Grant 3269. 151½ acres. Tipton County.

I certify that this is a true copy of grant No. 3269 issued by the State of Tennessee to John Trigg, as the same appears of record in

my office in Book No. 4, page 536. Witness my hand and private seal (there being no seal of office), at office in Jackson, Tenn., Dec. 7th, 1901.

JNO. W. GATES, [L. S.]
Register Land Office for West Tennessee.

The defendant objected to this grant because it did not bear the impression of the Great Seal of the State of Tennessee. The court overruled the objection, holding that the scroll in the upper left hand corner denoted the seal; to which defendent excepted.

209 16. A certified copy from the office of the Register of Tipton County, Tennessee, of the deed of John Trigg to Thomas P. Hall, dated October 16th, 1838.
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed.

Filed Dec. 3, 1901.

Registered February 8th, 1848.

John Trigg
to
Thomas P. Hall.

Deed.

Know all men by these presents, that I, John Trigg, of the county of Shelby and State of Tennessee, for and in consideration of the sum of three hundred dollars to me in hand paid by Thomas P. Hall, have given, granted, bargained, sold and by these presents do give, grant, bargain, sell and confirm to him the said Thos. P. Hall, his heirs and assigns forever, the one-half or an undivided moiety of the following tracts of land situate in Tipton county, State of Tenn., on Island No. 37, in the Mississippi river, in range 9, section 6, of District 10, and granted to me by the State of Tenn. aforesaid, viz: One tract containing thirty-seven acres granted to me 13th Nov., 1837, by grant No. 3292, bounded as follows: Beginning at the head of Island No. 37, running thence N. 10 degrees, W. poles, down the main river to a sycamore marked J. T.; thence west 90 poles to a hackberry marked J. T.; thence south 80 poles to a hackberry marked

J. T. on McKenzie's chute; thence up said chute to the beginning. One tract containing one hundred and fifty-two acres granted to me by grant No. 3319, dated Nov. 13th, 1837, bounded as follows: Beginning at a sycamore marked J. T.; the N. E. corner
210 of grant No. 3292 for 38 acres on the main river, running thence west 144 poles to a gum and mulberry marked J. T.; thence north 220 poles to a cottonwood, mulberry marked J. T. on the main chute on river; thence up said chute S. 25 E. to the beginning. One tract containing one hundred and fifty-one acres 80 perches granted to me Nov. 10th, 1837, by grant No. 3269 bounded as follows: Beginning at the N. E. corner of grant No. 3319 at a mulberry and sweet gum marked J. T. on the main river, running thence west 150 poles to a mulberry and cottonwood marked J. T.; thence north 220 poles to an elm and sycamore marked J. T.; thence east 40 poles to a sycamore on the bank of the main river; thence up the river S. 48 degrees, E. 60 poles and S. 25 degrees, E. 170 poles to the beginning. One tract containing one hundred acres granted to me Nov. 13th, 1837, by grant No. 3271, bounded as follows: Beginning at the northwest corner of grant No. 3319 for 152 acres on a cottonwood, running thence south with said grant 100 poles to a sycamore marked J. T. N. P.; thence west 160 to a box elder; thence north 100 poles to an elm J. T.; thence east 160 poles to the beginning. One tract containing thirty acres granted to me 10th Nov., 1837, by grant No. 3270, bounded as follows: Beginning at the southeast corner of an occupancy entry in the name of J. Barney, assignee of Zephanih Doane, on two small cottonwoods marked J. B. standing on the bank of McKenzie's chute, running thence south with Barney's line 68 poles to two persimmons; thence east 85 poles to a large cottonwood; thence south 48 poles to a hackberry marked J. T. on said chute; then down said chute south 65 degrees, W. 90 poles, to the beginning. To have and to hold an undivided moiety of all the above described tracts of land as tenant in common with me to him, the said Thomas P. Hall, his heirs and assigns forever. And the said John Trigg for himself, his
211 heirs and assigns doth covenant for the consideration aforesaid forever to warrant and defend the premises to him the said T. P. Hall, his heirs and assigns against the lawful claims of all and every person or persons whatsoever.

In testimony whereof, I have hereunto subscribed my name and affixed my seal, this Oct. Anno Domini 1838.

JOHN TRIGG. [SEAL.]

In presence
JAMES McCLURKIN. *pro.*
W. B. ROBESON. *pro.*

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, John W. Fuller, clerk of the County Court of Shelby County, James H. McClurkin and W. B. Robeson, subscribing witnesses to the foregoing deed, who, being

first sworn, depose and say they are acquainted with John Trigg, the bargainor, and that he (*he*) acknowledged that he executed the within deed in their presence upon the (*the*) day it bears date.

Witness my hand at office, this 16th day of October, 1838.

J. W. FULLER.

Received State tax.

T. R. SMITH, *C. C. T. C.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, February 8th, 1848.

I, James Overall, Register of said county, hereby certify that the foregoing deed was this day at 12 o'clock M. filed with me and noted for registration in Entry Book A, page 35, and that the same, together with the certificate of probate thereof was this day duly registered in my office in Book H, pages 60, 61 and 62.

JAMES OVERALL,
Register.

Copied from the entry of the original deed recorded in Book H, pages 60, 61 and 62, and in the office of the Register of
212 Tipton county, Tennessee, Sept. 21st, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, I. R. Calhoun, Register of said county, do certify that the above instrument as interlined is a true and exact copy of the instrument found of record in my office in Deed Book H, page 60 et seq.

I. R. CALHOUN,
Register.

17. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed from Thomas P. Hall to Robert I. Chester, dated April 29th, 1848.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed to 507¼ Acres.

Filed Dec. 3, 1901.

Thomas P. Hall
to
Robert I. Chester.

Deed 507¼ Acres.

Registered October 29th, 1850.

Whereas, heretofore, to wit: in the year 1837, I, Thomas P. Hall, then of the county of Tipton and State of Tennessee, for the consideration of three thousand dollars to be paid to me by John G. Chalmers, Ransom H. Byrnes and William H. Long, bargained and sold to them 507¼ acres of land hereinafter described and gave a title bond to convey said land on the payment of the purchase money, and after an affidavit having been made that said title bond is lost or mislaid and that the same has not been transferred
213 and a bond of indemnity given by Robert I. Chester to whom the interest which the said Chalmers, Byne and Long had in said land having been conveyed and he having paid the balance of the purchase money. Now, therefore, for and in consideration of the premises and the consideration aforesaid, I, the said Thomas P. Hall, do hereby give, grant, bargain, sell and convey to the said Robert I. Chester of the county of Madison and State of Tennessee, the following tracts and parcels of land situated in Tipton county, Tennessee, the 11th surveyor's district, range 9, section 6, on Island No. 37, in the Mississippi river, to wit: One tract containing one hundred acres granted to me by grant No. 3278, dated Nov. 12, 1837, bounded as follows: Beginning at the lower or N. E. corner of entry No. 9, in the name of J. Trigg for 151½ acres at a sycamore running thence west 40 poles to an elm and sycamore marked J. T.; thence south with his line 40 poles to a mulberry marked T. P. H.; thence west 160 poles to a mulberry; thence north 100 poles to a cottonwood on the bank of the river; thence up the river east 60 poles, east 10 degrees, south 80 poles, east 20 degrees, south 50 poles, east 40 degrees, south 20 poles to the beginning. 2. Also the undivided fourth part of a tract of land containing six hundred and forty acres and granted to N. Potter by the State of Tennessee, being the location interest in the same, the whole survey being

bounded as follows. Beginning southwest corner of J. Trigg's grant No. 3319 for 152 acres on a mulberry marked J. T.; running thence north 120 poles to a sycamore, the S. E. corner of J. Trigg's grant 3271 for 100 acres; thence with his line 160 poles to a box elder; thence north with his line 100 poles to an elm marked J. T.; thence west 400 poles to a box elder marked N. P.; thence south 220 poles to a stake on the north boundary of Doane's occupant; thence east to the beginning. 3. Also the undivided half or moiety of the following tracts of land granted to John Trigg by the State of
214 Tennessee, viz: One tract containing thirty-seven acres by grant No. 3292, dated 13th Nov., 1837, bounded as follows: Beginning at the head of said Island No. 37, running thence north 10 degrees, west down the main or old river 60 poles to a sycamore marked J. T.; thence west 90 poles to a hackberry marked J. T.; thence south 80 poles to a hackberry marked J. T. on McKenzie's chute; thence up said chute with its meanders to the beginning. 4. One tract containing one hundred and fifty-two acres, grant No. 3319, dated Nov. 13, 1837, bounded as follows: Beginning at a sycamore marked J. T. the N. E. corner of grant No. 3292 for 37 acres, running thence west 140 poles to a mulberry marked J. T.; thence north 220 poles to a cottonwood, then east 75 poles to a small gum mulberry marked J. T. on the main river; thence up said river south 25 degrees, east to the beginning. 5. One tract containing one hundred and fifty-one and a half acres by grant No. 3269, dated Nov. 10, 1837, bounded as follows: Beginning at the northeast corner of grant No. 3319 at a mulberry and sweet gum marked J. T. on the main river, running thence west 150 poles to a mulberry and cottonwood marked J. T.; thence north 220 poles to an elm and sycamore marked J. T.; thence east 40 poles to a sycamore on the bank of the main river; thence up the river S. 48 degrees, east 60 poles thence S. 25 degrees, east 170 poles to the beginning. 6. One tract containing one hundred acres, grant No. 3271, dated Nov. 10, 1837, bounded as follows: Beginning at the northwest corner of grant No. 3319 for 152 acres on a cottonwood, running thence south with said grant 100 poles to a sycamore marked J. T.; thence west 160 poles to a box elder marked J. T.; thence north 100 poles to an elm marked J. T.; thence east 160 poles to the beginning. 7. One other tract containing thirty acres by grant No. 3270, dated Nov. 10, 1837, bounded as follows: Beginning at the southeast corner of an occupant entry in the name of J. Barney, assignee of Zephaniah Doane, on two small cottonwoods
215 marked J. B. standing on the bank of McKenzie's chute, running thence north with Barney's line 68 poles to two persimmons; thence east 85 poles to a large cottonwood; thence south 48 poles to a hackberry marked J. T. on said chute; thence down said chute south 65 degrees, W. 90 poles to the beginning. To have and to hold the premises to him, the said Robert I. Chester, his heirs and assigns forever in fee simple, and I covenant to warrant and forever defend the title of said land unto him, the said Chester, and his heirs and assigns against the lawful claim or claims of all and every person or persons whatsoever.

In testimony whereof, I have hereunto subscribed my hand and affixed my seal, this 29th day of April, A. D. 1848.

THOMAS P. HALL, [SEAL.]
By His Attorneys in Fact, R. W. SANFORD AND
JAS. W. HALL.

STATE OF TENNESSEE,
Tipton County:

Personally appeared before me, Richard H. Munford, Clerk of the County Court of Tipton County, the above named Thos. P. Hall, the bargainor, by his attorneys in fact, R. W. Sanford and Jas. W. Hall, with whom I am personally acquainted, and who acknowledged that they executed the within deed for the purposes therein contained Witness my hand at office this 27th day of April, 1848.

R. H. MUNFORD, *Clerk.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, October 29, 1850.

I, Jacob Sullivan, Register of said county, do certify that the within deed was this day at 9 o'clock A. M. filed with me and noted for Registration in Entry Book A, page 53, and that the same is duly registered in my office with the certificates thereto in Book I, pages 109, 110 and 111.

J. SULLIVAN,
Register.

216 Copied from the entry of the original deed recorded in Deed Book I, pages 109, 110 and 111 in the office of the Register of Tipton County, Tennessee, November 2d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

DEC. 2, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is a true and exact copy of the instrument and certificates found of record in Deed Book 1, 109 et seq.

I. R. CALHOUN, *Register.*

18. A certified copy from the office of the Register of Tipton County, Tennessee, of the deed from Robert I. Chester to John Trigg, dated December 6th, 1850.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed from Chester to Trigg.

Filed Dec. 3, 1901.

Robert I. Chester
to
John Trigg.

Deed. Registered February 6th, 1851.

I, Robert I. Chester, of the county of Madison, State of Tennessee, have this day bargained and sold and do hereby transfer and convey to John Trigg, his heirs, forever, for the consideration of sixteen hundred dollars to me paid, the following described tracts or parcels of land in the state of Tennessee, county of Tipton and on an island in the Mississippi river known as Island No.
217 37, in the 11th surveyors' district, range 9, section 6, one tract containing 100 acres entered in the name of Thomas P. Hall, and bounded as follows: Beginning at the lower or N. E. corner of entry No. 9 in the name of John Trigg, for 151½ acres at a sycamore, running thence west 40 poles to an elm and sycamore marked J. T.; thence south with his line 40 poles to a mulberry marked T. P. H.; thence west 160 poles to a mulberry; thence north 100 poles to a cottonwood on the bank or the river; thence up the river east 60 poles, east 10 degrees south 80 poles, east 20 degrees south 50 poles, east 40 degrees south 20 poles to the beginning, granted by the state of Tennessee to Thomas P. Hall by Grant No. 3278. Also the individual half or moiety of the following land granted to John Trigg; One tract containing 151½ acres by Grant No. 3269, the whole tract bounded as follows: Beginning at the N. E. corner of Grant No. 3319 at a mulberry and sweet gum marked J. T. on the bank of the river, running thence west 150 poles to a mulberry and cottonwood marked J. T.; thence north 220 poles to an elm and sycamore marked J. T.; thence east 40 poles to a sycamore on the bank of the river; thence up the river south 48 degrees east 60 poles; thence S. 25 degrees east 170 poles to the beginning. One other tract containing 152 acres, Grant No. 3319, whole tract bounded as follows: Beginning at a sycamore marked J. T., in the N. E. corner of Grant 3292 on the bank of the river, running west 140 poles to a mulberry marked J. T.; thence north 220 poles to a cottonwood; thence east 75 poles to a small gum and mulberry marked J. T.; thence up the river with its meanderings to the beginning. One tract containing 37 acres by Grant No.

3292, whole tract bounded as follows: Beginning at the head of island 37, running thence north 10 degrees west down the main or old river 60 poles to a sycamore marked J. T.; thence W. 90 poles to a hackberry; thence south 80 poles to a hackberry marked J. T., on McKenzie's chute; thence up said chute with its meanderings to the beginning. Also one other tract by Grant No.
218 3271, for 100 acres, which tract bounded as follows: Beginning at the N. W. corner of Grant No. 3319 for 152 acres on a cottonwood, running thence south with said grant 100 poles to a sycamore marked J. T.; thence west 160 poles to a box elder marked J. T.; thence north 100 poles to an elm marked J. T.; thence east 160 poles to the beginning. In all containing by estimation 320 acres, be the same more or less.

To have and to hold the same to the said John Trigg, his heirs and assigns forever, in fee simple, and I warrant and forever def-nd the title of said lands against the lawful claim of all and every person whatever.

In testimony whereof the said Robert I. Chester subscribed his name and affixed his seal the 6th day of December, in the year of our Lord, 1850.

[SEAL.] —— ——.

Testi.
WM. E. D. CHESTER.
ANDREW CHESTER.

STATE OF TENNESSEE,
Shelby County, ss:

Personally appeared before me, W. L. Dewoody, clerk of the county court of said county, Robert I. Chester, the bargainor within named, with whom I am personally acquainted, who acknowledged the execution of the within deed for the purposes therein contained.

Witness my hand at office, November 22d, 1850.

W. L. DEWOODY, *Clerk.*
By JAS. ROSE, *Dep. Clerk.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, February 6th, 1851.

I, Jacob Sullivan, Register of said county, do certify that the within deed was this day at one o'clock p. m., filed with me and noted for registration in Entry Book A, page 56. And that the same is duly registered in my office with the certificates
219 thereto in Book I, pages 178, 179 and 180.

J. SULLIVAN, *Register.*

Copied from the entry of the original deed recorded in Deed Book I. pages 178, 179 and 180, in the office of the Register of Tipton county, Tennessee.

November 2, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book I, page 178, et seq.

I. R. CALHOUN, *Register.*

19. A certified copy from the office of the clerk and master of the chancery court of Shelby County, Tennessee, of the decree made in said court on January 9th and 13th, 1882, in the case T. A. Nelson, executor of the will of John Trigg, deceased, vs. Mrs. M. L. Trigg, et al., No. 775, R. D., in which the deed of John Trigg, dated November 4th, 1857, to Frederick R. Smith, to certain lands was established and the title to said lands vested in the heirs of said Smith.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Copy of Decree on Petition of Mrs. M. P. Smith.

Filed Dec. 3, 1901.

Chancery Court of Shelby County.

220 STATE OF TENNESSEE,
Shelby County:

Be it remembered, that at a term of the Chancery Court of Shelby County, State aforesaid, begun and held at the court house in the city of Memphis, in and for said county, on the first Monday in October, 1881, present and presiding the Hon. W. W. McDowell, Chancellor of said court.

On, to wit, the 13th day of January, 1882, one of the days of said term, the following proceedings were had as appears of record in Minute Book 33, page 459, viz.:

775.

T. A. NELSON, Ex't'r John Trigg, Dec'd,
vs.
Mrs. M. L. TRIGG et al.

Decree on Petition of Mrs. M. P. Smith.

This cause came on for hearing on Monday, the 9th day of January, 1882, it being one of the days of the Oct. Term, 1881, thereof. Hon. W. W. McDowell, Chancellor, presiding. Upon the petition of Mrs. M. P. Smith, widow of the late Frederick R. Smith, dec'd, and her petition as the next friend of her son, Fred R. Smith, a minor, and of Mary A. Davidson, a daughter of said Fred. R. Smith, dec'd, and her husband, Geo. F. Davidd*o*n, with the proof in the cause, establishing the purchase of the land described and set out in the petition above, and it appearing that there is no adverse testimony, and, further, that the purchase money was paid and the deed executed and delivered by the said John Trigg in his life time to Frederick R. Smith, in his life time, all of which being satisfactorily shown and fully established and counsel for complainant consenting thereto. It is, therefore, ordered, adjudged and decreed by the court, that the deed to the land set out and described in said petition, which is in the following words and figures, to wit:

I, John Trigg, of the county of Shelby and state of Tennessee, have this day bargained and sold, and do hereby transfer and convey to Frederick R. Smith and his heirs forever, for the
221 valuable consideration of five thousand dollars to me paid, the following described tracts or parcels of land in the county of Tipton and state of Tennessee, on Island 37, in the Mississippi river in the 11th surveyor's district, range 9, sec. 6, one tract containing one hundred acres of land, entered in the name of Thomas P. Hall, and bounded as follows, to wit: Beginning at the N. E. corner of entry No. 9, in the name of John Trigg, for 151½ acres, at a sycamore tree, running thence W. 40 poles to an elm and sycamore marked J. T.; thence S. with his line 40 poles to a mulberry marked J. P. H.; thence W. 160 poles to a mulberry; thence N. 100 poles to a cottonwood on the bank of the Mississippi river; thence up the river 60 poles, E. 10 degrees S. 81 poles, E. 20 degrees S. 50 poles, E. 40 degrees S. 20 poles, to the beginning, granted by the state of Tennessee to T. P. Hall, by grant No. 3278. Also one other tract containing 151½ acres by grant No. 3269, bounded as follows: Beginning at the N. E. corner of Grant No. 3319, at a mulberry and sweet gum marked J. T.; on the bank of old river; running W. 150 poles to a mulberry and cottonwood marked J. T.; thence N. 220 poles to elm and sycamore marked J. T.; thence E. 40 poles to a sycamore on the bank of old river; thence with the river S. 25 degrees E. 170 poles to the beginning. Also one other tract containing 152 acres and bounded as follows: Beginning at the N. E. corner of entry No. 7, in the name John Trigg, on a

sycamore marked J. T.; thence W. 145 poles to a mulberry marked J. T.; thence N. 220 poles to a cottonwood; thence E. 75 poles to a small gum and mulberry marked J. T., on the bank of Old river; thence up said river S. 25 degrees E. to the beginning. Also one other tract containing 100 acres and bounded as follows: Beginning at the N. W. corner of entry No. 8 for 152 acres in the name of John Trigg, on a cottonwood; thence S. with the W. line of said entry 100 poles to a sycamore marked J. T. and N. P.; thence
W. 160 poles to a box elder; thence N. 100 poles to an elm
222 marked J. T.; thence E. 160 poles to the beginning. Also
one other tract containing 37 acres, beginning at the head of said Island 37 and running N. 10 degrees W. 60 poles to sycamore marked J. T.; thence W. 90 poles to a hackberry marked J. T.; thence S. 80 poles to a hackberry McKinstry's chute, marked J. T.; thence up said chute E. 20 degrees north 95 poles to the beginning. Also one other tract containing 30 acres by grant No. 7098, beginning at the S. E. corner of occupant entry in the name of J. Barney, on two small cottonwoods marked J. B., standing on the bank of McKinsty's chute; thence N. with Barney's line 68 poles to two persimmon trees; thence E. 85 poles to a large cottonwood; thence S. 48 poles to a hackberry marked J. T., on said chute; thence down said chute S. 55 degrees W. 90 poles to the beginning, containing in six entries five hundred and seventy-one and one-half (571½) acres, be the same more or less, to have and to hold the same to the said F. R. Smith, his heirs and assigns in fee simple forever. And I warrant and defend the title to the same against the lawful claims of all persons whomsoever. In testimony whereof, I hereunto set my hand and seal this the 4th day of Nov., 1857.

JOHN TRIGG. [SEAL.]

is found to have been duly executed by the said Trigg and delivered to the said Frederick R. Smith, and the same is hereby declared and by the court is decreed to be fully established and the land conveyed, adjudged and decreed to be the property of the said Frederick R. Smith, his heirs and legal representatives, the petitioners herein. It is therefore ordered and adjudged and decreed that the injunction heretofore prayed for and granted in this cause, be made perpetual and the title and possession in and to the land conveyed in said deed to be fully vested in petitioners as the heirs and legal representatives of Frederick R. Smith, dec'd. And upon application of counsel for petitioners, a lien is expressly declared upon the land herein described to secure the payment of his fees
in this cause. Petitioners and security will pay the costs of
223 this petition and proceedings thereunder, for which execution
will issue.

STATE OF TENNESSEE,
Shelby County:

I, T. B. Caldwell, clerk and master, of the Chancery Court of Shelby County, do hereby certify that the foregoing three and one-half (3½) pages contain a full, true and perfect transcript of de-

cree on petition of Mrs. M. P. Smith, entered in a certain cause lately pending herein, wherein T. A. Nelson, Extr. of John Trigg, dec'd., was complainant and Mr. M. L. Trigg, et al., defendants, as the same appears of record in my office, in Minute Book No. 33, page 459. In witness whereof, I hereunto set my hand and affix the seal of said court, at office, in Memphis, this 27th day of Nov., A. D. 1901.

[L. S.]

T. B. CALDWELL,
Clerk & Master.
By M. L. VESEY, *D. C. & M.*

20. A certified copy from the office of the register of Tipton county, Tennessee, of the deed in trust to the clerk and master of the Chancery Court of Shelby County, Tennessee, to secure the payment of $1000.00 to Thomas P. Chambers, and made by Martha P. Smith, Frederick R. Smith, Mary E. Davidson and her husband, George F. Davidson, on February 27th 1882.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Appointment of Black as Trustee.

Filed Dec. 3, 1901.

224 T. A. NELSON, Extr.,
vs.
M. L. TRIGG et al.

Filed 1st and Registered 9th Jan., 1883. Consent Degree of Mrs. M. P. Smith et al.

Be it remembered that we, Martha P. Smith, Frederick R. Smith, Geo. F. Davidson and Mary E. Davidson, his wife, (formerly Mary E. Smith), petitioners in the above cause, being indebted to Thos. P. Chambers for professional services rendered us in the above styled cause in sustaining our title to certain lands particularly described in the petition above referred to, filed in the above cause, and a lien having been filed by the decree of the Chancery Court in said cause of record, in Minute Book No. 33, page 459, to secure said fee, which, by agreement, is fixed at 1000 one thousand dollars, now, therefore, we consent and agree that the sum of one thousand dollars shall be the fee of the said Chalmers in said cause it being the estimated one-third value of the property so recovered, and we further consent and agree that the said sum shall be reconsidered

as adjustment or decree of this court fee, said sum which we hereby consent and agree shall be entered of record in said cause, and we further consent if the said sum of one thousand dollars be not paid or satisfied by us within sixty days from this date, then and in that event, we hereby vest the C. &. M. *as* the legal title to said land as trustee for the consideration of one dollar and the execution this trust authorizes the clerk and master of the Chancery court to advertise the land described in said decree for four successive weeks, once each week in some paper published in the city of Memphis, and sell the same for cash without equity of redemption, said sale to take place in front of the court house door in the city of Memphis. Said land to be sold in separate tracts, according to the original survey, and only so much thereof sold as may be necessary to satisfy this decree, except (copy illegible) happens to fall in
225 the sale of the last tract in which event the C. & M., after paying the cost of the sale shall pay the remainder unto us in equal parts. It is further agreed that the clerk in making this sale shall make the deed as a trustee directly to the purchaser, and the clerk and master is hereby fully authorized to file this as a decree for the said sum as well as a decree of sale, and execute the same upon the failure heretofore specified to pay said decree. Dated this 27th day of Feb., 1882, the interlineations above made legal signing.

MARTHA P. SMITH. [SEAL.]
FRED R. SMITH. [SEAL.]
G. A. DAVIDSON. [SEAL.]
MARY E. DAVIDSON. [SEAL.]
Deputy Clerk.

C. & M. will file this paper as executed by us.
G. T. DAVIDSON.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Jno. J. Shea, deputy clerk of the county court of said county, Martha P. Smith, a widow, Fred R. Smith, G. F. Davidson and his wife, Mary E. Davidson, the within named bargainors, with whom I am personally acquainted and who acknowledged that they executed the within instrument for the purposes therein contained, and Mary E. Davidson, having appeared before me privately and apart from her husband, the said G. F. Davidson, acknowledged the execution of the said instrument, etc., to have been done by her freely, voluntarily and understandingly, without compulsion or constraint from her husband, and for the purposes therein expressed.

Witness Jno. J. Shea, deputy clerk of said court, at office this 29th day of May, 1882.

JNO. J. SHEA,

226 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan. 9, 1883.

I, J. N. Harris register of said county do certify that the within deed was filed in my office at 2:20 o'clock p. m. on the 1st day of January, 1883, and entered for registration in Entry Book 6, page 88, and together with this and the above certificate is this day duly registered in Deed Book 31, page 150.

J. N. HARRIS, *Register.*

Copied from the entry of the original deed recorded in Deed Book 31, pages 150, 151, 152, in the office of the register of Tipton county, Tennessee.

Oct. 31, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 31, page 150, et seq.

I. R. CALHOUN, *Register.*

21. A certified copy from the office of the Register of Tipton county, Tennesssee, of the deed of R. J. Black, trustee, to Thomas P. Chambers, dated June 8th, 1882.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

227 *Trust Deed.*

Filed Dec. 3, 1901.

R. J. Black, Trustee,
to
Thos. P. Chambers.

Deed.

Filed 1st and Registered 8th January, 1883.

I, R. J. Black, clerk and master of the chancery court of Shelby county, under and by virtue of a deed in trust and consent paper filed in the cause of T. A. Nelson, Extr., vs. M. L. Trigg et al., made by Mrs. M. P. Smith, Fred R. Smith, Geo. F. Davidson and Mary E. David-

son, in which I am appointed a trustee to execute and enforce the provisions of said decree or trust deed, the same having been duly acknowledged by the maker- thereof, and the contingencies therein provided for having lessen (sic) to wit: the makers of the trust having failed to pay the money therein admitted to be due and secured.

Now therefore, I, the above named R. J. Black, as trustee aforesaid, and at the request of the beneficiary of said trust after having duly advertised the land therein conveyed and subject to said trust once each week for four successive weeks in the Weekly Ledger, a newspaper published in the city of Memphis, proceeded to sell the land described in said trust in separate tracts as provided for in said trust on Saturday, the 27th day of May, 1882, at the hour of 12 M. in front of the court house door in the city of Memphis, at which time the first tract of one hundred acres described as follows, to-wit: Being in Island 37 in the Mississippi river and in the county of Tipton and State of Tennessee, in the 11 surveyor's district, section 6, entered in the name of T. P. Hall. Beginning at the N. E. corner of entry No. 9 in the name of Jno. Trigg for 151 1-2 acres at a sycamore tree, running thence W. 40 poles to an elm and sycamore marked J. T.; thence south with his line 40 poles to a mulberry marked T. P. H.; thence west 160 poles to a mulberry; thence north 100 poles to a cottonwood on the bank of the Mississippi river; thence up the river 60 poles, E. 10 degrees, S. 81 poles, E.
228 20 degrees, S. 50 poles, E. 40 degrees, S. 20 poles to the beginning, which said tract of land was bid off by Thomas P. Chalmers for and at the sum of one (1) dollar per acre, which was the highest and best bid for said one hundred acres of land, which not being sufficient to discharge the said indebtedness, the second tract containing one hundred and fifty-one and one-half (151 1-2) acres was then offered for sale, said tract described as follows: Beginning at the N. E. corner of grant No. 3319 at a mulberry and sweet gum marked J. T. on the bank of Old river, running W. 151 poles to mulberry and cottonwood marked J. T.; thence N. 220 poles to an elm and sycamore marked J. T.; thence east 40 poles to a sycamore on the bank of old river; thence S. 48 degrees, E. 60 poles; thence with the river S. 25 degrees, E. 1711 poles to the beginning, and struck off to Thos. P. Chalmers for and at the sum of two (2) dollars per acre, which being the highest and best bid for the same he was declared the purchaser thereof, and there remaining a balance of the indebtedness still due and unpaid, the third tract was offered for sale, being described as follows, to wit: Beginning at the N. E. corner of entry No. 7 in the name of John Trigg on a sycamore marked J. T.; thence 1455 poles to a mulberry marked J. T.; thence N. 2211 poles to a cottonwood; thence E, 75 poles to a small gum and mulberry marked J. T. on the bank of old river; thence up the river S. 25 degrees, east to the beginning, containing 152 acres, more or less, which said tract of land was struck off to Thos. P. Chalmers for and at the sum of two (2) dollars per acre, which was the highest and best bid for the same. He was declared the purchaser thereof, which yet being insufficient to

pay the said debt the fourth tract containing 100 acres, more or less, and beginning at the N. W. corner of entry N. 8 for 152 acres in the name of John Trigg on a cottonwood; thence S. with the west line of said entry 100 poles to a sycamore marked J. T. &
229 N. P.; thence W. 160 poles to a box elder; thence N. 100 poles to an elm marked J. T.; thence east 160 to the beginning, containing 100 acres, for which said tract of land Thos. P. Chalmers bid the sum of two dollars per acre, which being declared the purchaser thereof, and there being still a balance due of the debt secured upon this land the 5th tract containing 37 acres was then offered, beginning at the head of Island 37 running N. 10 degrees, W. 60 poles to a sycamore marked J. T.; thence W. 90 poles to a hackberry marked J. T.; thence south 80 poles to a hackberry on McKentry's chute marked J. T.; thence up said chute E. 211 degrees, N. 95 poles to the beginning, for which said tract of land the sum of one (1) dollar per acre was bid by Thos. P. Chalmers, which being the highest and best bid for the same *be* was declared the purchaser thereof, and there being still a balance due the sixth tract of land containing 30 acres was then offered for sale, being described as follows: Beginning at the S. E. corner of occupant entry in the name of J. Barney's in two small cottonwoods marked J. B. Standing on the bank of McKentry's chute; thence north with Barney's line 68 poles to two persimmon trees; thence east 85 poles to a large cottonwood; thence S. 48 poles to a hackberry marked J. T. in said chute, S. 65 degrees, W. 90 poles to the beginning, and the sum of one dollar per acre being bid for the same by Thos. P. Chalmers, and it being highest, last and best bid he was declared the purchaser thereof, and the said Thos. P. Chalmers having paid the said sum, the purchase, to wit: one hundred dollars for the first lot offered, the sum of three hundred and three (303) dollars for the second and the sum of three hundred and four (304) dollars for the third and the sum of (200) two hundred dollars for the fourth and the sum of (37) thirty-seven dollars for the fifth the sum of thirty (30) dollars for the sixth, aggregating the sum of nine hundred and seventy-four (974) dollars for six tracts of land, aggregating five hundred and seventy and
230 one-half acres (570 1-2) of land more or less by crediting the said debt of one thousand dollars with the said sum of nine hundred and seventy-four dollars the amount of the purchase money bid for said six several tracts of land, wherefore the said R. J. Black, C. & M., as trustee in said trust, in pursuance of the authority vested in me therein, do hereby sell, alien and convey to Thos. P. Chalmers the foregoing and above described lands to him, his heirs and legal representatives forever, with all the right, title and interest vested in me by the said Mrs. M. P. Smith, Fred R. Smith and Mary E. Davidson and Geo. F. Davidson by their said trust deed referred to herein.

In testimony whereof I set my hand and seal this the 8th day of June, 1882.

R. J. BLACK,
C. & M. and Trustee.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Louis Kettman, deputy clerk of the said county, R. J. Black, C. & M., trustee, the within named bargainor, with whom I am personally — and who acknowledged that he executed the within instrument for the purposes therein contained. Witness my hand at office this 8th day of June, A. D. 1882.

LOUIS KETTMAN, *D. C.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan. 8th, 1883.

I, J. N. Harris, Register of said county, do certify that the within trust deed was filed in my office at 12:25 o'clock P. M. on the 1st day of January, 1883, and entered for registration in entry book C, page 88, and together with this and the above certificate is this day duly registered in Deed Book, pages 146-148.

J. N. HARRIS,
Register.

231 Copied from the entry of the original deed recorded in Deed Book 31 on pages 146, 147, 148 and 149 in the office of the Register of Tipton county, Tennessee, Oct. 26th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 31, page 146 et seq.

I. R. CALHOUN, *Register.*

22. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed in trust of Frederick R. Smith to Thomas P. Chalmers, dated February 15th, 1882, and to secure the payment of certain stated sums to Mrs. Martha P. Smith.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Trust Deed.

Filed Dec. 3, 1901.

Fred R. Smith
to
Thos. P. Chambers.

Trust Deed.

Filed 4th and Registered 5th April, 1882.

I, Frederick R. Smith, of the city of Memphis, Tennessee, for the consideration of one dollar in hand paid, receipt whereof is hereby acknowledged, and other good and valuable considerations hereinafter set forth, do hereby sell, alien and convey to Thomas P.
232 Chambers, trustee, the following described property, to wit:

Five head of horses and three head of mules now on my place on Island 37 in Tipton county, Tennessee, and my undivided one-half interest in the Love tract of land on Island 37, known as the "Two head place," and my undivided one-third (1/3) interest in the Trigg land, being the same sold by the late John Trigg to my father, the late Frederick R. Smith, and fully described and set out in the decree in the case of T. A. Nelson, Extr., vs. Mrs. M. L. Trigg et al., in the chancery court of Shelby county, in the petition of Mrs. M. P. Smith et al. in said cause; and to which reference is here made to him, the said Thos. P. Chalmers and his legal representatives forever. I covenant that I am lawfully seized and have a good right to convey, and that the same is unencumbered save that the Love place is chargeable with a balance of unpaid purchase money due W. E. Massey and wife and the Trigg land is chargeable with unpaid past due taxes for about 15 years, against none of which do I have warrant, but as to all other matters personal to myself and my heirs, I warrant and defend the title. But this deed is in trust for the following uses and purposes and none other. Whereas Mrs. M. P. Smith, my mother, has heretofore loaned me the rents of her place on Island 37 in order to establish me in business and for other purposes a sum of money amounting to the aggregate of nine hundred and ninety-five ($995) dollars, which said sum should have been paid at and before 1st day of January, 1882, and whereas I have been unable to repay the same, having lost it in my business, and being desirous of repaying the same and securing its payment, I

have this day executed to her my promissory note due 18 months after date, with interest from date, the said note bearing even date with this deed. I therefore make and execute this my deed in trust to the said Chalmers, as trustee, to secure the payment of the
233 same. Now, therefore should I pay the above described note at maturity, with the legally accrued interest thereon, then this deed to be void and the trustee shall reconvey at my expense the property herein conveyed to me. But should I fail to pay said note at maturity, then and in that event the said Chalmers, as trustee, shall at the request of *the* Martha P. Smith advertise the above described property once in each week for four successive weeks in some newspaper published in the city of Memphis, giving notice of time, place and terms of sale, and sell the same in front of the court house door, for cash, the personal property first, and then the real estate, one tract at a time, and to stop the sale where sufficient is sold to pay the debt, interest and costs—only selling the entire property in the event it becomes necessary, and after paying the expenses of making the sale, to pay off and discharge the debt herein secured, principal and interest, and the remainder, if any, to myself, my heirs or legal representatives.

In testimony whereof I have hereunto set my hand and seal this the 15th day of February 1882.

FRED R. SMITH. [SEAL.]

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, John J. Shea, deputy clerk of the County Court of said county, Fred R. Smith, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained. Witness my hand at office this 15th day of Feb., A. D. 1882.

[L. S.] JNO. J. SHEA,
Deputy Clerk.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE April 5, 1882.

234 I, J. N. Harris, Register of said county, do hereby certify that the within trust deed was filed in my office at 4:45 o'clock P. M. on the 4th day of April, 1882, and entered for registration in Entry Book C, page 66, and together with this and the above certificate is this day duly registered in Deed Book 30, pages 346, 347 and 348.

J. N. HARRIS, *Register.*

Copied from the entry of the original deed recorded in Deed Book 30, pages 346, 347 and 348 in the office of the Register of Tipton county, Tennessee. Nov. 2d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 30, page 346 et seq.

I. R. CALHOUN, *Register.*

23. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of Thomas P. Chambers to Mrs. Martha P. Smith, dated June 3d, 1882.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 6 Tracts.

Filed Dec. 3, 1901.

Thomas P. Chalmers
to
Mrs. M. P. Smith.

Deed.

Filed 1st and Registered 9th January, 1883.

235 I, Thos. P. Chalmers, of Little Rock, Arkansas, for the consideration of eight hundred and eighty-six dollars in hand paid, receipt hereof is hereby acknowledged, hereby sell and convey to Martha P. Smith, of the county of Tipton and State of Tennessee, all of the tracts of land lying and being in the Island 37 in the Mississippi river and in section 6, known as the "Trigg land," being the same recovered by the heirs of Frederick R. Smith, dec'd, in the case of T. A. Nelson, Extr., vs. Mrs. M. L. Trigg in the Chancery Court of Shelby county, being No. 775 R. D. in said court, and to the decree rendered therein reference is here made for description of a more particular character as well as the deed of R. J. Black, trustee, to myself, and of record in the recorder's office of Tipton county, Tenn. Now, therefore, for the consideration above, I hereby sell the above described land to the said Martha P. Smith, her heirs and legal representatives forever, and I bind myself, my heirs and legal representatives — defend the title against the lawful claims of any

who may claim under or through me, and also against any claim of the heirs of John Trigg or any of them.

In testimony whereof I hereunto set my hands and seal this the 3d day of June, 1882.

THOS. P. CHALMERS. [SEAL.]
H. D. CHALMERS.

STATE OF ARKANSAS,
County of Pulaski:

Be it remembered, that on this day came before me, the undersigned, a notary public within and for the county aforesaid duly commissioned and acting, Thos. P. Chalmers, to me well known as the grantor in the foregoing deed and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and on the same day also voluntarily appeared before me the said Mrs. H. D. Chambers, wife of the said Thos. P. Chambers, to me well known, and in the absence of her husband declared that she had, of her own free will, signed and sealed the re-
236 linquishment of dower in the foregoing deed for the purposes therein contained and set forth without compulsion or undue influence of her said husband. Witness my hand and seal as such Notary Public on this 11th day of Dec., 1882.

[L. S.] HENRY M. SCHAAD,
Notary Public.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan. 9th, 1883.

I, J. N. Harris, Register of said county, do certify that the within deed was filed in my office at 12:30 o'clock P. M. on the 1st day of January, 1883, and entered for registration in Entry Book C, page 88, and together with this and the above certificate is this day duly registered in Deed Book 31, page 149.

J. N. HARRIS,
Register.

Copied from the entry of the original recorded in Deed Book 31, pages 149, 150, in the office of the Register of Tipton county, Tennessee. Oct. 30th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 31, page 149 et seq.

I. R. CALHOUN,
Register.

24. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of Mrs. Martha P. Smith et al. to Mary E. Pillow, dated December 4th, 1874.
(The clerk will please here insert it.)

237 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 4 Tracts.

Filed Dec. 3, 1901.

Martha P. Smith et al.
to
Mary E. Pillow.

Deed 75 Acres.

Filed 11th and Registered 13th June, 1883.

STATE OF TENNESSEE,
Tipton County:

This indenture made on the 4th day of Dec. in the year one thousand eight hundred and seventy-four between Martha P. Smith, Mary E. Smith and Fred R. Smith, of the county of Tipton and State of Tennessee, of the first part Mary E. Pillow, of the county of Shelby and State of Tennessee, of the second part, witnesseth: That the parties of the first part for and in consideration of seventy-five acres, beginning at a stake on John V. Wise- south line 610 acres T. P. Hall thence south 100 poles to a box elder, thence 120 poles east, thence north 100 poles, thence west 120 poles to the beginning, containing 75 acres, having remised, released and quit claimed and by these presents to remise, release and quit claim unto the said party of the second part and to her heirs and assigns forever all that certain piece or parcel of land lying and being situated in Tipton County, Tenn., on Island No. 37, Mississippi river, 11th Surveyor's Dist., Range 9, Section 6, one tract containing 100 acres entered in the name of T. P. Hall, also one other tract containing 151½ acres by grant No. 3269, also one other tract containing 152*x*. Beginning at the N. E. corner of Entry No. 7, in the name of John Trigg, also 25 acres on the east end of 100 acre tract adjoining Entry No. 8 of 152 acres together with all and singular
238 the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion or

reversions, remainder and remainders, rents, issues and profits thereof and also all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever as well as in law as in equity of the parties of the first part of, in or to the above described premises and every part and parcel thereof with the appurtenances, to have and to hold all and singular the above mentioned and described premises together with the appurtenances, unto the party of the second part, her heirs and assigns forever.

MARTHA P. SMITH. [SEAL.]
MARY E. SMITH. [SEAL.]
F. R. SMITH. [SEAL.]

Signed, sealed and delivered in the presence of the undersigned witnesses:

E. W. MASSEY.
J. H. SMITH

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, James Reilly, Clerk of the County Court of Shelby County aforesaid, E. W. Massey and J. H. Smith subscribing witnesses of the within deed, who, being first sworn, deposed and said that they are acquainted with Martha P. Smith, Mary E. Smith and F. R. Smith, the bargainors, and that they acknowledged the same in their presence to be their act and deed and upon the day it bears date. Witness my hand at office this 7th day of Dec. 1874.

JAMES REILLY, *Clerk.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, June 14, 1883.

I, J. N. Harris, Register of said county, do certify that the within deed was filed in my office at 8:35 o'clock A. M. on the 11th day of June, 1883, and entered for registration in Entry Book C, page 104, and together with this and the above certificate is this
239 day duly registered in Deed Book 32, page 1.

J. N. HARRIS, *Register.*

Copied from the entry of the original deed recorded in Deed Book 32, pages 1 and 2, in the office of the Register of Tipton County, Tennessee, Oct. 24th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 32, page 1, et seq.

I. R. CALHOUN, *Register.*

25. A certified copy from the office of the Register of Tipton County, Tennessee, of the deed from Mary E. Pillow to Martha P. Smith, dated October 18th, 1883:

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY,
vs.
W. A. CISSNA.

Quit-claim Deed.

Filed Dec. 3, 1901.

Mary E. Pillow
to
Martha P. Smith.

Quit-claim Deed.

Filed 7th and registered 21st Jan'y, 1884.

This indenture of quit-claim entered into this 18th day of October, A. D. 1883, between Mary E. Pillow, widow, of the first part, and Martha P. Smith, widow, of the second part, witnesseth: That for and in consideration of two hundred and fifty dollars
240 cash, in hand paid by the said Martha P. Smith to the said Mary E. Pillow, the receipt of which is hereby acknowledged by the said Mary E. Pillow. The said Mary E. Pillow hereby bargains, sells, conveys, release- and quit-claims to the said Mary P. Smith and her heirs forever all her right, title and interest in and to a tract of land situated in the County of Tipton, State of Tennessee, on Island 37 in the Mississippi river, described particularly as follows: 11th Surveyor's District, Range 9, Section 6, one tract containing 100 acres entered in the name of T. P. Hall, also one other tract containing 151½ acres by grant No. 3269, also one other tract containing 152, beginning at the N. E. corner of Entry No. 7 in the name of John Trigg, also 25 acres on the east end of 100 acre tract adjoining entry No. 8 of 152 acres, being the same conveyed by deed of the said Martha P. Smith, Mary E. Smith and Fred R. Smith to the said Mary E. Pillow, dated December 4th, 1874, and recorded in the office of the Register of the said County of Tipton in Book 32, page 1. To have and to hold the said tract of land to the said Martha P. Smith and her heirs in fee free from the claims of the said Mary E. Pillow and all persons claiming by, through or under her. This deed is only intended as a deed of release and quit-claim with no warranty of title what-

ever. In testimony whereof, the said Mary E. Pillow has hereto set her hand and seal the date above written.

MARY E. PILLOW. [SEAL.]

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, Lee Thornton, a notary public in and for the State and county aforesaid, duly commissioned, qualified and acting, Mary E. Pillow, the within named bargainor, with whom I am personally acquainted and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal of office this 18th day of Octo-
241 ber, 1883.

[L. S.] LEE THORNTON,
Notary Public, Shelby Co., Tenn.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, January 21, 1884.

I, J. N. Harris, Register of said County, do certify that the within deed was filed in my office at 10:56 o'clock A. M. on the 7th day of January, 1884, and entered for registration in Entry Book C, page 121, and together with this and the above certificate is this day duly registered in Deed Book 32, page 486.

J. N. HARRIS, *Register.*

Copied from the entry of the original deed recorded in Deed Book 32 on pages 486 and 487 in the office of the Register of Tipton County, Tennessee, Oct. 24, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 32, page 486, et seq.

26. A certified copy from the office of the Register of the Land Office for West Tennessee, of grant No. 3283 of 640 acres of land by the State of Tennessee to Nathaniel Potter, and dated November 12th, 1837;

(The Clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

242 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 3283. 640 *acres, Tipton County.*

Filed Dec. 3, 1901.

No. 3283.

[L. L.]

The State of Tennessee to all to whom these presents shall come, Greeting:

Know ye, That by virtue of entry No. 26, dated Tipton County, 5th day of January, 1837, in the name of Nathaniel Potter for 640 acres, founded on Commissioner of West Tennessee Warrant No. 3384 for 640 acres to the heirs of James E. Harra there is granted by the said State of Tennessee, unto Nathaniel Potter, assignee of Wesley Nixon, a certain tract or parcel of land containing 640 acres, lying and being in the County of Tipton and State of Tennessee, Range 9, Section 6, on Island No. 37 in the Mississippi river. Beginning at the southwest corner of Entry No. 8 for 152 acres in the name of John Trigg, on a mulberry marked J. T., running thence north with his line 120 poles to a sycamore marked J. T. and N, P., the southeast corner of Trigg's 100 acre entry; thence west with the same entry 160 poles to a box elder; thence north 100 poles to an elm marked J. T.; then west 340 poles to a box elder marked N. P.; then south 220 poles to a stake on the north boundary of J. Doan's occupant; then east with his line to his N. E. corner on a sassafras; then east 350 poles to the beginning—survey bearing date 14th October, 1837—with hereditaments and appurtenances, To have and to hold the said tract or parcel of land, with its appurtenances to the said Nathaniel Potter and his heirs forever.

In witness whereof, Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the State to be affixed, at Nashville, on the 12th day of November in the year of our Lord one thousand eight hundred and thirty-seven, and of the Independence of the United States the 61st.

243 By the Governor: NEWTON CANNON.
LUKE LEA, *Secretary of State.*

Endorsed: Grant No. 3283, 640 acres, Tipton County.

I certify that this is a true copy of grant No. 3283 issued by the State of Tennessee to Nathaniel Potter as the same appears of record in my office in Book No. 4, page 550.

Witness my hand and private seal (there being no seal of office) at office in Jackson, Tennessee, this 11th Oct., 1901.

JNO. W. GATES, [L. L.]
Register of the Land Office for West Tennessee.

The defendant objected to this copy of this grant because it did not contain a copy of the great seal of the State of Tennessee, and was therefore void. The court overruled this objection, holding that the scroll in the upper left-hand corner of the grant denoted the seal; to which ruling defendant excepted.

27. A certified copy from the office of the Register of Tipton County, Tennessee, of the deed of Samuel B. Marshall, United States Marshal, to Lloyd B. Addison, dated June 2d, 1840:
(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed of U. S. Marshal.

Filed Dec. 3, 1901.

Samuel B. Marshall,
to
Lloyd D. Addison.

Deed.

Registered 4th December, 1840.

244 This indenture made the second day of June in the year 1840, between Samuel B. Marshall, Marshal of the United States for the Middle District of Tennessee, of the one part, and Lloyd D. Anderson of the other part; Whereas, in the Circuit Court of the United States for the District of West Tennessee, at Nashville, on the 18th day of September, 1837, the said Lloyd D. Anderson recovered against Nathaniel Potter, John Postlethwaite and Thomas Moncrief, fourteen thousand five hundred and ninety-five 30-100 dollars for debt and damages and forty-six 15-100 dollars for costs of suit. And, whereas, afterwards, to-wit, on the 4th day on January, 1839, there was issued on said judgment a pluries writ of Fieri Facias directed to the Marshal of the United States for the District of West Tennessee, whereby he was commanded that of the goods and chattels, lands and tenements of the said Potter, Postlethwaite and

Moncrief in his district he should cause to be made the debts, damages and costs aforesaid and have the same to render at &c. on the first Monday in March next thereafter; which said writ at Fieri Facias came to the hands of the said Samuel B. Marshall, Marshal as aforesaid, on the same day of the issuance thereof, and was by him on the 7th day of January, 1839, levied upon all the right, title, claim and interest that John Postlethwaite had to lots 9 and 10 in the town of Randolph, Tennessee, as per the plan of said town. And, whereas, the said Samuel B. Marshall, Marshal as aforesaid, after having given forty days' notice of the time and place of sale by advertisement in the "Union," a newspaper published in the town of Nashville, and after having given twenty days' written notice thereof to the tenants in possession did on the 4th day of March, 1839, at the Court House in Nashville expose to the public sale to the highest bidder for cash the lots of ground levied on as aforesaid, when and where the same was fairly struck down to Lloyd D. Addison,
245 the plaintiff, at and for the sum of three thousand dollars, he being the highest, best and last bidder therefor. And, whereas, afterwards, towit, on the 6th day of April, 1840, there was issued on said judgment an alias pluries writ of Fieri Facias directed to the Marshal of the United States for the District of West Tennessee, whereby he was commanded that of the goods and chattels, lands and tenements of the said defendants he should cause to be made the balance of the debt, damages and costs aforesaid and have the same ready to render, &c., on the first Monday in September next thereafter, which said writ of Fieri Facias came to the hands of the said Samuel B. Marshall, Marshal as aforesaid, on the same day of the issuance thereof, and was by him on the 16th day of April, 1840, levied upon Entry 69 founded on part of Warrant No. 2662 for 4,000 acres issued to William Prue and Potter's interest, as assignee of Robert Young, including part of said Young's occupant containing one hundred and fifty acres in Section 7, Range 6, beginning 10 poles north and 34 degrees east of J. Porterfield's northeast corner of his 5,000 acre entry, running thence south 160 poles to a white oak marked R. Y., thence east 150 poles to a hickory marked N. P., thence north 160 poles to a white oak marked N. P., thence west 150 poles to the beginning. Also 388 acres founded on Entry No. 21 and Warrant No. 3501, Range 617, Section 7, beginning at the northeast corner of Terrill's 1,000 acre entry on a poplar marked J. Y., running thence west with his line 180 poles to an elm, Sampson Fread's southeast corner, thence north with his line 200 poles to his northeast corner, thence east 40 poles to a stake on J. White's extension line, thence south with said line 100 poles to his southwest corner, thence east with said extension and said J. Hunt's occupancy entry No. 227,228 poles to the east corner of Hunt's occupant on a hickory, thence north 100 poles to the southwest corner of Cannon's entry No. 1319, thence east with his line 38 poles to his northwest corner of occupant entry No. 524 in the name of
246 J. H. Beate, thence south 140 poles to the southwest corner on a dogwood, thence east 40 poles to a white oak marked J. & Y., thence south with Stewart's line 150 poles to a gum and dogwood

on Cannon's line, thence with Stokes' line 127 poles to an elm on Terrill's line, thence north 105 poles to the beginning. Also, on 40 acres founded on entry No. 77 and warrant No. 2835, Range 6, and Section 7, beginning 10 poles north J. Porterfield's northeast corner of a 5,000 acre grant, thence east 40 poles to a stake and white oak, the northwest corner of entry No. 69 for 150 acres in the name of said Potter, thence south with his line 160 poles to his southwest corner on a white oak marked R. Y., thence west 40 poles to a stake on Porterfield's line, thence north 160 poles to the beginning. Also on 320 acres founded upon entry No. 1700 and warrant No. 3330 issued to Daniel Wheaton, Range 7, Section 6, west, including said Potter's occupant claim as assignee of B. Hughes and part of his claim as assignee of H. Townsend, beginning at the southeast corner of occupant No. 360 for 200 acres in the name of R. M. Wynne at a hickory on the west boundary of a 5,000 acre tract in the name of J. Porterfield, thence west 160 poles to a white oak marked R. M. W., Wynne's southwest corner, thence north with his line 620 poles to a sweet gum marked R. M. W., his corner on the Munford line, thence south 13 degrees west with said line to the northwest corner of occupant No. 96, in the name of H. Townsend on a black oak marked H. T., thence south 120 poles to a black gum marked S. R., thence east 127 poles to a white oak on the west boundary of G. Daugherty's 290 acre entry, thence north with his line 280 poles to his northwest corner, thence east 190 poles to his northeast corner on the Porterfield line, thence north with his line 100 poles
247 to the beginning. Also on 640 acres founded on entry No. 76 and warrant No. 3384 issued to the heirs of James O'Hara, Range 9, Section 6, on Island 37, beginning at the southwest corner of entry No. 8, for 152 acres in the name of J. Trigg at a mulberry marked J. T., thence north with his line 120 poles to a sycamore marked J. T. & N. P., the southeast corner of Trigg's 100 acre entry, thence west with said entry 160 poles to a box elder, thence north 100 poles to an elm marked J. T., thence west 340 poles to a box elder marked N. P., thence south 320 poles to a stake on the north boundary of J. Doan's occupant, thence east with his line to his northeaster- corner on a sassafras, thence 350 poles to the beginning.

Also on 205 acres as per deed from John D. Thomas to Nathaniel Potter, beginning at the northwest corner of lot sold and conveyed to John L. Brown by Samuel Dickens, agent for the State Bank of North Carolina, and running east with his line 205 poles to H. Moore's line; thence south with his line to the beginning, all of which several tracts of land are situate, lying and being in Tipton county, Tennessee, and were levied upon as the property of Nathaniel Potter, and whereas the said Samuel B. Marshall, marshal as aforesaid, after having given forty days' notice of the time and place of sale, by advertisement in the "Union," a newspaper printed in the town of Nashville, and after having also given 20 days' written notice thereof to the tenants in possession did, on the first day of June in the year 1840, at the court house in Nashville, expose to sale to the highest bidder for cash, the said several tracts or parcels of land

levied on as aforesaid, when and where the same were fairly struck down to Lloyd D. Addison; the plaintiff, at and for the sum of one dollar per acre, amounting in all to the sum of seventeen hundred and forty-three dollars, he being the highest, last and best bidder therefor, at that price, all of which by reference to the said
248 judgment and the several writs of fieri facias issued thereon, and the endorsements thereon made remaining of record in said court will more fully and at large appear.

Now, therefore, this indenture witnesseth, that the said Samuel B. Marshall, marshal as aforesaid, for and in consideration of the premises and of the said sums of three thousand dollars, and of seventeen hundred and forty-three dollars bid by the said Lloyd D. Addison, as aforesaid, and credited on said judgment and writs of fierci facias, hath given, granted, bargained and sold, and by these presents — give, grant, bargain and sell, alien, release, convey and confirm unto the said Lloyd D. Addison, his heirs and assigns the several town lots and tracts or parcels of land hereinbefore mentioned and described. To have and to hold the same together with all and singular the improvements, rights, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining, unto the said D. Addison, his heirs and assigns forever, in as full and ample manner as the said Samuel B. Marshall, marshal as aforesaid, is enabled by virtue of the premises, and of his said office to convey the same. And the said Samuel B. Marshall, all for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said Lloyd D. Addison, his heirs and assigns, that the title to the above described property he will warrant and forever defend against the title, claim and demand of all and every person or persons whomsoever claiming title to the same by, thro' or under him, the said Samuel B. Marshall, marshal as aforesaid, but not against the title, claim or demand of any other person or persons whomsoever.

In testimony whereof the said Samuel B. Marshall, marshal as aforesaid, hath hereto subscribed his name and affixed his seal, the day and year first aforesaid.

[SEAL.] S. B. MARSHALL,
Marshal of United States for Middle District of Tennessee.

249 STATE OF TENNESSEE,
Davidson County:

Personally appeared before me, Smith Criddle, clerk of the county court of said county, the within named Samuel B. Marshall, marshal of the U. S. States for the Middle District of Tennessee, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within deed for the purpose therein contained. Witness my hand at office, this 3d day of June, 1840.

SMITH CRIDDLE,
By FELIX H. HARRIS, *Deputy.*

Copied from the entry of the original deed recorded in Book E, page 413, 414 and 415, in the office of the Register of Tipton county, Tennessee.

Nov. 9, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of Tipton County, do hereby certify that the above and foregoing is true and correct copy of this instrument now of record in my office in Deed Book E, page 413.

I. R. CALHOUN, *Register.*

28. A certified copy from the office of the register of Tipton county, Tennessee, of the deed of Lloyd B. Addison to Samuel J. Hays, dated January 27th, 1845.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 640 *Acres.*

Filed Dec. 3, 1901.

250 L. D. Addison
to
Samuel J. Hays.

Deed 640 Acres.

Registered 3d February, 1845.

This indenture made and entered into this the 27th day of January, 1845, between Lloyd D. Addison, of the city of New Orleans, and state of Louisiana, of the one part and Sam'l J. Hays, of the county of Madison, and state of Tennessee, of the other part. Witnesseth: That the said Lloyd D. Addison, for and in consideration of the sum of one thousand and sixty dollars, the receipt whereof is hereby acknowledged, hath bargained, sold, aliened and conveyed unto Sam'l J. Hays, his heirs and assigns, forever, a certain tract or parcel of land situate, lying and being in the county of Tipton, on

an island in the Mississippi river known as Island No. 37, containing six hundred and forty acres, being the same entered in the name of Nathaniel Potter, by equity No. 26, in range 9, section 6, and bounded as follows: Beginning at the southwest corner of entry No. 8, for 152 acres, in the name of John Trigg, at a mulberry marked J. T.; thence north with his line 120 poles to a sycamore marked J. T. and N. P., the southeast corner of John Trigg 100 acres. Then with — to a corner of same 100 acres in the name of John Trigg; thence north with a line of the same to its corner in the line of 610 acres in the name of Thomas P. Hall; thence with the line of said 610 acres to its corner; thence with said line to its corner on the line of an occupant, now a grant, in the name of Sam'l. Hays; thence with that line and the line of 200 acres to the beginning. The above described tract having been sold by said Potter to Byrne and others, but no deed being made nor bond rec'd, the same was sold in 1840 by the marshal of West Tennessee, under an execution issued from the Court of the United States at Nashville, in my favor against said Potter, the title derived from such sale being the one now
251 conveyed, Byrne and others right only reserved if they have any; the marshal's deed in my favor being now on record in Tipton county. To have and to hold the aforesaid tract of land and bargained premises with all and singular the right, title, hereditaments and appurtenances of the same in any wise appertaining to the only use and behoof of him, the said Sam'l J. Hays, his heirs, &c., forever. And the said Lloyd D. Addison, for himself, his heirs, executors or assigns, doth convenant and agree with the said Hays that the above mentioned land and bargained premises he will warrant and defend from all lawful claims whatever.

In testimony whereof the said Lloyd D. Addison has hereunto set his hand and seal the day and year above written.

[SEAL.] L. D. ADDISON.

STATE OF TENNESSEE,
Tipton County:

Personally appeared before me, John W. Fuller, clerk of the county court of said county, L. D. Addison, the within named bargainor, with whom I am personally acquainted, who acknowledged the execution of the within deed for the purposes therein contained. Witness my hand at office, January 24th, 1845.

JOHN W. FULLER, *Clerk.*
By JAMES ROSE, *D. Cl'k.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, 3d February, 1845.

I, James Overall, register of said county, do hereby certify that the within deed was filed with me this day at 3 1-2 o'clock p. m., and noted in Entry Book A, page 18, for registration, and that the

same was then duly recorded in my office, in Book G, pages 82 and 83.

JAMES OVERALL,
Register.

252 Copied from the entry of the original deed recorded in Book G, on pages 82 and 83, in the office of the register of Tipton county.

Oct. 19th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
*Tipton County*s

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book G, page 82, et seq.

I. R. CALHOUN,
Register.

29. A certified copy from the office of the Register of the Land Office of West Tennessee of grant Number 4498 of two hundred acres of land by the state of Tennessee to Samuel J. Hays, dated Sept. 2d, 1840.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 4498, 200 *Acres.*

Filed Dec. 3, 1901.

No. 4498.

The State of Tennessee, to all to whom these presents shall come—Greeting:

Know ye, that by virtue of entry No. 109 in Tipton county, dated 17th of July, 1840, made in the name of Ransom H. Byrns for 200 acres, founded on part of C. W. T. warrant No. 3637, issued to Thos. King for 5,000 acres, by survey bearing date 20th of July, 1840. There is granted by the said state of Tennessee unto Samuel

253 J. Hays, assignee originally of said King a certain tract or parcel of land containing 200 acres, situate, lying and being in the county of Tipton, in range 9, and section 6, in the 11th district, on an island in the Mississippi river, known as Island No. 37. Beginning 280 poles west from the head of said island on a box

elder marked T. B., running south 110 poles to a cottonwood on McKenzie's chute; thence down said chute south 70 degrees west 240 poles to a stake on the margin of said chute; thence north 160 poles to an elm marked T. B., thence east 230 poles to the beginning, with the hereditaments and appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances to the said S. J. Hays, and his heirs forever.

It witness whereof, Jas. K. Polk, Governor of the State of Tennessee, hath hereunto set his hand and cause the great seal of the state to be affixed at Nashville, on the second of September, in the year of our Lord, one thousand eight hundred and 40, and of the Independence of the United States the 65th.

By the Governor:

J. K. POLK.

JOHN S. YOUNG,
Secretary of State.

Endorsed: Grant No. 4498. 200 acres. Tipton County.

I certify that this is a true copy of grant No. 4498, as appears of record in my office in Book No. 5, page 857.

Witness my hand and private seal (there being no seal of office) at office, in Jackson, Tenn., Oct. 11th, 1901.

[L. S.] JNO. W. GATES,
Register Land Office for West Tennessee.

30. A certified copy from the office of the register of Tipton county, Tennessee, of the deed of Samuel J. Hays to Robert I. Chester, dated January 8th, 1849.

(The clerk will here please insert it.)

254 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed.

Filed Dec. 3, 1901.

Samuel J. Hays
to
Robert I. Chester.

Deed.

Registered 4th June, 1851.

This indenture made and entered into this eight day of January, 1849, between Sam'l J. Hays, of the County of Madison and state

of Tennessee, of the one part and Robert I. Chester, on the county and state aforesaid, of the other part. Witnesseth. That the said Samuel J. Hays for and in consideration of the sum of ten dollars in hand to him paid, receipt whereof is hereby acknowledged, has sold and conveyed and by these presents does bargain, sell, convey, confirm and infeoff unto Robert I. Chester, his heirs and assigns, the following described tracts or parcels of land situated, lying and being in the county of Tipton and state of Tennessee.

1. One tract containing six hundred and forty (640) acres in range 9, section 6, on Island No. 37, entered in the name of N. Potter, by Entry No. 26, conveyed to the said Samuel J. Hays, by Lloyd D. Addison, by deed bearing date 27th day of January, 1845, and recorded in the Register's office in Tipton county, for a more particular description of said tract reference is made to said deed.

2. One tract containing two hundred and four (204) acres in range 9, section 6, on Island No. 37, granted by the state of Tennessee to the said Sam'l J. Hays by Grant No. 4499, for a more particular description of said tract reference is made to said grant.

255 3. One tract containing two hundred (200) acres on range 9, section 6, on Island No. 37, granted by the state of Tennessee to the said Sam'l J. Hays by Grant No. 4498, for a more particular description of said tract reference is made to said grant.

4. The one-half or an equal undivided moiety of one other tract containing eight hundred (800) acres, on the south side and bounded by Big Hatchie river, near the mouth of said river, entered in the name of Charles G. Fisher and Sam'l J. Hays, and granted to them by the state of Tennessee by grant No. 5155, for a more particular description of said tract reference is made to said grant.

5. Also one-half or an equal undivided moiety of one other tract containing one hundred and thirty-eight (138) acres, on Island No. 35, entered in the name of Charles G. Fisher and Sam'l J. Hays, and granted to them by the state of Tennessee by grant No. 5154, for a more full and particular description of said tract reference is made to said grant.

To have and to hold the above described lands with all and singular the rights, profits, hereditaments and appurtenances to the said Robert I. Chester, his heirs and assigns forever, and the said Sam'l J. Hays doth hereby covenant and bind himself, his — and assigns, that he will defend the same from all claim or claims, by, through, or under him or any person claiming the same under him, but no further. In testimony whereof the said Samuel J. Hays has hereunto set his hand and seal this day and year first above written. In presence of

[SEAL.] S. J. HAYS.

STATE OF TENNESSEE,
Madison County:

Personally appeared before me, Thomas W. Gamewell, clerk of the county court of said county, Sam'l J. Hays, the bargainor, with whom I am personally acquainted, and who acknowledged that he executed the foregoing deed for the purposes therein contained.
Witness my hand, at office this 8th day of Jan'y, 1851.

THOS. W. GAMEWELL, *Clerk.*

256 STATE OF TENNESSEE,
Tipton County:

I, Jacob Sullivan, Register of said county, do certify that the foregoing deed was duly filed in my office, this day, in Book I, pages 276 and 277.
Witness my hand at office, this 4" day of June, 1851.

J. SULLIVAN, *Register.*

Copied from the entry of the original deed, recorded in Deed Book I, pages 276 and 277, in the office of the Register of Tipton county, Tennessee.
November 2d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book I, page 276, et seq.

I. R. CALHOUN, *Register.*

31. A certified copy from the office of the Register of the Land Office for West Tennessee, of Grant No. 3284, of one hundred and thirty-five acres of land, by the state of Tennessee to J. S. Lyons, J. G. Chalmers, W. H. Long and R. H. Byrns, dated Nov. 13th, 1837.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY

vs.

W. A. CISSNA.

257 *Grant No.* 3284, 135 *Acres.*

Filed Dec. 3, 1901.

No. 3284.

[L. S.]

The State of Tennessee to all to whom these presents shall come, Greeting:

Know ye, that by virtue of entry in Tipton county, No. 35, dated 13th day of Feb., 1837, in the name of James S. Lyon, John G. Chalmers, Wm. H. Long and Ransom H. Byrns, for 135 acres, founded on certificate warrant No. 3547 issued to William W. Woodfork, on the 18th day of Nov., 1836, for 135 acres. There is granted by the said state of Tennessee, unto Jas. S. Lyon, John G. Chalmers, William S. Long and Ransom H. Byrns, assignee of William W. Woodfork, a certain tract or parcel of land containing 135 acres by survey, bearing date the 13th day of October, 1837, situated, lying and being in the county of Tipton and state of Tennessee, range 9, and section 6, on Island No. 37, in the Mississippi river. Beginning at the lower or S. W. corner of Entry No. 7, for 37 acres in the name of John Trigg, at a hackberry marked J. T., running thence down McKenzie's chute west 25 degrees south 100 poles to the upper corner of Trigg's 30 acre entry on a hackberry marked J. T., then north with his line 50 poles to a large cottonwood; thence west 87 poles to two persimmons on the Barring's line; then north with his line 45 poles to his corner on a box elder; then west with his north line 230 poles to an elm on J. Doane's line; then north 45 poles to a cypress, his N. E. corner, then east with N. Potter's 640 acre entry 400 poles to a hackberry marked J. T.; then south 8 poles to the beginning, with the hereditaments and appurtenances.

To have and to hold the said tract or parcel of land, with his appurtenances to the said J. S. Lyon, J. G. Chalmers, W. H. Long and R. H. Byrns and their heirs forever. It witness whereof Newton Cannon, Governor of the State of Tennessee, hath hereunto set his hand and caused the Great Seal of the State to be affixed, at
258 Nashville, on the 13th day of November in the year of our Lord one thousand eight hundred and 37, and of the Independence of the United States the *one hundred and* 61st.

By the Governor:

NEWTON CANNON.

LUKE LEA,
Secretary of State.

Endorsed: Grant No. 3284. 135 acres. Tipton County.

I certify that this is a true copy of grant No. 3284 issued by the State of Tennessee to Jas. G. Lyon and others, as the same appears of record in my office in Book No. 4, page 551.

Witness my hand and private seal (there being no seal of office), at office in Jackson, Tenn., this 11th day of Oct., 1901.

JNO. W. GATES, [L. *l.*]
Register of the Land Office for West. Tennessee.

Defendant objected to this copy of the grant for the reason that it did not contain an impression of the Great Seal of the State of Tennessee, and was, therefore, void. The court overruled this objection, holding that the scroll in the upper left hand corner denoted the seal; to which ruling of the court the defendant excepted and exceptions noted.

32. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of Ransom H. Byrns to Robert I. Chester, dated March 17th, 1848.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

259 *Deed 1-3 of 409 acres.*

Filed Dec. 3, 1901.

Ransom H. Byrn,
to
Rob. I. Chester.

Deed 1-3 of 409 acres.

Registered August 22d, 1848.

This indenture made and entered into this 17th day of March, 1848, between Ransom H. Byrn of the county of Tunica and State of Mississippi, of the one part, and Rob. I. Chester, of the county of Madison and State of Tennessee, of the other part, witnesseth:

That the said R. H. Byrn for and in consideration of the sum of one thousand dollars in hand paid to the said R. H. Byrn, the receipt whereof is hereby acknowledged, has this day bargained, sold and conveyed and doth hereby bargain, sell, alien, convey and confirm unto the said Rob. I. Chester, his heirs and assigns the following described tracts or parcels of land, to wit: My undivided inter-

est, being the one-third, of a tract of two hundred and seventy-four acres. The whole tract bounded as follows: Beginning at a corner of entry in the name of C. I. Love for 172 acres on the bank of the old channel of the Mississippi river, running thence south to a corner, then west to the old channel, then up the old channel with its meanders to the beginning.

And my undivided interest, being one-third; in a tract of one hundred and thrity-five acres; the whole tract bounded as follows: Beginning at a corner of the same on the south boundary line of a 640 acres in the name of N. Potter, running east to a corner of 37 acres entered in the name of John Trigg; thence south to a corner on the bank of McKinsey's chute; then down the same as it meanders to a corner of an entry for 30 acres in the name of John Trigg; then north to a corner of the same; then west with the same to a corner on the east line of an occupant in the name of
260 Barney; then north with the same to its corner; then west with the north boundary of the same to its corner; then north to the beginning. Both tracts situated, lying and being on an Island in the Mississippi river known as Island No. 37, and both tracts granted by the State of Tennessee to the said Byrn and others with all and singular the rights, hereditaments and appurtenances to the same belonging or in any wise appertaining.

To have and to hold to the said Rob. I. Chester the said interest in said lands, &c., and the said R. H. Byrn for himself, his heirs, administrators or executors, doth hereby warrant the right and title to the same to the said Chester from all lawful claim or claims whatsoever.

In witness whereof the said R. H. Byrn has hereunto set his hand and seal, this day and year above written.

R. H. BYRN. [SEAL.]

In presence of
BYRD HILL.
C. D. McLEAN.

STATE OF TENNESSEE,
Shelby County, ss:

Personally appeared before me, Wm. L. Dewoody, Clerk of the County Court of said county, Byrd Hill and Chas. D. McLean, subscribing witnesses to the within named deed, who, being first sworn, depose that they are acquainted with R. H. Byrn, the bargainor therein named, and that he acknowledged the execution of the same in their presence on the 5th day of July, 1848.

Witness my hand at office July 29th, 1848.

W. L. DEWOODY, *Clk.*
By JAS. ROSE, *Dep. Clk.*

261 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, August 22d, 1848.

I, Jacob Sullivan, Register of said county, do certify that this deed was this day filed with me and noted in Entry B. A, page 38, at 9 o'clock A. M., and that the same and certificates are duly registered in my office in Book H, page 165.

J. SULLIVAN, *Register.*

Copied from the entry of the original deed recorded in Book H, page 165 in the office of the Register of Tipton county, Tennessee. Nov. 14th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County.

RECORDER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book H, page 165.

I. R. CALHOUN, *Register.*

33. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of William H. Long to Robert I. Chester, dated June 7th, 1847.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY,
vs.
W. A. CISSNA.

Deed 1-3 *of* 409 *acres.*

Filed Dec. 3, 1901.

William H. Long
to
262 Robt. I. Chester.

Deed 1-3 of 409 acres.

Registered August 22d, 1848.

I, William H. Long, have this day bargained and sold and do hereby transfer and convey to Rob I. Chester and his heirs forever

for the consideration of three hundred dollars to me paid, the following tracts of land in the State of Tennessee, Tipton county, on an island in the Mississippi river known as Island No. 37, in range nine and section six. One tract of two hundred and seventy-four acres, beginning at the lower corner of entry No. 20 for 172 acres in the name of Charles I. Love, on a cottonwood, running thence down the river south 56 degrees, west 80 poles, south 30 degrees, west 360 poles to a cottonwood on the bank of the Mississippi river; then east 240 poles to a stake; then north 362 poles to the beginning. My undivided interest, being by estimation the one-third of the above described tract, be the same more or less. Also one tract containing one hundred and thirty-five acres, beginning at the lower or southwest corner of entry No. 7 for 37 acres in the name of John Trigg, running then down McKensey's chute west 25 degrees, south 100 poles to the upper corner of 30 acres in the name of John Trigg; then north with this line 50 poles to a large cottonwood; then west 84 poles to 2 persimmons on Barney's line; then north with his line 45 poles to his corner; then west with his north line 235 poles to an elm on Jo Dones' line; then north 45 poles to a sassafras, his N. E. corner; then east with N. Potter 640 acre tract 400 poles to a hackberry marked J. T.; then south 80 poles to the beginning. My undivided interest, being by estimation one-third of the above described tract, be the same more or less. To have and to hold the same to the said Robt. I. Chester, his heirs and assigns forever. I do covenant with the said Rob. I. Chester that I am lawfully
263 seized of said land, have a good right to convey it, and that the same is unencumbered. I do further covenant and bind myself, my heirs and representatives to warrant and forever defend the title to the said land and every part thereof to the said Rob. I. Chester, his heirs and assigns against the lawful claims of all persons whatever.

In testimony whereof, I have hereunto set my hand and seal this 7th day of June, 1847.

WM. H. LONG, [SEAL.]

Executed and delivered in presence of:
Test:
W. W. McCONY.

STATE OF TENNESSEE,
Madison County:

Personally appeared before me, Thomas W. Gamewell, Clerk od the County Court of said county, Wm. H. Long, the foregoing bargainor, with whom I am personally acquainted and who acknowledged that he executed the foregoing deed for the purposes therein contained.

Witness my hand at office his 10th day of July, 1848.

THOS. W. GAMEWELL, *Clerk.*

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, August 22d, 1848.

I, Jacob Sullivan, Register of said county, hereby certify that the foregoing deed was this day at 9 o'clock A. M. filed with me and noted for registration in Entry Book A, page 38, and that the same and certificates were duly registered in my office in Book H, page 164.

J. SULLIVAN, *Register.*

Copied from the entry of the original deed recorded in Book H, page 164, in the office of the Register of Tipton county, Tennessee. Nov. 13th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

264 I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book H, page 164.

I. R. CALHOUN, *Register.*

34. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of Robert I. Chester to Mrs. Martha P. Smith, dated February 26th, 1869.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed.

Filed Dec. 3, 1902.

Robert I. Chester
to
Mrs. Martha P. Smith.

Registered March 16th, 1869.

This indenture made this twenty-sixth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, between Rob't I. Chester, of the county of Madison and State of Ten-

nessee, of the one part, and Mrs. Martha P. Smith, of the county of Tipton and State of Tennessee, of the other part, witnesseth: That the said Rob't I. Chester for and in consideration of three thousand dollars to him in hand paid by the said Mrs. Martha P. Smith, the receipt whereof is hereby acknowledged, hath given, granted, bargained, aliened, conveyed and confirmed, and by these presents doth give, grant, bargain, sell, alien and confirm unto the said Mrs. Martha P. Smith, her heirs and assigns forever, a certain tract
265 or parcel of lands situated, lying and being in the county — Tipton, State of Tennessee, on what is known as Island No. 37, butted and bounded as follows, viz.: Beginning at the N. E. or upper corner of 204½ acres in the name of R. H. Byrnes, it being a corner of 1,010 acres, half of which has been heretofore conveyed to L. Speck, running from thence north with the line of the same to the N. E. corner of said Speck in Potter's 640 acre north boundary line and in the south boundary line of 610 acres in the name of T. P. Hall; then east with the line of the same to a corner of 100 acres in the name of John Trigg; thence to a corner of said 100 acres; then S. E. corner of said 100 acres in the west boundary line of 152 acres in the name of John Trigg and in the east boundary line of N. Potter's 640 acre tract, of which this conveyance is a part; then south with the west boundary of the said 162 acres to the bank of the Mississipppi river; then down said river as it meanders to the east boundary or upper line of the said 204½ acres; then north with east boundary lines of the said 204½ acres to the beginning; containing by estimation 500 acres, be the same more or less.

To have and to hold the aforesaid land with all and singular the rights, profits, emoluments, hereditaments and appurtenances of, in and to the same belonging, or in anywise appertaining to the only proper use and behoof of her, the said Mrs. Martha P. Smith, her heirs and assigns forever. And the said Rob't I. Chester for himself, heirs, ex'tors and adm'rs, doth covenant and agree to and with said Mrs. Martha P. Smith, her heirs or assigns, that he lawfully seized in fee of the aforesaid granted premises; that the same are free from all encumbrances; that he had a good right to sell and convey the same to Mrs. Martha P. Smith as aforesaid; and that the before granted land and premises he will warrant and forever de-
266 fend against the right, title, interest or claim of all and every person whomsoever.

In witness whereof, the said Rob't I. Chester has hereunto set his hand and affixed his seal the day and year above written.

ROB'T I. CHESTER. [SEAL.]

STATE OF TENNESSEE,
Madison County:

Personally appeared before me, P. C. Cowat, Clerk of the County Court of said county, the within named bargainor, Rob't I. Chester, with whom I am personally acquainted, and acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand at office, this 7th day of March, 1869.

P. C. COWAT, *Clerk.*

STATE OF TENNESSEE,
Tipton County:

I, Jas. W. Trabough, Register of said County, do certify that the foregoing deed with $3.00 U. S. Int. Rev. stamps affixed thereon, was filed in my office and entered for registration in Entry Book "A", page 209, at 10:25 o'clock A. M., this 16th day of March, 1869.

J. W. TRABOUGH, *Register,*
By R. H. MUNFORD, *D. R.*

Copied from the entry of the original deed recorded in the Book R on pages 291 and 293 in the office of the Register of Tipton county, Tennessee, Nov. 4th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do certify that the above and foregoing is a true and correct copy of the instrument now of record in Deed Book R, page 291 et seq.

I. R. CALHOUN, *Register.*

267 A certified copy from the office of the Register of Tipton County, Tennessee, of the deed in trust to Mrs. Martha P. Smith and Fred R. Smith to Samuel M. Jarvis to secure the payment of $3,525.00 to the Jarvis-Conklin Mortgage Trust Company, and dated October 1st, 1889.
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed of Trust.

Filed Dec. 3, 1901.

Martha P. Smith
to
Samuel M. Jarvis.

Deed of Trust.

Filed and Registered Oct. 25th, 1889.

This indenture made this first day of October, in the year of our Lord, one thousand eight hundred and eighty-nine, between Martha

P. Smith, a widow, Fred R. Smith, of the county of Tipton and state of Tennessee, party of the first part, and Samuel M. Jarvis, Trustee of the county of Jackson, and state of Missouri, of the second part. Witnesseth: Whereas, the said Martha P. Smith and Fred R. Smith are justly indebted unto the Jarvis Conklin Mortgage Trust Company in the sum of thirty-five hundred and twenty-five ($3525) dollars, borrowed money, as is evidenced by their note of even date herewith for the sum of thirty-five hundred and twenty-five dollars due and payable on the first day of Oct., 1894, with interest at the rate of six per cent per annum from date until maturity. Said interest payment being payable semiannually, and further specified and shown by ten coupons of one hundred five and 75-100 dollars each, attached to said note, which coupons are due and payable on the first day of April, and first day of October, of each and every year,
268 until the maturity of said note. Said coupons to draw six per cent interest per annum after due. Said note and coupons being payable to the order of the Jarvis Conklin Mortgage Trust Company, at its office in Kansas City, Missouri. Now, therefore, the said party of the first part in consideration of the premises and for the purposes aforesaid, and in further consideration of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed, hereby granted, bargains, sells and conveys unto the said party of the second part, or his successors in trust forever, the following described lands and premises, situate in Tipton county and state of Tennessee, known and described as follows, to wit: A certain tract, piece or parcel of land lying, being, situate on Island No. 37, in the Mississippi river in said Tipton county, Tennessee, containing six hundred acres, more or less, and more particularly described as follows, to wit: Beginning at the northeast corner of a 204½ acre tract in the name of P. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of same to the northeast corner of same, a stake in the north boundary line of N. Potter's 640 acres, and in the south boundary line of 610 acres in the name of T. P. Hall; thence east on said line three hundred and fifty poles (350), more or less, to the northwest corner of Entry No. 8 for 152 acres, in the name of John Trigg; thence south along the west boundary line of said John Trigg's 152 — to the bank of the Mississippi river; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. T. Byrne; thence south on said line to the place of beginning.

It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now
269 touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's Chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or sodded to said above described lands.

To have and to hold the same, together with all and singular the privileges and appurtenances thereunto belonging or in any wise appertaining to the premises hereby conveyed unto the party of the second part or his successors in trust hereinafter named, forever, hereby releasing all claims to homestead and dower therein. In trust, nevertheless, to wit: That in case of default in the payment of said indebtedness, or in any part thereof with the interest thereon, at the time and in the manner and at the place specified for the payment thereof or in case of waste or non-payment of taxes, or neglect to procure or renew insurance, or in case of a breach of any of the covenants or agreements herein contained; then and in such case on the application of the legal holder of said note, it shall and may be lawful for said party of the second part or his successors in trust, to enter upon, possess, hold and enjoy the above granted premises, and either with or without such entry, after having advertised such sale thirty days in a newspaper published (or by posting four notices, provided no paper is published in said county), in the county where the premises are situated, to sell the said premises, or any part thereof, and all right and equity of redemption of said party of the first part, their heirs, executors, administrators or assigns therein, at public vendue, at the door of the court house in the county of Tipton, or in the county where the premises are situate, to the highest bidder for cash, and in bar of all right and equity of redemption, which is hereby waived and surrendered, at the time appointed in such
270 advertisement or to adjourn the sale from time to time at discretion, upon the making of such sale or sales the said party of the first part does hereby authorize and empower said party of the second part, or his successors in his or her name, to execute and deliver to the purchaser or purchasers, a deed or deeds of conveyance in fee of the premise sold by virtue hereof (and it is agreed that the recitals in said deed shall be taken and accepted as prima facie evidence of the facts therein stated) and to apply the proceeds of such sale to the payment of: First. The costs and expenses of executing this trust, including three hundred and fifty-two dollars attorneys' fees, and compensation to the trustee for his services. Second. All sums of money paid by said second party or the holder of said note, for insurance, taxes, assessments or charges to protect the title or possession of said premises, together with interest from the time of paying the same at the rate of six per cent per annum. Third. To the payment of principal and interest due on said notes, and rendering the surplus if any, to the said first party.

And the said Martha P. Smith and Fred R. Smith do hereby covenant that they are lawfully seized of said premises, and for their heirs, executors and administrators do covenant and agree to and with the party of the second part, or his successors in trust, that they will well and truly pay the principal of said loan and the interest thereon, according to the conditions hereinbefore set forth; and that in case of any suit being instituted for the collection of the same or any part thereof, that they will pay to Samuel M. Jarvis or his successors in trust, the sum of three hundred fifty-two dollars, as

solicitors' fee, and that a decree or judgment may be rendered for the payment of said sum, in addition to the taxable costs of such
suit, and that they will not at any time hereafter, until the
271 said principal sum and the interest thereon has been fully
paid, suffer said premises, or any part thereof to be sold for any tax or assessments whatsoever, nor will they do or permit to be done to, upon or about said premises any thing that will in anywise tend to impair the value thereof, or to diminish the security intended to be effected by virtue of this instrument, and in the event the said third party, the assignee or legal representatives, or the party of the second part, or his successors in trust, shall expend, any money to protect the title or possession of said premises then all such money so expended shall be a new and additional principal sum of the money secured by this instrument and shall be payable and may be collected with interest thereon at the rate of six per cent per annum from the time of so expending the same. And that they will cause any buildings upon said premises to be insured in such safe and responsible insurance company for the sum of — dollars or such less sum as the legal holders of the notes secured hereby may elect, and keep the same so insured, and will deliver all policies of insurance and all renewal certificates from time to time to said party of the second part, or his successors in trust. And it is stipulated and agreed that in case of default in any of said payments of principal or interest, as aforesaid, or in the event of a breach of any of the covenants or agreements herein; then and in that case, the whole of said principal sum hereby secured, and the interest to the time of sale, and all moneys advanced to that time, shall, at the option of the legal holder of said indebtedness, or any part thereof, the trustee herein named, or then acting, or either or any of them, at once become absolutely due and payable, without notice to the first party, and the said premises may be sold in like manner and with the same effect as though said indebtedness had fully matured by lapse of time in said obligation mentioned. The bond and oath
of any trustee, executing this trust are hereby respect*fully*
272 waived.

And further, that in case of the death, absence, resignation or other inability or refuse- to act of the said second party, then Stanley L. Conklin, of Kansas City, Mo., shall become successor in trust to said party of the second part, and in case of the death, resignation or other inability or refusal to act of the said Stanley L. Conklin, then it shall be competent and proper for the second party or his successors in trust, or the holder of said indebtedness or any part thereof, to appoint and substitute any other person as trustee to act instead of the party of the second part, who shall succeed to, and be vested with all the rights, power and authority conferred upon the second party by these presents; and shall be successors in trust of the second party in all respects. Now, if the covenants aforesaid shall be well and truly kept by the said part*y*- of the first part or their legal representatives, then the property hereinbefore conveyed shall be released at the costs of the said part*y*- of the first part.

In witness whereof, the said party- of the first part have hereunto set their hands and seals on the day and year first above written.

MARTHA P. SMITH. [SEAL.]
FRED R. SMITH. [SEAL.]

Signed, sealed and delivered in presence of:
W. A. SMITH.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, P. J. Quigley, clerk of the county court of said county, the within named bargainors, Martha P. Smith, a widow, and Fred R. Smith, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand at office, this 23 day of October, A. D., eighteen hundred and eighty-nine.

[L. S.] P. J. QUIGLEY, *Clerk.*

273 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Oct. 25th, 1889.

I. M. A. Misenheimer, Register of said county, do certify that the foregoing instrument was filed in my office at 10 o'clock a. m., on the 25th day of Oct., 1889, and entered for registration in Entry Book D, page 182, and together with this and the above certificate is this day duly registered in Deed Book 41, page 100.

M. A. MISENHEIMER, *Register.*

Copied from the entry of the original deed recorded in Book 14, pages 100, 101, 102, 103, 104, in the office of the Register of Tipton County, Tennessee.

Nov. 9th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 41, page 100, et seq.

I. R. CALHOUN, *Register.*

36. A certified copy from the office of the Register of Tipton County, Tennessee, of the power of attorney made by Samuel M. Jarvis and Stanley L. Conklin to F. K. Maxwell, dated May 15th, 1897.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

274 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Power of Attorney.

Filed Dec. 3, 1901.

Samuel M. Jarvis and Stanley L. Conklin
to
F. K. Maxwell.

Filed and Registered Aug. 9th, 1897.

Whereas, Martha P. Smith, widow, and Fred R. Smith, by their certain deed of trust dated the first day of October, eighteen hundred and eighty-nine, and recorded in Volume 41, at page 100, of the records of deeds in Tipton county, state of Tennessee, conveyed to Samuel M. Jarvis, as trustee, the following described real property, situated in the county of Tipton and state of Tennessee, to wit, a certain tract, piece, or parcel of land, lying, being and situate on Island No. 37, in the Mississippi river in said Tipton county, Tennessee, containing 600 acres, more or less, and more particularly described as follows, to wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of same to the northeast corner of same, a stake in the north boundary line of N. Potter's 640 acres and in the south boundary line of 610 acres in the name of T. P. Hall; thence east on said line 350, poles more or less, to the northwest corner of entry No. 8, for 152 acres in the name of John Trigg; thence south along the west boundary line of said John Trigg's 152, to the bank of the Mississippi river; thence down said river as it meanders to the east or upper boundary line of said 204½
acre tract in the name of R. H. Byrne; thence north on said
275 line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course, and does not now touch any of above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry, and known as McKenzie's Chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands. And whereas it is provided in said deed of trust that if Samuel M. Jarvis, the trustee therein named shall be absent from the state of Tennessee or shall refuse to act as such trustee, then Stanley L. Conklin shall

become the successor in trust; and in the case of the death, resignation, refusal to act or other disability of the — Stanley L. Conklin, it shall be competent for the said Samuel M. Jarvis or Stanley L. Conklin to appoint and substitute any other person as trustee under the terms of said Trust deed with all the powers of the original trustee, and whereas the — Samuel M. Jarvis and Stanley L. Conklin are absent from the state of Tennessee and now refuse to further act as such trustee, now, therefore, we the said Samuel M. Jarvis, trustee, and Stanley L. Conklin, his successor in the trust, do hereby appoint and substitute J. K. Maxwell as trustee, under the said deed of trust with all the powers of the original trustee to advertise, sell and convey by good and sufficient deed the above described property as provided in said deed of trust, and to apply the proceeds of said sale in satisfaction of said note, and of the expenses of said sale, and to any taxes unpaid on said premises.

It witness whereof, we, the said Samuel M. Jarvis and Stanley L. Conklin, have hereunto set our hands and seals this 15th day of May, 1897.

SAMUEL M. JARVIS. [SEAL.]
STANLEY L. CONKLIN. [SEAL.]

276 STATE OF NEW YORK,
County of Tipton, *ss:*

Personally appeared before Lilah M. Lykins, a notary public, in and for the county and state aforesaid, the within named Samuel M. Jarvis and Stanley L. Conklin, the bargainors with whom I am personally acqainted, and who acknowledged that they executed the within instrument for the purposes therein contained, and in the capacity therein set forth.

In witness whereof, I have hereunto set my hand and official seal this 15th day of May, A. D. 1897.

My commission expires March 30th, 1899.

[L. S.] LILAH M. LYKINS,
Notary Public in and for the County of New York, State of New York.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Aug. 9th, 1897.

I, Misenheimer, Register of said county, do certify that the foregoing instrument was filed in my office at 1:30 o'clock p. m., on the 9th day of Aug., 1897, and entered for registration in Entry Book "F," page 105, and, together with this and the above certificate, is this day duly registered in Deed Book 56, page 218.

M. A. MISENHEIMER, *Register,*
By A. J. COLE, *D. R.*

Copied from the entry of the original deed recorded in Deed Book 56, pages 216, 217 and 218, in the office of the Register of Tipton county, Tennessee, Nov. 15th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that above and foregoing is true and correct copy of this instru-
277 ment, now of record in my office in Deed Book 56, page 216, et seq.

I. R. CALHOUN, *Register.*

37. A certified copy from the office of the Register of Tipton county, Tennessee, of the deed of F. K. Maxwell, Trustee, to W. J. Caesar, dated July 24th, 1897.
(The clerk will please here insert it)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed 600 *Acres.*

Filed Dec. 3, 1901.

F. K. Maxwell, Trustee,
to
W. J. Caesar.

Deed 600 Acres.

Filed and Registered 10th Aug., 1897.

This indenture made this 24th day of July, A. D. 1897, by and between F. K. Maxwell, as substitute trustee, party of the first part, and W. J. Caesar, party of the second part. Witnesseth: That, whereas, Martha P. Smith, a widow, and Fred R. Smith, by their certain deed of trust dated the 1st day of October, A. D. 1889, and recorded in the Register's office of Tipton county, Tennessee, in Volume "41," at page 100, of the records of deeds in said county, conveyed to Samuel M. Jarvis, as trustee, all the premises hereinafter described, to secure the payment of one certain note or bond in the sum of thirty-five hundred and twenty-five dollars ($3,525) with coupons for the semi-annual interest attached thereto, payable five years after date, and upon certain conditions in said deed of trust particularly referred to, which deed is hereby for greater
278 certainty made part hereof. And, whereas, it was provided in said deed of trust that if Samuel M. Jarvis, the trustee therein named should be absent from the state of Tennessee, or

should refuse to act as such trustee, then the said Samuel M. Jarvis might appoint and substitute any other person as trustee to act in his place and stead, and who should be vested with all the rights, power and authority conferred upon the original trustee.

And, whereas, the said Samuel M. Jarvis was and is absent from the State of Tennessee and has resigned his trust in writing and now refuses to further act as trustee and has appointed me, the undersigned, with full powers to — as substitute trustee thereunder. And, whereas, default having been made in the payment of said principal note or bond when due and said note with three interest coupons thereto has long since become due and payable. The said premises were on the 21st day of May, 1897, by the said first party advertised for public sale to take place at the hour of twelve o'clock noon on the 22nd day of June, 1897, at the front door of the Court House in the city of Covington, county of Tipton and State of Tennessee, in the manner provided by said trust deed and notice of which was published in the Covington Leader, a newspaper of general circulation printed and published in the county of Tipton in said State for a period of more than thirty days prior to said sale; a verified copy of which advertisement or notice is herein incorporated and made part of this deed. And, whereas, the said premises were at the time and place, and on the terms stated in said deed and pursuant thereto offered for sale at public auction for cash in hand and in bar of the equity of a redemption, dower and homestead, as provided in said deed of trust, and being cried for a reasonable time were finally struck off and sold to the party of the second part herein for the sum
279 of three thousand dollars ($3,000), he being the highest and best bidder therefor, which sum was in hand paid and then applied as by said trust deed directed and provided. Now, therefore, these presents, witnesseth: That said party of the first part or substitute trustee in pursuance of the power and authority vested in him in and by the said trust deed and the power of attorney from the said Samuel M. Jarvis, trustee, and in consideration of the full payment to him by the said second party of the said amount of the aforesad bid, the receipt whereof is hereby acknowledged, does hereby bargain, sell, transfer and convey unto the said party of the second part, his heirs, executors and assigns all the following described tract, piece or parcel of land situate, lying and being in the county of Tipton and State of Tennessee, to wit: A certain tract, piece or parcel of land lying and situate on Island 37 in the Mississippi river in said Tipton County, Tennessee, containing 600 acres, more or less, and more particularly described as follows, to wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1010 acre tract sold by R. I. Chester to L. Speck and John V Wise, thence north with the line of same to the northeast corner of same stake in the north boundary line of N. Potter's 640 acres and in the south boundary line of 610 acres in the name of T. P. Hall, thence east on said line 350 poles, more or less, to the northwest corner of Entry No. 8, for 152 acres in the name of John Trigg, then south along the west boundary line of said John Trigg's 152 to the bank of the Mississippi river, thence

down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. H. Byrne, thence north on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has
280 changed its course and does not now touch any of the above described lands and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands, together with all and singular the tenements, hereditaments, improvements, buildings, eas-ments and appurtenances thereon and thereunto belonging and appertaining as an inheritance in fee over every and all right and equity of redemption, dower and homestead of the makers of said trust deed and all persons claiming through and under them or either of them. To have and to hold the aforesaid property and premises unto the said second party, his heirs, executors and assigns forever, as fully and absolutely as by virtue of the power and authority in him vested by the said trust deed he can convey the same. The party of the first part covenants that as substitute trustee he is lawfully seized of said property, has good right to convey, and will and does warrant unto the said second party, his heirs and executors and assigns, title to said property as against all persons claiming by, through or under the party of the first part, but no further or otherwise. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

F. K. MAXWELL,
Substitute Trustee.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, R. L. Bartels, a notary public in and for said county and State, F. K. Maxwell, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument in the capacity set forth and for the purposes therein contained.
281 Witness my hand and official seal at my office in Memphis, Tennessee, this 24th day of July, A. D. 1897.

[L. S.] R. L. BARTELS,
Notary Public.

This is to certify that the hereto attached publication has been published for full thirty days in the Covington Leader, a newspaper published in the town of Covington, Tipton County, Tennessee. Said publication was placed in said newspaper on May 21st, and was continuously published in each issue of said paper up to and including the copy of June 18th, 1897.

J. W. SIMONTON.

Sworn to and subscribed before me this 22nd June, 1897.

[L. S.] W. V. BRINGLE,
Notary Public.

Trustee's Sale Notice.

Whereas, Martha P. Smith, a widow, and Fred R. Smith, by their deed of trust dated 1st day of October, A. D. 1889, and recorded in Volume 41 at page 100 of the Records of Deeds in Tipton County, State of Tennessee, conveyed to Samuel M. Jarvis, as trustee, the following described real property situated in the County of Tipton and State of Tennessee, to-wit: A certain tract, piece, or parcel of land, lying, being and situate on Island No. 37 in the Mississippi river in said Tipton County, Tennessee, containing 600 acres, more or less, and more particularly described as follows, to-wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same also being a corner of a 1,010 acre tract sold by R. H. Chester to L. Sheck and John V. Wise; thence north with the line of same to the northeast corner of same to a stake in the north boundary line of N. Potter's 640 acres, and in the south boundary line of 610 acres in the name of T. P. Hall; thence east on said line
350 poles, more or less, to the northwest corner of entry No. 8
282 for 152 acres in the name of John Trigg; thence south along the west boundary line of said John Trigg's 152 to the bank of the Mississippi river; thence down said river as it meanders to the east or upper boundary line of 204½ acre tract in the name of R. H. Byrne; thence north on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's chute, and it is further understood that this conveyance carries with it all accretions now formed or added to said above described lands. Which said deed of trust was made to secure the payment of a certain promissory note in the sum of thirty-five hundred and twenty-five dollars with coupons attached for the semi-annual interest thereon. And, whereas, said principal sum together with three interest coupons on said note have long since become due and still remain unpaid. And, whereas, it is provided in said deed of trust that if Samuel M. Jarvis or Stanley L. Conklin, the successor in trust therein named shall be absent from the State of Tennessee or shall refuse to act as such trustee, then the said Samuel M. Jarvis or Stanley L. Conklin may appoint and substitute any other person as trustee to act in their place and stead and who shall be vested with all the rights, power and authority conferred upon the original trustee. And, whereas, the *and* Samuel M. Jarvis and Stanley L. Conklin are absent from the State of Tennessee and have resigned their trust in writing and now refuse to further act as such trustee and have appointed me, the undersigned, with full power to act as trustee thereunder. Now, therefore, I, F. K. Maxwell, will at the request of the legal
283 holders of said note and coupon and following the terms of said deed of trust proceed to sell the above described real estate with all the appurtenances thereunto belonging at public

vendue to the highest and best bidder for cash and in bar or equity of redemption, dower and homestead at the front door of the Court house in the City of Covington in the county of Tipton and State of Tennessee, on the 22d day of June, A. D. 1897, at the hour of 12 o'clock M., to satisfy the debt by said deed of trust secured and the costs and expenses of executing this trust.

F. K. MAXWELL,
Substitute Trustee.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Aug. 10th, 1897.

I, M. A. Misenheimer, Register of said county, do certify that the foregoing instrument was filed in my office at 1:32 o'clock P. M. on the 9th day of Aug., 1897, and entered for registration in Entry Book F, page 105, and together with this and the above certificate is this day duly registered in Deed Book 56, page 218.

M. A. MISENHEIMER, *Register,*
By A. J. COLE, *D. R.*

Copied from the entry of the original deed recorded in Deed Book 56, pages 218, 219, 220, 221, 222, and 223, in the office of the Register of Tipton County, Tennessee, November 15th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the instrument now of record in my office in Deed Book 56, page 218, et seq.

I. R. CALHOUN,
Register.

284 A certified copy from the office of the Register of Tipton County, Tennessee, of the deed of W. J. Cæsar to H. W. Stockley, dated April 18th, 1898:
(The Clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Warranty Deed.

Filed Dec. 3, 1901.

W. J. Cæsar
to
H. W. Stockley.

Warranty Deed.

Filed 22d June and Registered 4th July, 1898.

This indenture made on the 18th day of April, A. D. 1898, by and between W. J. Cæsar, a single man, of the County of New York, State of New York, party of the first part, and H. W. Stockley, of the County of Tipton, State of Tennessee, party of the second part, witnesseth: That said party of the first part, in consideration of the sum of five thousand two hundred dollars ($5,200), of which sum one thousand seven hundred and fifty dollars ($1,750) is now paid and the receipt of which is hereby acknowledged, and the remainder is to be represented by one certain promissory note dated ——, —, in the sum of three thousand four hundred and fifty dollars ($3,450) due in three years from its date, and executed by the grantee herein, and secured by a trust deed on the premises hereinafter described; does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns the following described premises, to-wit: A certain tract, piece or parcel of land lying, being and situate on Island No. 37 in the Mississippi river in said Tipton County, Tennessee, and more particularly described as follows, to-wit: Beginning
285 at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of the same to the northeast corner of same, a stake in the north boundary line of N. Potter's 640 acres, and in the south boundary line of 610 acres in the name of T. P. Hall; thence east in said line 350 poles more or less to the northwest corner of entry No. 8 for 152 acres in the name of John Trigg; thence south along west boundary line of said John Trigg's 152 acres to the bank of the Mississippi river; thence down said river as it meanders to the east of upper boundary line of said 204½ acre tract in the name of R. H. Byrne; thence north on said line to the place

of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course of bed is now dry and known as McKenzie's chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands. This deed is made and delivered in lieu of the deed heretofore executed by W. J. Cæsar to the grantee herein, covering the same premises, and which was lost or destroyed before its delivery. To have and to hold the premises aforesaid with all and singular the rights, privileges, appurtenances and immunities thereto belonging, or in anywise appertaining unto the said party of the second part, and to his heirs and assigns forever. The said party of the first part hereby covenanting that the said premises are free and clear from any incumbrances except all taxes, and
286 the said party of the first part will warrant and defend the title to the said premises unto the said party of the second part and unto his heirs and assigns forever, against the lawful claims and demands of all persons claiming under him and not otherwise.

*I*t witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. J. CÆSAR. [SEAL.]

STATE OF NEW YORK,
County of New York:

Personally appeared before me, Lilah M. Lykins, the within named W. J. Cæsar, the bargainor, with whom I am personally acquainted and who acknowledged that he executed the within instrument for the purposes therein contained.

*I*t witness whereof, I have hereunto set my hand and official seal this twenty-first day of April, A. D. 1898.

My commission expires March 30th, 1899.

[L. S.] LILAH M. LYKINS,
Notary Public in and for the County of New York, State of New York.

STATE OF TENNESSEE,
County of Tipton:

REGISTER'S OFFICE, July 4, 1898.

I, M. A. Misenheimer, Register of said county, do hereby certify that the foregoing instrument was filed in my office at 7:27 o'clock A. M. on the 22d day of June, 1898, and entered for registration in Equity Book F, page 163, and together with this and the above certificate is this day duly registered in Deed Book 58, page 119.

M. A. MISENHEIMER, *Register.*

287 Copied from the entry of the original deed recorded in Deed Book 58, pages 119 and 120, in the office of the Register of Tipton County, Tennessee, Nov. 16th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is true and correct copy of this instrument now of record in my office in Deed Book 58, et seq.

I. R. CALHOUN, *Register.*

39. A certified copy from the office of the Register of Tipton County, Tennessee, of the deed in trust of W. H. Stockley and wife to Samuel M. Jarvis to secure the payment of $3,450.00 to W. J. Cæsar, dated August 1st, 1897:
(The Clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Deed of Trust.

Filed Dec. 3, 1901.

H. W. Stockley and wife
to
Samuel M. Jarvis.

Deed of Trust.

Filed 22d June and Registered 4 July, 1898.

This indenture made this first day of August, A. D. 1897, between H. W. Stockley and Hattie H. Stockley, his wife, of Tipton county, State of Tennessee, and Samuel M. Jarvis, Trustee, of the county of New York, State of New York, witnesseth:

288 That for the consideration of one dollar to me in hand paid and for other considerations hereinafter mentioned, the said H. W. Stockley and Hattie H. Stockley, his wife, bargains, sells and conveys unto the said Samuel M. Jarvis, Trustee, the following described real estate situate in county of Tipton and State of Tennessee, to wit: A certain tract, piece or parcel of land lying, being and situate on Island No. 37, in the Mississippi river, in said Tipton county, Tennessee, and more particularly described as follows, to wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise, thence north with the line of same to the northeast corner of same, a stake in the north boundary line of N. Potter's 640 acres, and in

the south boundary line of 610 acres in the name of T. P. Hall; thence east on said line 350 poles, more or less, to the northwest corner of entry No. 8, for 152 acres in the name of John Trigg; thence south along west boundary line of said John Trigg's 152 acres to the bank of the Mississippi river; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in name of R. H. Byrne; thence south on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's chute; and it is further understood and agreed that this conveyance carries with it all accretions now found or added to said above described lands. To have and to hold unto the said Samuel M. Jarvis, Trustee, and to his heirs and assigns forever, free
289 from all claim of homestead and dower which are expressly released and conveyed to the said Samuel M. Jarvis, Trustee. And we do hereby covenant that we are legally seized of said real estate, that the same is unencumbered, and that we will warrant and defend the title to the same against all persons whomsoever. Whereas, the said H. W. Stockley and Hattie H. Stockley, his wife, are justly indebted to W. J. Cæsar on a certain bond of even date herewith for the sum of thirty-four hundred and fifty ($3450) dollars, lawful gold coined money of the United States of America of the standard of weight and fineness established by the laws of the land of the United States, borrowed money, payable to the order of the said W. J. Cæsar at the office of the North American Trust Company, New York City, New York, three (3) years after date with interest from date at the rate of six (6) per cent per annum, payable semi-annually, according to the tenor of six (6) interest coupons to the said bond attached. Now, therefore, this conveyance is made in trust for the purpose of securing to the said W. J. Cæsar the payment of the said bond and coupons and the performance of the things hereinafter expressed. The said H. W. Stockley and Hattie H. Stockley, his wife, expressly agrees.

First. Neither to commit or permit waste upon said premises; second, to pay all the taxes on said premises before delinquency; third, to procure and keep the buildings—real estate insured in the sum of $— so long as this indenture shall remain in force, in such insurance company as the holder of said bond or his assigns shall select the policies to be drawn so that the loss, if any, shall be paid to the said —— ——, Trustee, as additional security, and deliver all policies and renewal receipts to the said Trustee, and if default is
290 made by the said —— —— in this behalf, then the said trustee may effect and keep up such insurance and recover the cost thereof, with interest at the rate of — per cent per annum, from the said —; fourth; if necessary to resort to law to enforce the payment of said bond or coupons, or to protect the security for its payment, or in case of failure to pay said taxes, or to procure said insurance, then that the holder of said bond may pay such taxes and pro-

cure such insurance, and the sums so advanced, with interest at the rate of six (6) per cent per annum, shall be repaid by the said H. W. Stockley and Hattie H. Stockley, his wife, and the amount, together with three hundred and twenty-five dollars as attorney's fee shall be secured by this indenture; and in case of loss, and payment by any insurance company the amount so paid shall be applied on the debt as aforesaid or in rebuilding, as the holder of said bond shall exact. And the said H. W. Stockley and Hattie H. Stockley, his wife, hereby further agrees that if default be made in the payment of any coupon, or part thereof; or in the payment of said bond, or any part thereof; or in the payment of any tax, or any part thereof; or in procuring or keeping up such insurance; or in keeping and performing said covenants and agreements, that then, after any such default has continued twenty days, the legal holder of said bond may treat the bond and coupons, and moneys so advanced, as due and collectable as hereinafter provided. In case the said H. W. Stockley and Hattie H. Stockley, his wife, shall pay or cause to be paid, the said bond, coupons, taxes and insurance as specified in the bond, and in this indenture, and shall fully do and perform all the covenants and agreements hereinabove expressed, then this deed to be null and void; but in case H. W. Stockley and Hattie H. Stockley, his wife, shall fail to pay said bond, coupons, taxes and insurance or to keep
291 and perform any or all the said covenants and agreements as aforesaid, then the said Samuel M. Jarvis, as trustee, shall after advertising the time, terms and place of sale for thirty days in some newspaper published in the city of Covington, Tennessee, or by written notice posted at the court house door in the county in which said realty is situated for 30 days, shall sell the said real estate at the court house door in the said city of Covington, Tennessee, to the highest and best bidder at the public outcry for cash in hand and in bar of the equity of redemption. The proceeds of said sale to be applied, first, to the payment of all the costs incident to this trust; second, to the payment of said bond and coupons, taxes and insurance, attorneys' fees as herein provided, and the repayment of all or any moneys advanced by the holder of said bond or trustee under the term of this deed; third, the balance, if any, shall be paid to H. W. Stockley and Hattie H. Stockley, his wife, or their legal representative. The said trustee shall execute a deed to the purchaser, and in the event of sale agrees to surrender to the purchaser possession of said premises without demand or notice. It is further stipulated, that in case of the death, legal disability, refusal or neglect of the said Samuel M. Jarvis to act as trustee, the legal title to the real estate aforesaid shall vest in Stanley L. Conklin, who shall have and exercise all the powers as trustee herein conferred upon said Samuel M. Jarvis. The oath and bond required of trustee is hereby expressly waived.

In witness whereof we have set our hands and seals this first day of August, A. D. 1897.

H. W. STOCKLEY. [SEAL.]
HATTIE H. STOCKLEY. [SEAL.]

292 STATE OF TENNESSEE,
Shelby County:

Personally appeared before C. U. White, a Notary Public in and for said State and county, at Memphis, duly commissioned and qualified, H. W. Stockley, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the with- instrument for the purposes therein contained.

Witness my hand and notarial seal at Memphis aforesaid, this 15th day of June, 1898. My term expires Oct. 26th, 1898.

C. U. WHITE.
Notary Public.

STATE OF ——,
—— *County:*

Personally appeared before me, Jno. J. Stockley, a Notary Public, in and for said county and State, H. W. Stockley and Hattie W. Stockley, his wife, the within named bargainors, with whom I am personally acquainted, and who acknowledged that she executed the within named instrument for the purposes therein contained. And Hattie W. Stockley, wife of the said H. W. Stockley, having appeared before me privately and apart from her husband, the said Hattie H. Stockley acknowledged the execution of the said instrument to have been done by her freely, voluntarily and understandingly, that without compulsion or constraint from her husband, and for the purposes therein expressed.

Witness my hand and seal of office, this 16th day of June, 1898.

[L. S.] JOHN T. STOCKLEY,
Notary Public.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, July 4th, 1898.

293 I, M. A. Misenheimer, Register of said county, do certify that the foregoing instrument was filed in my office at 7:30 o'clock A. M. on the 22d day of June, 1898, and entered for registration in Entry Book F, page 163, and together with this and the above certificate is this day duly registered in Deed Book 58, page 121.

M. A. MIESENHEIMER, *Register.*

Copied from the entry of the original deed recorded in Book 58, on pages 121, 122, 123, 124, in the office of the Register of Tipton county, Tennessee, Nov. 16th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is true and exact copy of the instrument and certificate *and* aforesaid recorded in Deed Book 58, page 121 et seq.

I. R. CALHOUN, *Register.*

40. A certified copy from the office of the Register of Tipton county, Tennessee, of the quit claim deed of Samuel M. Jarvis, Trustee, to H. W. Stockley, dated Oct. 12th, 1900.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Quit Claim Deed.

Filed Dec. 3, 1901.

294 Samuel M. Jarvis
to
H. W. Stockley.

Quit Claim Deed.

Filed and Registered Dec. 11, 1901.

Know all men by these presents, that whereas on August 1st, 1897, H. W. Stockley and Hattie H. Stockley, his wife, of Tipton county, Tennesseee, did make and execute unto me, Samuel M. Jarvis, of the county of New York, State of New York, a certain deed in trust, recorded in the office of the Register of Tipton county, Tennessee, in Book 58, page 121, to secure one W. J. Cæsar the payment of a certain sum of money, to wit: Thirty four hundred and fifty-four dollars ($3450.00), evidenced by a certain obligation in writing, therein described and set of even date therewith and due three years from date, and whereas the said sum of thirty-four hundred and fifty dollars ($3450.00) has been duly paid at maturity by the said H. W. Stockley to the said W. J. Cæsar, and all the obligations undertaken by the said deed in trust, and the bond secured by it have been duly and fully performed by the said H. W. Stockley unto the said W. J. Cæsar, and all the provisions of said trust deed having been performed, and whereas I have been notified by the said W. J. Cæsar of the payment of said sum of money and the fulfillment of all his other obligations therein undertaken by the said H. W. Stockley, and have been directed by the said W. J. Cæsar to make and execute this quit claim deed unto the said W. W. Stockley; now, therefore, I, the same Samuel M. Jarvis, of New York county, State of New York, for and in consideration of the payment of said indebtedness of thirty-four hundred and fifty dollars ($3450.00) and all other sums secured by said trust deed by the said H. W. Stockley to
295 the said W. J. Cæsar as heretofore related, hereby bargain, sell, release, quit claim and convey unto the said H. W. Stockley of Tipton county, Tennessee, his heirs in fee simple forever, the

following described tract or parcel of land situated in the county of Tipton and State of Tennessee, to wit: A certain tract, piece or parcel of land, lying, being, si-uate on Island No. 37 in the Mississippi river, in said county of Tipton, State of Tennessee, and more particularly described as follows, to wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Spek and John V. Wise; thence north with the line of same to the northeast corner of same, a stake in the north boundary line of N. Potter's 640 acre tract and in the south boundary line of 610 acres in name of T. P. Hall; thence east on said line 350 poles, more or less, to the north corner of entry No. 8 for 152 acres in the name of John Trigg; thence south along west boundary of said John Trigg's 152 acres to the bank of the Mississippi; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in name of R. H. Byrne; thence north on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie' chute. It is further understood and agreed that this conveyance carries with it all accretions now formed or added to said *to said* above described lands, it being the same tract of land conveyed to me as trusee to secure the payment of the said sum of money to the said W.
296 J. Cæsar by the said H. W. Stockley as hereinbefore described, it having been conveyed to me by the said H. W. Stockley and wife by a deed in trust dated Aug. 1st, 1897, but executed on June 15th, and 16th, 1898, and which *and* trust is recorded in Book 58, page 121, in the office of the Register of Tipton county, Tennesseee, to which — is herewith made for a fuller description. To have and to hold the aforesaid tract of land with all and singular the hereditaments and appurtenances of and to the same belonging or in anywise appertaining, together with all the accretions thereto and made land derived from the waters that bound it, and such — these to be — the said H. W. Stockley, his heirs and assigns in fee simple forever; and I do hereby warrant the title to the said H. W. Stockley against the claims of all persons whomsoever claiming the same by, through or under me, but not against the claims of any other persons.

In testimony whereof I hereunto set my hand and affix my seal on this the 12th day of October, 1900.

SAMUEL M. JARVIS, *Trustee.* [SEAL.]

STATE OF NEW YORK,
New York County:

Personally appeared before me, a Notary Public in and for said state and county, duly commissioned and qualified, Samuel M. Jarvis, Trustee, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the

within instrument for the purposes therein contained. And I certify that my commission as Notary Public began March 30th, 1899, and March 30th, 1901.

Witness my hand and notarial seal at office on this the 12th day of October, 1900.

[L. S.] LILAH M. LYNKINS,
Notary Public in and for the County of New York, State of New York.

297 STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 11, 1900.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument was filed in my office at 10 o'clock A. M. on the day of Dec. 11th, 1900, and entered for registration in Entry Book G, page 81, and together with this and the above certificate is this day duly registered in Book 65, page 282.

I. R. CALHOUN, *Register.*

Copied from the entry of the original deed recorded in Deed Book 65, pages 282, 283, 284 and 285, in the office of the Register of Tipton county, Tennessee, Nov. 16th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Dec. 2d, 1901.

I, I. R. Calhoun, Register of said county, do hereby certify that the above and foregoing is a true and correct copy of the Instrument now of record in my office in Deed Book 65, page 282 et seq.

I. R. CALHOUN, *Register.*

41. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of John Trigg's thirty acres survey October 13th, 1837, by T. P. Hall, D. S. T. C.

(The Clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

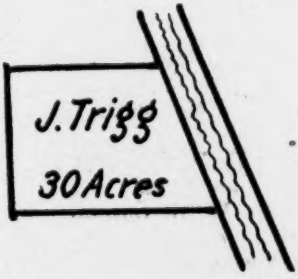
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

298 *Survey of Entry No.* 11.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 11 dated 5 Sept., 1836, founded on Register certificate No. 7098, for 20 acres and 2963, for 10 acres, I have surveyed for John Trigg, assignee, &c., thirty acres of land in said county, range 9, section 6, on Island No. 37, beginning at the southeast corner of Occupant Entry in the name of J. Barney, assignee of T. Deane, on 2 small cottonwoods, marked J. B., standing on the bank of McKenzie's chute, running thence north with Barney's line 68 poles to a persimmon; thence east 85 poles to a hackberry marked J. T., on McKenzie's chute; thence down the chute south 65 west 95 poles to the beginning.

Oct. 13th, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in survey Book A, on page 172, in the office of the Register of Tipton county, Tennessee.

Aug. 21st, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 11, as the same appears in my office.

299 Given under my hand at office, in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

42. A certified copy made by the entry taker of Tipton county, Tennessee, of the certificate of survey of John Trigg's one hundred fifty-two acres, surveyed October 14th, 1837, by T. P. Hall, D. S. T. C. (The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 8.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 8, dated Sept. 5, 1836, founded on warrant No. 3470, for 152 acres, I have surveyed for John Trigg, assignee, &c., 152 acres of land in said county, Range 9, Section 6, on Island No. 37, beginning at the northeast corner of Entry No. 7, in the name of said Trigg, at a sycamore marked J. T.; thence west

145 poles to a mulberry marked J. T.; thence north 220 poles
300 to a cottonwood; thence east 75 poles to a mulberry and sweet gum marked J. T.; thence up said chute or main river S. 25 degrees east, to the beginning.

Oct. 14, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on page 171, in the office of the Register of Tipton county. Tennessee.

Aug. 21st, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 8, as the same appears of record in my office at Covington.

Given under my hand at office, in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

43. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of John Trigg's one hundred fifty-one and one-half acres, surveyed Oct. 14th, 1837, by T. P. Hall, D. S. T. C.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

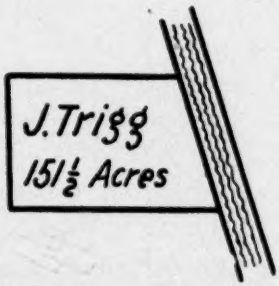
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

301 *Survey of Entry No. 9.*

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 9, dated Sept. 5th, 1836, founded on Register certificate No. 7106, for 151½ acres, I have survey- for John Trigg, assignee, &c., 151½ acres of land in said county, Range 9, section 6, on Island No. 37, beginning at the northeast corner of Entry No. 8, in the name of said Trigg, on a mulberry and sweet gum marked J. T., on the bank of the main chute or old river, running thence west 150 poles to a mulberry and cottonwood, marked J. T.; thence north 220 poles to an elm and sycamore, marked J. T., thence east 40 poles to a sycamore on the bank of the main river; thence south 48 degrees east 60 poles; thence with the river south 25 east 170 poles, to the beginning.

Oct. 14, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on page 171, in the office of the Register of Tipton county, Tennessee.

Aug. 21st, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

302 I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 9, as the same appears of record in my office.

Given under my hand at office, in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

44. A certified copy made by the Entry Taker of Tipton county, Tennessee, *on* the certificate of survey of T. P. Hall's one hundred acres, surveyed October 16, 1837, by T. P. Hall, D. S. T. C.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

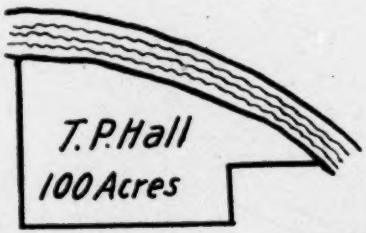
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 12.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 12, dated Dec. 1st, 1836, founded on certificate warrant No. 2932, for 100 acres, I have surveyed for Thomas P. Hall, assignee, &c., 100 acres of land in said county, range 9, section 6, on Island No. 37, beginning at the lower or northeast corner of Entry No. 9, for 151½ acres in the name of John Trigg, on a sycamore, running thence west 40 poles to an elm and
303 sycamore marked J. T.; thence south with Trigg's line 40 poles to a mulberry marked T. P. H.; thence west 160 poles

to a mulberry; thence north 100 poles to a cottonwood on the bank of the river; thence up the river east 60 poles east 10 degrees south 80 poles, east 30 degrees south 50 poles, and east 40 degrees south 20 poles, to the beginning.

October 16, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
JAMES VAUGHN,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, page 172, in the office of the Register of Tipton county, Tennessee.

Aug. 21st, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 12, as the same appears of record in my office.

Given under my hand at office, in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

45. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of John Trigg's thirty-seven acres, survey by T. P. Hall, D. S. T. C., on October 14th, 1837.

(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

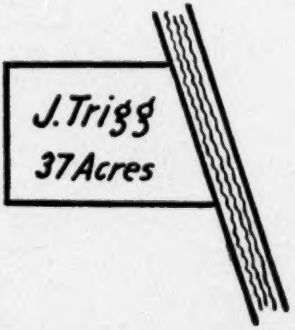
304 No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 7.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 7, dated Sept. 5, 1836, founded on warrant No. 3469, for 30 acres, No. 7097 for 2 acres, and No. 7093 for 5 acres. I have surveyed for John Trigg, assignee, &c., 37 acres of land in Tipton county, range 9, section 6, on Island No. 37, in the Mississippi river, beginning at the head of said Island, 400 poles N. 50 degrees west from S. Huddleston's N. E. corner, running thence down the north or main chute N. 10 degrees W. 60 poles to a sycamore marked J. T.; thence west 90 poles to a hackberry marked J. T.; thence south 80 poles to a hackberry on McKenzie's chute marked J. T.; thence up said chute east 20 degrees north 95 poles to the beginning.

Oct. 14, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, page 170, in the office of the Register of Tipton county, Tennessee.

Aug. 21st, 1901.

SUE E. MURPHY.

305 STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 7, as the same appears of record in my office.

Given under my hand at office, in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

46. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of John Trigg's one hundred acres surveyed on October 16th, 1837, by T. P. Hall, D. S. T. C.
(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 10.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:

J. Trigg
100 Acres

By virtue of Entry No. 10, dated Sept. 5, 1836, founded on warrant No. 3073 for 100 acres, issued to William Christian, I have surveyed for John Trigg, assignee, &c., 100 acres of land in said county, Range 9, Section 6, on Island No. 37, beginning at the northwest corner of Entry No. 8, for 152 acres, in the name of said Trigg, on a cottonwood running thence south with the west line of said entry 100 poles to a sycamore, marked J. T. and N. P.; thence west 160 poles to a box elder; thence north
306 100 poles to an elm marked J. T.; thence east 160 poles to the beginning.

Oct. 16, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in Survery Book A, on pages 171 and 172 in the office of the Register of Tipton County, Tennessee.
Aug. 21, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 10, as the same appears of record in my office.
Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

47. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of N. Potter's six hundred and forty acres, surveyed on October 14th, 1837, by T. P. Hall, D. S. T. C.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 26.

Filed Dec. 3, 1901.

307 STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 26, dated Jan. 5, 1837, founded on warrant No. 3384, for 640 acres, issued to the heirs of James Ohara, I have surveyed for Nathaniel Potter, assignee, &c., 640 acres of land in said county, Range 9, Section 6, on Island No. 37, beginning at the southwest corner of Entry No. 8, for 152 acres in the

name of John Trigg, at a mulberry marked J. T., running thence north with his line 120 poles to a sycamore of Trigg's 100 acre Entry; thence west with said entry 160 poles to a box elder; thence north 100 poles to an elm marked J. T.; west 340 poles to a box elder marked N. P.; thence south 220 poles to a stake on the north boundary of J. Dean's Occupant; thence east with his line to his northeast corner on a sassafras; thence east 350 poles to the beginning.

Oct. 14, 1837.

T. P. HALL, *D. S. T. C.*

ASHLEY DAVIS,
THOMAS ROANE,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on page 173, in the office of the Register of Tipton county, Tennessee.

Aug. 22, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, O. W. Menefee, Entry Taker for Tipton county, Tennessee, de certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 26, as the same appears of record in my —.

308 Given under my hand at office this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

48. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of John G. Chalmers, William H. Long, and R. H. Burns, one hundred and thirty-five acres of land surveyed on October 13th, 1837, by T. P. Hall, D. S. T. C.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

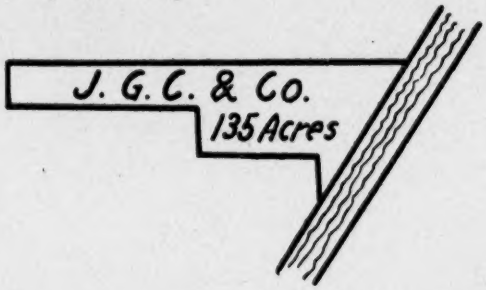
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 35.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 35, for 135 acres, dated Feb. 13, 1837, founded on warrant No. 3547, for 135 acres, I have surveyed for John G. Chalmers, Wm. H. Long and R. H. Burns, 135 acres of land in said county, Range 9, Section 6, on Island No. 37, beginning at the lower or southwest corner of Entry No. 7, for 37 acres in the name of John Trigg at a hackberry marked J. T., running thence down McKenzie's Chute west 25 degrees south 100 poles to the upper corner of Trigg's 30 acre entry on a hackberry; thence north with his line 50 poles to a large cottonwood; thence west 85 poles to a persimmon on Barney's line; thence north with his line 45 poles to his corner on a box elder; thence west with
309 his north line 230 poles to an elm on Deane's line 45 poles to a sassafras, his northeast corner; thence east with N. Potter's 640 acre entry 400 poles to a hackberry marked J. T.; thence south 80 poles to the beginning.

Oct. 13, 1837.

T. P. HALL, *D. S. T. C.*

JAMES VAUGHN.
THOMAS ROANE.

Copied from the entry of the original survey recorded in Survey Book A, on page 174, in the office of the Register of Tipton county, Tennessee.

Aug. 22, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton County, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 35, as the same appears of record in my office.

Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

49. A certified copy made by the Entry Taker of Tipton county, Tennessee, of the certificate of survey of R. H. Burns' two hundred acres, surveyed on July 20th, 1840, by Fred R. Smith D. S. T. C.
(The clerk will please here insert it.)

Circuit Court of the United States, Western District of Tennessee.

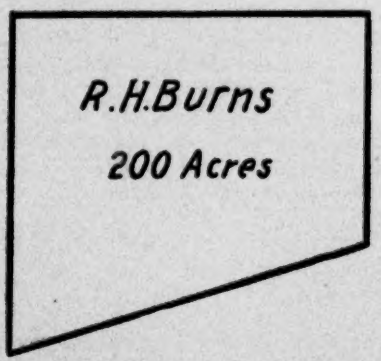
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

310 *Survey Entry No.* 109.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 109, dated July 17, 1840, founded on part of warrant No. 3637 issued to the heirs of Thomas King, I have surveyed for Ransom H. Burns, assignee, &c., 200 acres of

land in said county, Range 9, Section 6, of the 11th Surveyor's District on an Island in the Mississippi river, known as Island No. 37, beginning 280 poles west from the head of said island on a box elder marked J. B.; thence south 110 poles to a cottonwood on McKenzie's Chute; thence down said chute S. 70 degrees W. 240 poles to a stake on the margin of said chute; thence north 160 poles to an elm marked J. B.; thence east 230 poles to the beginning.

Surveyed July 20, 1840.

FRED R. SMITH, *D. S. T. C.*

R. I. CHESTER,
F. R. SMITH,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on page 192, in the office of the Register of Tipton county, Tennessee.

Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton County, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 109, as the same appears of record in my office.

311 Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

50. A certified copy made by the entry taker of Tipton county, Tennessee, of the survey of T. P. Hall's six hundred and ten acres surveyed on October 14th, 1837, by T. P. Hall, D. S. T. C.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

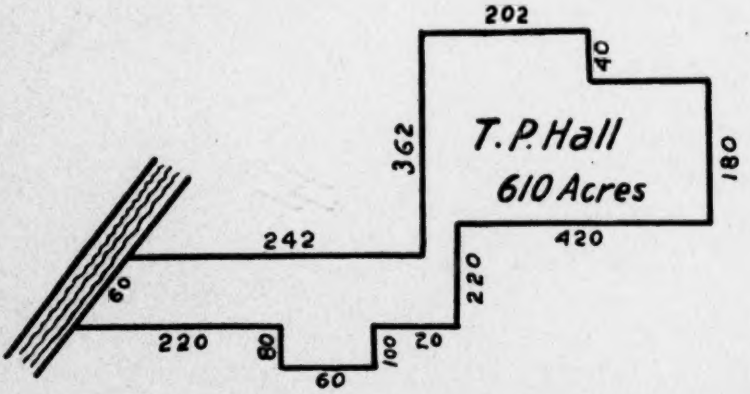
H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 339, 610 *acres.*

Filed Dec. 3, 1901.

Scale 200 poles per inch.

STATE OF TENNESSEE,
Tipton County:



By virtue of entry No. 42, dated 11th March, 1837, founded on warrant No. 3588 for 610 acres, I have surveyed for Thomas P. Hall, assignee, &c., 610 acres of land in said county, Range 9, Section 6 on Island No. 37, beginning at the southeast corner of Entry No. 12, for 100 acres in the name of said Hall, at a mulberry marked T. P. H.; thence south with Trigg's entry No. 9, for 151 1-2 acres, 180 poles to a mulberry and cottonwood; thence west with
312 said Trigg's 100 acre entry and N. Potter's 640 acre entry, 420 poles to Potter's N. W. corner on a box elder marked N. P. thence south with his line 220 poles to his southwest corner on J. Dean's Occupant; thence west 20 poles to a maple marked J. D.; thence south with his line 100 poles to a red bud marked J. D.; the northeast corner of J. Sloane's 12 acre entry; thence west with his line 60 poles to an elm marked J. S.; thence north with T. P. Hall's 148 acre entry 80 poles to a sycamore marked T. P. H.; thence west 220 poles to a maple, his northwest corner; thence

north 33 degrees east 60 poles to the lower corner of entry No. 36 for 274 acres; thence east with said entry 242 poles to its southeast corner; thence north 362 poles to a cottonwood; thence east with Love's 172 acre entry 260 poles to a mulberry marked C. I. L.; thence south 40 poles to a mulberry, the southwest corner of T. P. Hall's 100 acre entry; thence east with said entry 160 poles to the beginning.

14 Oct., 1837.

T. P. HALL, *D. S. T. C.*

JAMES VAUGHN,
ASHLEY DAVIS,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on pages 176 and 177, in the office of the register of Tipton County, Tennessee.

Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of entry No. 42, as the same appears of record in my office at Covington.

Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

313 51. A certified copy made by the entry taker of Tipton county, Tennessee, of the certificate of survey of R. H. Burns' two hundred and four and one-fourth acres surveyed on July 20th, 1840, by F. R. Smith, D. S. T. C.

(The clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

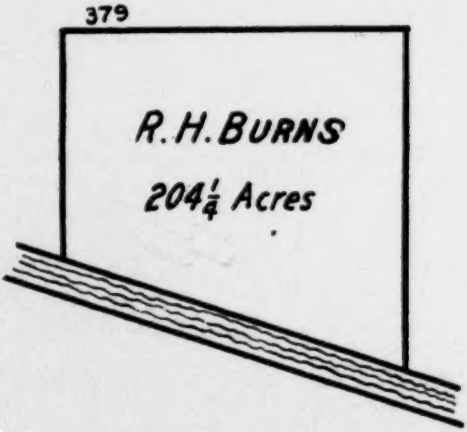
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 110, 204½ *Acres.*

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 110, dated 17th July, 1840, founded on Warrant No. 2673, issued to M. Armstrong by the C. W. T. for 184½ acres and Warrant No. 6958 issued by the R. W. T. to James Davis for 20 acres. I have surveyed for Ransom H. Burns, assignee, &c., 204¼ acres of land in said county, Range 9, Section 6, on an island in the Mississippi river known as Island No. 37, beginning at a stake the southwest corner of Entry 109 for 200 acres in the name of said Burns on the north bank of McKenzie's chute, thence north 200 poles to a sassafras marked R. B., thence west 170 poles to a maple marked R. B., thence south 150 poles to a hackberry on said chute, thence up said chute south 70 degrees east to the beginning.

July 20, 1840.

F. R. SMITH, *D. S. T. C.*

314 R. I. CHESTER,
F. R. SMITH,
C. C.

Copied from the entry of the original survey recorded in Survey Book A on page 193 in the office of the Register of Tipton County, Tennessee.

Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton County, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 110 as the same appears of record in my office at Covington. Given under my hand at office in Covington, Tenn., this December 2, 1901.

W. O. MENEFEE,
Entry Taker, Tipton County, Tenn.

52. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of R. H. Burns' two hundred and seventy-four acres surveyed on October 16th, 1837, by T. P. Hall, D. S. T. C.:

(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

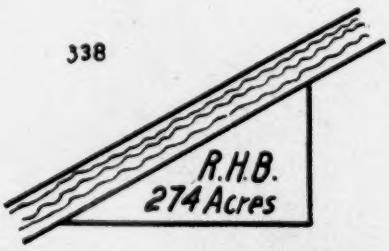
H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 36.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:

315



By virtue of Entry No. 36, dated Feb. 13, 1837, founded on Military Warrant No. 40, I have surveyed for John G. Chalmers, James

S. Lyon, Wm. H. Long and Ransom H. Burns 274 acres of land in said county, Range 9, Section 6, on Island No. 37, beginning at the lower corner of Entry No. 20 for 172 acres in the name of C. I. Love on a cottonwood, thence down the river S. 56 degrees W. 80 poles S. 30 degrees W. 360 poles to a cottonwood on the bank of the river, thence east 240 poles to a stake, thence north 360 poles to the beginning.

Oct. 16, 1837.

T. P. HALL, *D. S. T. C.*

JAMES H. VAUGHN.
ASHLEY DAVIS.

Copied from the entry of the original survey recorded in Survey Book A on page 176 in the office of the Register of Tipton County, Tennessee.

Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton County, Tennessee, do certify that th above and foregoing contains a full, true and perfect copy of the survey of Entry No. 36 as the same appears of record in my office. Given under my hand at office in Covington, Tennessee, this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

53. A ceritfied copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of T. P. Hall's one hun-
316 dred and forty-eight acres of land surveyed on December 14, 1836, by T. P. Hall, D. S. T. C.:

(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

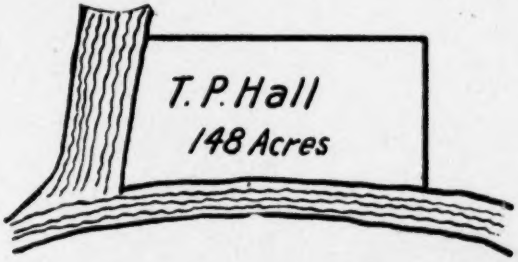
H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 281, 148 *Acres.*

Filed Dec. 3, 1901.

Scale 200 poles per inch.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 17, founded on Certificate Warrant No. 7128, issued to Wesley Nixon for 148 acres, I have surveyed for Thomas P. Hall, assignee of said Nixon, one hundred and forty-eight acres of land in Tipton County, Range 9, Section 6, on Island No. 37, in the Mississippi river, beginning at the southwest corner of Entry No. 15 for 12 acres in the name of J. Sloane at a hackberry on the north bank of McKenzie's cnute, running thence north 110 poles to a sycamore marked T. P. H., thence west 220 poles to a maple on the bank of the main chute, thence down the main river bank south 30 degrees west 120 poles to a willow marked T. P. H. on the lower part of the island, thence up McKenzie's chute east 200 poles, thence south 80 degrees east 40 poles to the beginning. Surveyed Dec. 14th, 1836.

T. P. HALL, *D. S. T. C.*

ZEPH DEANE,
CLARK HERRON,
C. C.

317 Copied from the entry of the original survey recorded in Survey Book A, on page 151, in the office of the Register of Tipton County, Tennessee, Aug. 20th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton County, — that the above and foregoing contains a full, true and perfect copy of the survey of entry No. 17 as the same appears in my office. Given under my hand at office, *at office,* this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

54. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certincate of survey of C. I. Love one hundred and seventy-two acres of land surveyed on October 16, 1837, by T. P. Hall, D. S. T. C.:
(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 330, 172 *Acres.*

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 20, dated Dec. 27, 1836, founded on Warrant No. 3507 for 172 acres, I have surveyed for the heirs of Charles I. Love, 172 acres of land in said county, Range 9, Section 6, on Island No. 37, including the towhead on the north side of the island beginning at the lower or northwest corner of
318 Entry No. 12 for 100 acres in the name of T. P. Hall, running thence south 80 poles to a mulberry marked C. I. L., thence west 260 poles to a cottonwood on the bank of a small chute dividing the island from the towhead, thence north 20 degrees east 80 poles, t hence north 50 degrees east 80 poles, thence east 15 degrees north 70 poles, thence eas' 60 poles S. 10 degrees E. 20 poles, thence south 20 degrees east to the beginning, Oct. 16, 1837.

T. P. HALL, *D. S. T. C.*

A. DAVIS,
J. VAUGHN, *C. C.*

Copied from the original survey recorded in Survey Book A on page 173 in the office of the Register of Tipton County, Tennessee, Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, O. W. Menefee, Entry Taker for Tipton County, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of the Entry No. 20 as the same appears of record in my office.

Given under my hand at office in Covington, Tenn., this December 3d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

55. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of James Sloans's twelve acres of land surveyed on December 14th, 1836, by T. P. Hall, D. S. T. C.:

(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

319 No. 3601.

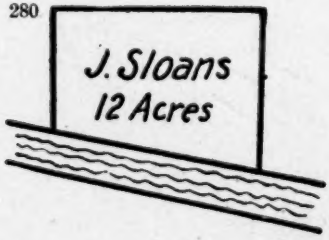
H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 280, 12 *Acres.*

Filed Dec. 3, 1901.

Scale 60 poles per inch.

STATE OF TENNESSEE,
Tipton County:



By virtue of Entry No. 15 founded on Certificate Warrant No. 5913 for 12 acres issued to Willis Nonworthy by the Register of

West Tennessee I have surveyed for James Sloane, assignee, &c., twelve acres of land in said county, Range 9, Section 6, on Island No. 37 in the Mississippi river, beginning at the lower southwest corner of Occupant Entry No. 6, in the name of J. Deane, on a hickory on the north bank of McKenzie's chute, running thence north 40 poles to a red bud marked J. S., thence west 60 poles to an elm marked J. S., thence south 30 poles to a hackberry on the bank of said chute, thence up the chute east 10 degrees south 65 poles to the beginning. Surveyed Dec. 14, 1836.

T. P. HALL, *D. S. T. C.*

ZEPH DEANE,
CLARK HERRON,
C. C.

Copied from the entry of the original survey recorded in Survey Book A on page 150 in the office of the Register of Tipton County, Tennessee, Aug. 20th, 1901.

SUE E. MURPHY,

STATE OF TENNESSEE,
Tipton County:

I, O. W. Menefee, Entry Taker for Tipton County, Tennessee, do certify that the above and foregoing contains a full, true
320 and perfect copy of Entry No. 15 as the same appears of record in my office.

Given under my hand at office this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

56. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of G. S. Fogleman's one hundred and twenty-five acres surveyed on Jan. 22d, 1845, by R. W. Smith, Surveyor of Tipton County, by A. Jones, D. S.:

(The Clerk will here please insert it.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry 153 Acres.

Filed Dec. 3, 1901.

TIPTON COUNTY,
Tennessee:



By virtue of Entry No. 153, dated Aug. 9, 1838, founded on part of Warrant No. 1860, issued for 1,860 acres, I have surveyed for George S. Fogleman, assignee of William Williams, 125 acres in Range 9, Section 5, of the 11th Surveyor's District, beginning at the southeast corner of G. S. Foglesman's 200 acre Entry No. 13, thence north to the northeast corner of the same on the Stephen Slades' south boundary line 200 poles to a sycamore marked G. S. F., thence east with said Slades' line 80 poles to a stake on the said line, thence south 280 poles to a small cottonwood on the east bank of the Mississippi river, thence up with the meanders of the
321 same N. 60 degrees W. 90 poles to a small cottonwood on the bank of the river, thence north 36 poles to the beginning. Surveyed 22d Jan., 1846.

A. W. SMITH,
Surveyor, Tipton County,
By A. JONES, *D. S.*

L. C. GRAVES,
T. MASON,
C. C.

Copied from the entry of the original survey recorded in Survey Book A on page 246 in the office of the Register of Tipton County, Tennessee, Aug. 23d, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, O. W. Menefee, Entry Taker for Tipton County, Tennessee, do certify that the above and foregoing contains the survey of Entry No. 153 as the same appears of record in my office.

Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County, Tenn.

57. A certified copy made by the Entry Taker of Tipton County, Tennessee, of the certificate of survey of G. S. Fogleman's two hundred acres surveyed on January 23d, 1846, by A. W. Smith, Surveyor of Tipton County, by A. Jones, D. S.
(The Clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

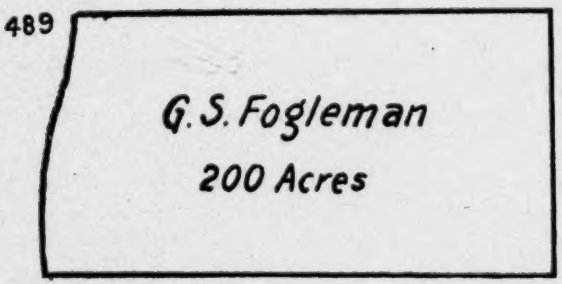
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

322 *Entry No.* 489, 200 *Acres.*

Filed Dec. 3, 1901.

TIPTON COUNTY,
Tennessee:



By virtue of Entry No. 12, dated Jan. 3, 1846, I have surveyed for George S. Fogleman 200 acres of land in Range 9, section 5. Beginning at a small cottonwood on the east bank of the Mississippi river the southeast corner of G. S. Fogleman's 125 a. entry; thence north 280 poles with sd. Fogleman's line to a stake on the south boundary line of Steven Slade; thence east 109 poles with Slade's line to a stake; thence south 320 poles to a small cottonwood on the bank of a chute nearly opposite the lower end of a towhead; thence with the meanders of the chute west 9 poles, N. 60, W. 78 poles; thence west 32 poles to the beginning.
Surveyed 23 Jan., 1846.

A. W. SMITH,
Surveyor Tipton County,
By A. JONES, *D. S.*

L. C. GRAVES.
A. JONES.

Copied from the entry of the original survey recorded in Survey Book A, on page 246, in the office of the Register of Tipton county, Tennessee. Aug. 22d, 1901.

SUE E. MURPHY.

STATE OF TENN.,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the aoove and foregoing contains a full, true and perfect copy of the survey of entry No. 12 as the same appears of record in my office.

323 Given under my hand at office in Covington, Tenn., this Dec. 2d, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

58. A certified copy made by the entry taker of Tipton county, Tennessee, of the certificate of survey of Simon Huddleston's two thousand acres of land surveyed December 19th, 1823, by John Ralston, D. S.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

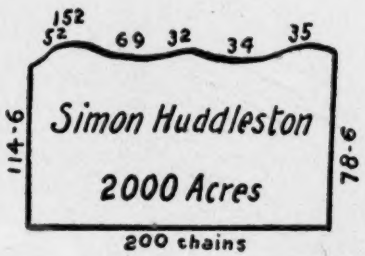
H. W. STOCKLEY
vs.
W. A. CISSNA.

Entry No. 722.

Filed Dec. 3, 1901.

Scale 100 Chains per inch.

STATE OF TENNESSEE,
11*th District:*



By virtue of entry No. 722, dated 2d July, 1822, founded on C. W. T. Warrant No. 364, dated 13th March, 1820, for 2000

acres, I have surveyed for Simon Huddleston 2000 acres of land in the 11th district, range 9, section- 5 and 6. Beginning at *at* a willow marked S. S., Steven Slade's N. E. corner on the bank of the Mississippi river, thence south with his line 114 chains to a mulberry marked S. S.; thence east 200 chains to a mulberry marked S. H. on the bank of the Mississippi river; thence N. 78 chs. to white oak marked S. H. on the bank of the Mississippi river, its meanders N. 41 degrees, W. 35 Chains, S. 82 degrees, W. 34 chains, N. 71 degrees 32 chains, S. 70 degrees, W. 62 chains, N. 72 degrees,
324 W. 52 chains to the beginning. Surveyed 19 Dec., 1833.

JOHN RALSTON, *D. S.*

WILLIAM R. REAVES,
JNO. A. MICKLEBERRY,
C. C.

Copied from the entry of the original survey recorded in survey book A, on pages 82 and 83 in the office of the Register of Tipton county, Tennessee. Aug. 20th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of Entry No. 722 as the same appears of record in my office.

Given under my hand at office in Covington, Tenn., this December, 1901.

W. O. MENEFEE,
Entry Taker, Tipton County.

59. A certified copy made by the entry taker of Tipton county, Tennessee, of the certificate of survey of Stephen Slade's twenty-five hundred and sixty acres of land, surveyed on December 24, 1823, by John Ralston, D. S.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

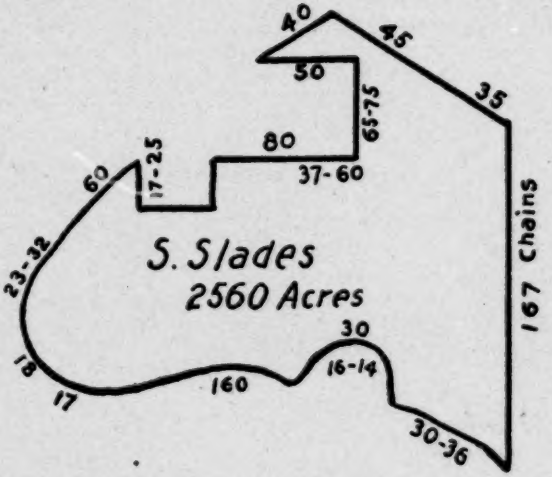
H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Entry No. 721.

Filed Dec. 3, 1901.

Scale 100 poles per inch.

325



STATE OF TENNESSEE,
11*th District:*

By virtue of entry No. 721, dated 2d July, 1822, founded on Military Warrant No. 1784, issued by the State of North Carolina to Steven Slade for 2560 acres, I have surveyed for Steven Slade 2560 acres of land in the 11th District, range 9 and 10, section- 5 and 6. Beginning at a box elder marked C. Mc. Charles McLung's northwest corner on the bank of the Mississippi river; thence east with his line 50 chains to a hackberry marked C. M., his northeast corner; thence south with his line 65 chains 75 links to a hackberry marked C. M., said McLung's S. W. corner on James H. McKenzie's line; thence south with said line 8 chains 44 links to a box elder marked J. H. M., said McKenzie's S. E. corner; thence west with his line 37 chains 60 links to a box elder marked J. H. M., his S. W. corner; thence north with his line 17 chains 25 links

to a stake from which S. 57 degrees, E. one chain an elm marked J. H. M., his N. W. corner on the bank of the river; thence down the river with its meanders S. 64 degrees, W. 60 chains, S. 68 degrees, W. 32 chains, S. 53 degrees, W. 23 chains, S. 28 degrees, W. 18 chains, south 17 chains to a cottonwood marked S. S.; thence east 160 chains to a cottonwood tree marked S. S. on the bank of the river; thence down the river with its meanders N. 21 degrees, E. 42 chains, N. 83 chains, E. 10 chains to a stake from which N. 33 degrees, E. 39 links an ash marked S. S. on Hugh B. Porter's line; thence north with said line 16 chains to a stake from
326 which N. 22 degrees, W. 29 links an elm marked H. B. P., said Porter's N. W. corner; thence east with his line 30 chains and 30 links to a stake 26 links west of an elm marked H. B. P., his N. E. corner; thence south with his line 14 chains to a hackberry marked S. S. on the bank of the river; thence down the river with its meanders S. 79 degrees, E. 30 chains, S. 71 degrees, E. 36 chains, S. 60 degrees, E. 5 chains to a box elder marked S. S.; thence north 167 chains to a willow marked S. S. on the bank of the river; thence down said river with its meanders N. 84 degrees, west 55 chains, west 45 chains, S. 54 degrees, W. 40 chains to the beginning.

Surveyed 24 Dec., 1823.

JOHN RALSTON, *D. S.*

WILLIAM P. REAVES,
JOHN A. MICKLEBERRY,
C. C.

Copied from the entry of the original survey recorded in Survey Book A, on pages 81 and 82, in the office of the Register of Tipton county, Tennessee. Aug. 20th, 1901.

SUE E. MURPHY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menefee, Entry Taker for Tipton county, Tennessee, do certify that the above and foregoing contains a full, true and perfect copy of the survey of entry No. 721 as the — appears of record in my office.

Given under my hand at office in Covington, Tennessee, this Dec. 2, 1901.

W. O. MENEFEE,
Entry Taker for Tipton County.

60. A certified copy made by the Register of Shelby county, Tennessee, of the certificate of survey of George S. Fogleman's one hundred acres of land, surveyed on January 4th, 1837, by
327 John Wherry, D. C. S., Shelby county.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

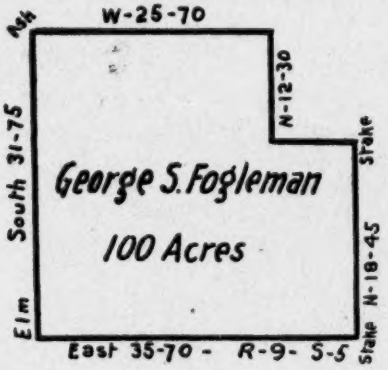
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey from John Wherry, D. C. S., to S. Fogleman.

Filed Dec. 3, 1901.

Taken out by G. B. Bateman, Aug. 14, 1837.



STATE OF TENNESSEE,
Shelby County:

By virtue of entry No. 14, dated 7th October, 1836, founded on part of certificate warrant No. 3526, issued by the commissioners of West Tennessee to Robt. M. Burton for 3037 acres of land, I have surveyed for George S. Fogleman 100 acres assignee of said Robt. M. Burton, including part of his occupant claim assignee of G. B. Bateman in range 9 sect. 5, said county. Beginning at a small mulberry marked S. H., Simon Huddleston's southeast corner of his 2000 acre entry No. —; then west with the south boundary line of said entry 25 chains and 70 links to a ash marked G. B. B.; then south 31 chains 75 links to an elm marked G. B. B. on the south boundary line of said 200 acres occupant; then east 35 chs. and 70 links to a stake 110 links south of an elm marked G. B. B., southeast corner of said occupant; then north 18 chs. and 45 links to a stake 20 links east of a sweet gum marked G. B. B. on the south boundary line of

Green B. Bateman's 45 acre entry on his 200 acre occupant
328 No. —; then west ten chains a large procon tree marked G. B. B., southwest corner of said 45 acre entry; then north 12 chs. and 30 links to the beginning.

Surveyed 4th Jany., 1837.

JOHN WHERRY, *D. C. S.*

GREEN B. BATEMAN,
JOHN WHERRY.

Endorsed: John Wherry, D. C. S., To: Survey, S. Fogleman.

I, Robt. F. Malone, Register of said county, hereby certify the endorsed one page to be a full, true and perfect copy from the records of my office of a survey from John Wherry, D. C. S., to S. Fogleman, of record in Survey Book A, page 312.

Witness my official signature, this 3d day of Dec., 1901.

ROBT. F. MALONE, *Register,*
By E. M. DOUGLASS, *Deputy.*

61. A certified copy made by the Register of Shelby county, Tennessee, of the certificate of survey of N. Potter's hundred and fifty-two acres of land surveyed on November 11th, 1837, by John Wherry, D. C. S., Shelby county.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

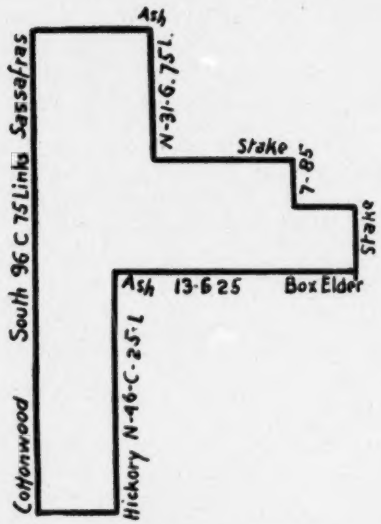
H. W. STOCKLEY
VS.
W. A. CISSNA.

Survey of Land for N. Potter.

Filed Dec. 3, 1901.

329

No.



P. & C. taken out by John Wherry 3d May, 1838.

STATE OF TENNESSEE,
Shelby County:

By virtue of entry No. 94, dated on the 7th day of December, 1836, founded on warrant No. 3500 issued to James G. Brehon for 252 acres, I have surveyed for N. Potter two hundred and fifty-two acres of land lying in fractional range 9, fractional section 5, Mississippi river. Beginning at an ash marked H. S. B., heirs of Jesse Benton's northwest corner of their 1436½ acre entry No. 727; then east at sixty chains and fifty links crossing a bayou sixty-five chains to a stake, east 20 links an elm marked N. P.; then north thirteen chains 25 links to a box elder marked N. P. on the south boundary line of G. B. Bateman's 256 acre entry No. 1626; then

west five chains and fifty links to a stake; then N. 45 degrees, W. 30 links a cottonwood md. G. B. B., southwest corner of said 256 acre entry; then north seven chains 85 links to a stake; whence north 100 links an elm marked G. B. B., southwest corner of said 256 acre entry; then north seven chains 85 links to a stake; whence north 100 links an elm marked G. B. B., southeast corner of Geo. G. Fogelman's 100 acre entry No. — then west thirty-five chains and 70 links to an elm S. W. corner of said 100 acre entry; then north thirty-one chains and 75 links to an ash marked G. B. B., northwest corner of said 100 acre entry on Simon Huddleson's south boundary line of his 2000 acre entry No. —; then west twenty-eight chains
75 links to a sassafras marked J. J., northeast corner of John
330 Jenkins' 1000 acre entry No. —; then south at 71 chains
25 links crossing and passing Jenkin's southeast corner in all ninety-six chains 75 links to a cottonwood marked S. B., Simon Bateman's southeast corner of his 100 acre entry; then east five chains 75 links to a hackberry marked G. B. B., northeast corner of G. B. Bateman's 49 acre entry No. — on the Hrs. of J. Benton's 1436½ acre entry; thence north forty-six chains 25 links to the beginning.

Surveyed 11th November, 1837.

JOHN WHERRY,
D. C. S., Shelby County.

JOHN WHERRY,
G. B. BATEMAN,
C. C.

Endorsed: John Wherry, D. C. S., To: Survey, N. Potter.

STATE OF TENNESSEE,
Tipton County:

I, Robt. F. Malone, Register of said county, hereby certify the *endorsed* one page to be a full, true and perfect copy from the records of my office of a survey from John Wherry, D. C. S. to N. Potter of record in Survey Book A, page 348.

Witness my official signature at office, this 3d day of Dec. 1901.

ROB'T F. MALONE, *Register,*
By F. M. DOUGLASS, *Deputy.*

62. A certified copy made by the Register of Shelby County, Tennessee, of the certificate of survey of Green B. Bateman's forty-five acres of land, surveyed on January 4th, 1837, by John Wherry, D .C. S., Shelby county.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

331 STATE OF TENNESSEE,
Shelby County:

I, Robt. F. Malone, Register of said county, hereby certify the *endorsed* ¾ page to be a full, true and perfect copy from the records of my office of a survey from John Wherry, D. C. S., to Green B. Bateman of record in Survey Book A, page 309.

Witness my official signature at office this 3d day of Decr., 1901.

ROB'T F. MALONE, *Register,*
By E. M. DOUGLASS, *Deputy.*

63. A certified copy made by the Register of Tipton county, Tennessee, of the certificate of survey of Green B. Bateman's four hundred acres, surveyed on November 6th, 1845, by A. W. Smith, Surveyor, by A. Jones, D. S.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
VS.
W. A. CISSNA.

Entry No. 481.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:

332 No. 3601.

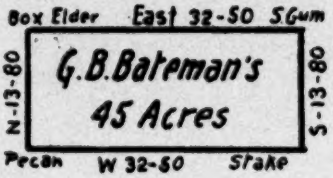
H. W. STOCKLEY
VS.
W. A. CISSNA.

Entry No. 10.

Filed Dec. 3, 1901.

Taken out by G. B. Bateman, Aug. 44, 1837.

STATE OF TENNESSEE,
Shelby County:



By virtue of entry No. 10, dated December 7th, 1836, founded upon part of certificate No. 3526 issued by the Commissioners of West Tennessee to Robt. M. Burton for 3037 acres of land, I have surveyed for Green B. Bateman, assignee of said Robt. M. Burton, 45 acres of land in range 9 section 5, said county, including his occupant claim No. 200. Beginning at a small sweet gum marked G. B. B., Green B. Bateman's southeast corner of his 155 acre entry on said occupant claim; then south 13 chs. and 80 links to a stake 1 ch. 30 links, south and 20 links east of a sweet gum marked G. B. B.; then south 32 chs. to a pecan tree marked G. B. B., the southwest corner of said 200 acre occupant claim; then north at 12 chs. and 30 link*e* passing a mulberry marked S. H., Simon Huddleston's southeast corner, in all 13 chs. and 80 links to a box elder marked G. B. B., Green B. Bateman's southwest corner of his 155 acre entry on said occupant on the east boundary line of Simon Huddleson's 2000 acre entry; then east 32 chs. and 50 links to *be* beginning.

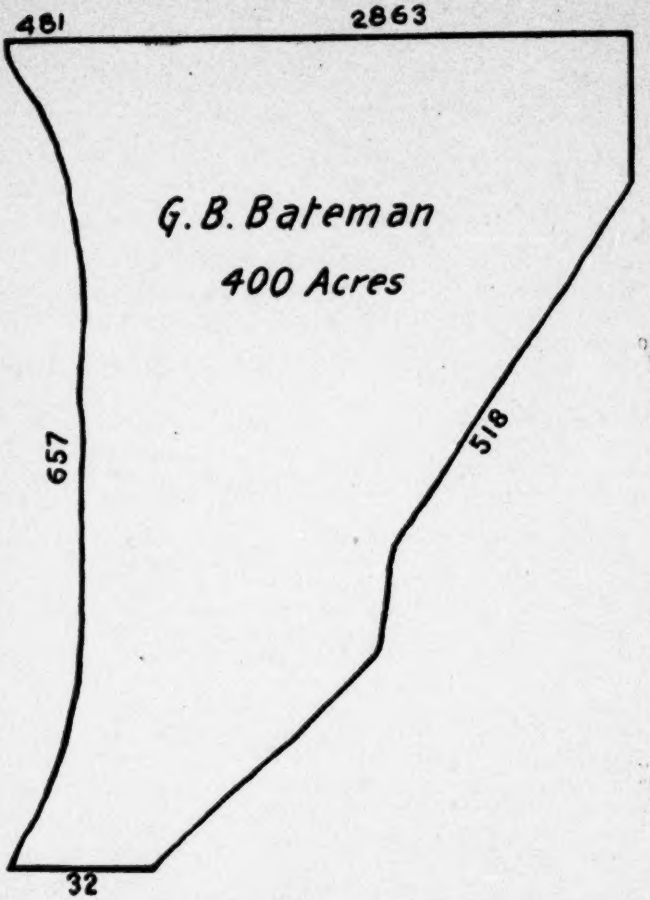
Surveyed 4th Jan., 1837.

JOHN WHERRY, *D. C. S.*

GREEN B. BATEMAN,
JOHN WHERRY,
C. C.

Endorsed: John Wherry, D. C. S., to: Survey, Green B. Bateman.

333



By virtue of Entry No. 20, dated Oct. 29, 1845, I have surveyed for G. B. Bateman 400 acres of land in said county, Range 8, Section 5, it being the lower part of Island No. 36, commonly called Old River Island. Beginning 265 poles up the Mississippi river from the N. W. corner of said Bateman's Entry No. 1625 for 155 acres at a stake, thence south 32 poles to old river, thence up the same with its meanders south 55 degrees E. 176 poles, thence south 75 degrees E. 60 poles, thence south 57 E. 216 poles, thence south 80 E. 60 poles to a stake in said old river, thence north passing the southwest corner Adam A. Lewis' 200 acre occupant entry, in all 284 poles to said Lewis' northwest corner on the south bank of the Mississippi river, thence down the same with its meanders S. 70 degrees W. 96 poles, thence due west 60 poles, thence S. 79 W. 108 poles, thence due west 80 poles,

thence N. 68 degrees W. 150 poles to the beginning. Surveyed Nov. 6, 1845.

A. W. SMITH, *Surveyor,*
By A. JONES, *D. S.*

334 HOSEA BATEMAN,
NICHOLAS PRESSON,
C. C.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan'y 10, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is a true and exact copy of an entry of record in Book A, page 241, in my office.

I. R. CALHOUN, *Register.*

STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM,
COVINGTON, TENN., ——, 1901.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tennessee, and that as said Register he is the official keeper of the record of deeds and other instruments of land titles in said county and as such Register is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee, and that his said certificate of attestation is in due form of law and that the signature thereto is his true and genuine official signature, and his official acts as such Register are entitled to full faith and credit.

Witness my hand this 14th day of January, 1901.

JOHN CRAIG, *Judge.*

STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, Clerk of the County Court of said county, certify that Hon. John Craig, whose genuine official signature appears to the above and hereto annexed certificate, is, and was at the time of the signing the same, sole and presiding Judge of the County Court in and for the county and State aforesaid, duly commissioned and qualified, and that all his official acts, as such,

335 entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and official seal of said court, at office, in the town of Covington, Tenn., this — day of ——, 1901.

[L. S.] E. H. PEETE, *Clerk.*

64. A certified copy made by the Register of Tipton County, Tennessee, of the certificate of survey of John Jenkins' one thousand acres of land surveyed on December *on* 27th, 1823, by John Ralston, D. S.:

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

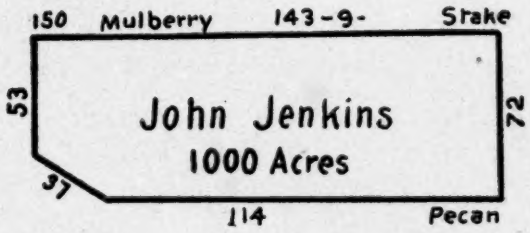
No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey of Land.

Filed Dec. 3, 1901.

Scale 50 chains per inch.
Taken out by John Massey.



STATE OF TENNESSEE,
11th District:

By virtue of Entry No. 813, dated 13 Dec., 1822, founded on Military Warrant No. 924, dated 5 Sept., 1822, I have surveyed for John Jenkins 1,000 acres of land in the 11th District, Section 5, Range 9. Beginning at a mulberry marked S. H., Simon Huddleston, southwest corner on Steven Slade's east boundary line, thence east with Huddleston's line 143 chains, 9 links to a stake 2 chains west of a sassafras marked g. g., thence south 72 chains to a pecan marked g. g., thence west 114 chains to a sweet
336 gum marked keel (g. g.) on the bank of the Mississippi river, thence up said river with its meanders north 55 degrees west 37 chains to a box elder marked 88, Steven Slade southeast corner, thence north with his line 53 chains to the beginning. Surveyed 27 Dec., 1823.

JOHN RALSTON, *D. S.*

WM. REAVES,
J. R. MICKLEBERRY,
C. C.

STATE OF TENNESSEE,
Tipton County:

RECORDER'S OFFICE, Feb'y 8th, 1901.

I, I. R. Calhoun, Register of said county and State, do certify that the above survey is a true and exact copy of the survey of record in my office in Survey Book A, page 81.

I. R. CALHOUN, *Register.*

STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM,
COVINGTON, TENN., ——, —.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tennessee, and as said Register is the official keeper of the record of deeds and other instruments of land title in said county, and, as such Register, is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee and that his said certificate of attestation is — due form of law, and his signature thereto is his true and genuine official signature, and official acts as such Register are entitled to full faith and credit.

Witness my hand this 8th day of Feby., 1901.

JOHN CRAIG, *Judge.*

337 STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, Clerk of the County Court of said County, certify that Hon. John Craig, whose genuine signature appears to the above and hereto annexed certificate is, and was at the time of signing the same, sole and presiding Judge of the County Court in and for the county and State aforesaid, duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the city of Covington, this 8th day of February, 1901.

[L. S.] E. H. PEETE, *Clerk.*

65. A certified copy made by the Register of Tipton County, Tennessee, of the certificate of survey of Green B. Bateman's one hundred and fifty-five acres of land surveyed on March 7th, 1836, by John Bateman, D. S.:

(The Clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Survey.

Scale 40 poles per inch. Filed Dec. 3, 1901.

STATE OF TENNESSEE,
11th District:

By virtue of Entry No. 1625, dated the 23d of December, 1834, founded on part of Warrant No. 393, for 3,750 acres, I have surveyed for Green B. Bateman 155 acres of land in said district, Range 9, Sections 5 and 6, on the Mississippi river in Tipton County, including part of his occupant claim No. 200, beginning at a white oak on the N. E. corner of Simon Huddleston's 2,000 acre entry on the bank of said river, thence up the eastern chute of the
338 river known by the name old river, with its meanders south 26 degrees east 19 chains south 3 degrees east 7 chains south 22 degrees east 12 chains, south 47 degrees east 26 chains and 50 links to a stake the N. E. corner of said occupant claim, thence south 24 chains 69 links to a sweet gum marked G. B. B., thence west 34 chains 17 links to a box elder marked G. B. B. on Simon Huddleston's line, thence north with said line 75 chains and 80 links to the beginning. Surveyed 7th March, 1836.

JOHN BATEMAN, *D. S.*
——— ———, *D. S.*

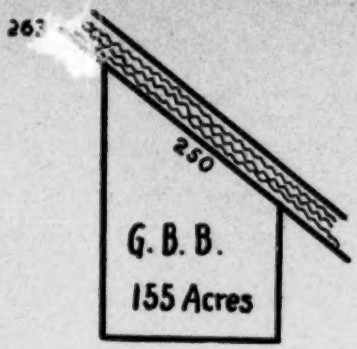
WM. BATEMAN,
H. W. BATEMAN,
C. C.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jany. 10, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is a true and exact copy of the entry found in Entry Book A, page 142, of my office.

I. R. [illegible]OUN, *Register.*



STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM,
COVINGTON, TENN., —— —, 1901.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tennessee, and that as said Register he is the official keeper of the record of deeds and other instruments of land titles in said county, and as such Register
339 he is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible in evidence in all courts of Tennessee, and that his certificate of attestation is in due form of law and that the signature thereto is his true and genuine official signature, and his official acts as such Register are entitled to full faith and credit. Witness my hand this 11th day of January, 1901.

R. G. CRAIG, *Judge.*

STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, Clerk of the County Court of said county, certify that Hon. John Craig, whose genuine official signature appears to the above and hereto annexed certificate, is, and was at the time of signing the same, sole and presiding Judge of the County Court in and for the county and State aforesaid, duly commissioned and qualified, and that all his official acts, as such are entitled to full faith and credit.

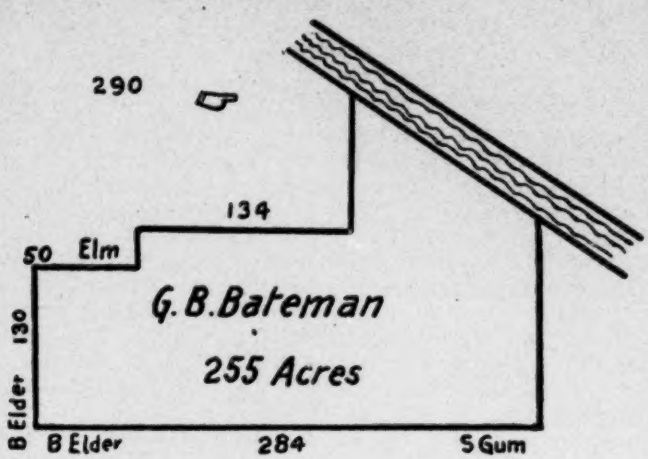
In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the town of Covington, Tenn., this 11th day of January, 1901.

E. H. PEETE, *Clerk.*

66. A certified copy made by the Register of Tipton County, Tennessee, of the certificate of survey of Green B. Bateman's two

hundred and fifty-six acres of land surveyed on February 10th, 1837, by S. P. Hall, D. S. T. C.;

(The Clerk will please insert it here.)



340 Scale 100 poles per inch.

STATE OF TENNESSEE,
Tipton County:

By virtue of Entry No. 1626 founded on Warranty No. 3334 for 256 acres I have surveyed for Green B. Bateman 256 acres in said county, Range 8, Section 5, beginning at the N. E. corner of G. B. Bateman's 200 acre occupant — on the Mississippi river, No. 200, running thence south with his line 80 poles to an elm and box elder marked G. B. B., thence west with his line 134 poles to a box elder, his southwest corner, thence south 3 poles to a mulberry, S. Huddleston's southeast corner of his 2,000 acres, thence west 50 poles to an elm marked G. B. B., thence south 130 poles to box elder marked G. B. B., thence east 284 poles to a sweet gum marked G. B. B., thence north 140 poles to a cottonwood on the bank of Old River, thence down the river north 60 degrees west 120 poles to the beginning. Surveyed Feby. 20th, 1837.

S. P. HALL, *D. S. T. C.*

LEM YOUNG,
THOMAS POUNDS,
C. C.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan'y 10, 1901.

I, I. R. Calhoun, Register of said county, do certify that the fore-

going is a true and exact copy of the entry found of record in my office in Entry Book A, page 155.

I. R. CALHOUN, *Register.*

341 STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM, COVINGTON, TENN., ——, 1901.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tennessee, and that as such Register he is the official keeper of the record of deeds and other instruments of land titles in said county, and as such Register is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee, and that his said certificate of attestation is in due form of law and that the signature thereto is his true and genuine official signature, and his official acts as such Register are entitled to full faith and credit.

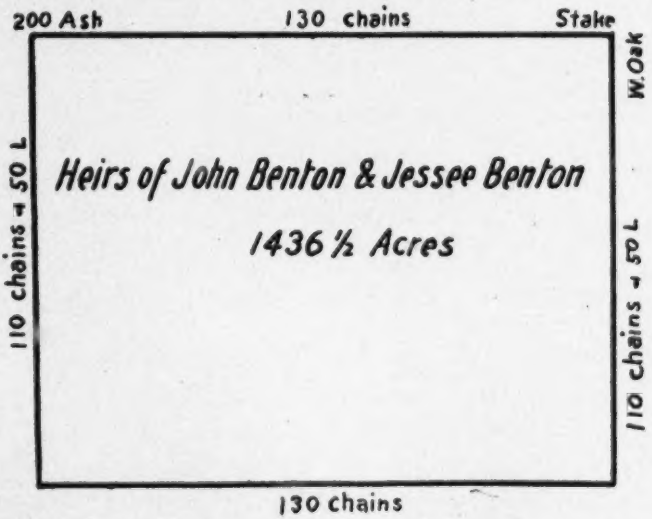
Witness my hand, this 11th day of January, 1901.

JOHN CRAIG, *Judge.*

67. A certified copy made by the Register of Tipton County, Tennessee, of certificate of survey of the heirs of John Benton and Jesse Benton's 1436 1-2 acres of land, surveyed on the 24th of November, 1824, by John Ralston, D. S.:

(The Clerk will please insert it here.)

Taken out at request of J. Ralston 11th May, 1825.



342 Scale 50 chains per inch.

STATE OF TENNESSEE,
11th District:

By virtue of Entry No. 727, dated 7th November, 1822, founded on certificate No. 2054, dated 23d March, 1821, issued for 1,436½ acres I have surveyed for the heirs of John Benton and Jesse Benton 1,436½ acres in the 11th District, Ranges 8 and 9, Section 5, on the east side of the Mississippi river, beginning at a sweet gum marked H. J. B. on the east boundary line of *of* Jesse Benton's 434¾ acre entry, 10 chains south of his northeast corner and thence east 130 chains to a white oak marked H. J. B., thence north 110 chains 50 links to a stake 18 links east of a pecan tree marked H. J. B., thence west 69 chains a bayou or outlet from the river 130 chains to an ash H. J. B., thence south crossing the bayou 110 chains 50 links to the beginning.

Surveyed 24th November, 1824.

JOHN RALSTON, *D. S.*

GRANGER McDANIEL,
THOMAS WILSON,
C. C.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan'y 11, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is a true and exact copy of the entry of record in Entry Book A, page 109, of my office.

I. R. CALHOUN, *Register.*

STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM,
COVINGTON, TENN., ——, 1901.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tenn., and that as said
343 Register he is the official keeper of the record of deeds and other instruments of land titles in said county, and as such Register is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee, and that his said certificate of attestation is in due form of law and the signature thereto is his true and genuine official signature, and his official acts as such Register are entitled to full faith and credit.

Witness my hand, this 11th day of January, 1901.

JOHN CRAIG, *Judge.*

STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, Clerk of the County Court of said county, certify that Hon. John Craig, whose genuine official signature appears to the above and hereto annexed certificate, is, and was at the time of signing the same, sole and presiding Judge of the County Court in and for the county and State aforesaid, duly commissioned and qualified, and all his official acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the town of Covington, Tennessee, this 11th day of January, 1901.

[L. S.] E. H. PEETE, *Clerk.*

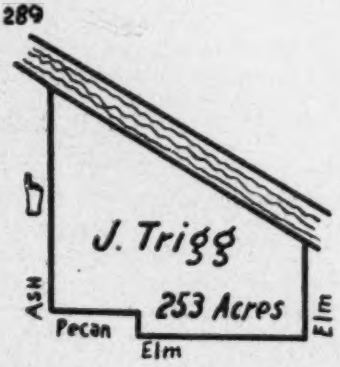
68. A certified copy made by the Register of Tipton County, Tennessee, of the certificate of survey of John Trigg's two hundred and fifty-three acres of land, surveyed by S. P. Hall, D. S. T. C.:

(The Clerk will please insert it here.)

STATE OF TENNESSEE,
Tipton County:

Scale 200 poles per inch.

344



By virtue of Entry No. 5 founded on claimant No. 3467 for 253 acres, dated the 1st Sept., 1836, I have surveyed for John Trigg, assignee, &c., 253 acres of land in said county, Range 8, Section 5, beginning at the northeast corner of Entry No. 1626 for 256 acres in the name G. B. Bateman, running thence south with his line 90 poles, Paplies corner, in all 230 poles to an ash on the north line of Entry No. 1436 acres in the name of J. Benton's heirs, thence east with their line 100 poles to a pecan marked H. J. B., their N. E. corner, thence south with their line 25 poles to an elm and hickory, thence east 170 poles to an elm marked J. T., thence north 65 poles

to a willow on the bank of Old River, thence west 30 degrees south 325 poles to the beginning.

S. P. HALL, *D. S. T. C.*

LEVI YOUNG,
THOMAS POUNDS,
C. C.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Jan'y 10, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument is a true and exact copy of an entry found of record in Entry Book A, page 155, of my office.

I. R. CALHOUN, *Register.*

STATE OF TENNESSEE,
Tipton County:

COUNTY COURT ROOM,
COVINGTON, TENN., —, 1901.

I, John Craig, sole and presiding Judge of the County Court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton County, Tennessee, and that as said
345 Register he is the official keeper of the record of deeds and other instruments of land titles in said county, and as such Register is authorized to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee, and that his said signature of attestation is in due form of law and that the signature thereto is his true and genuine official signature, and his official acts as such Register are entitled to full faith and credit.

Witness my hand, this 11th day of January, 1901.

JOHN CRAIG, *Judge.*

STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, Clerk of the County Court of said county, certify that Hon John Craig, whose genuine official signature appears to the above and hereto annexed certificate is, and was at the time of signing the same, sole and presiding Judge of the County Court in and for the county and State aforesaid, duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in the town of Covington, Tenn., this 11th day of January, 1901.

[L. S.] E. H. PEETE, *Clerk.*

69. A certified copy made by the Register of Tipton county, Tennessee, of the certificate of survey of Green B. Bateman's fifty-six and one-fourth acres of land, surveyed November 19th, 1845, by A. W. Smith, Surveyor of Tipton county, by A. Jones, D. S.
(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

346 No. 3601.

H. W. STOCKLEY
VS.
W. A. CISSNA.

Copy of Survey.

Filed Dec. 3, 1901.

STATE OF TENNESSEE,
Tipton County:

480
G.B. Bateman
56¼

By virtue of entry No. 152, dated Aug. 9th, 1838, and No. 22, dated Nov. 18, 1845, I have surveyed for Green B. Bateman 56¼ acres of land in said county, range 9, section 5. Beginning 260 poles east of the northwest corner of the heirs of Jesse Benton's entry No. 727 for 1436½ acres, also the southeast corner of N. Potter's 252 acre entry No. 94 on a sycamore marked G. B. B. on the south bank of the bayou; thence north 53 poles to a stake in the south boundary line of sd. Bateman's 256 acre entry No. 1626; thence east 170 poles to a stake on the west boundary ling of John Trigg's 252 acre entry; thence south 53 poles to sd. Trigg's south-west corner on the north boundary line of sd. Benton's entry No. 727; thence west 170 poles to the beginning. 44 acres of the above described land is entered by virtue of part of warrant 1860 issued 15 June, 1785, for 3840 acres to William Williams, and the balance 12¼ acres by virtue of the 12½ cents as it is commonly called.

A. W. SMITH,
Surveyor Tipton County,
By A. JONES, *D. S.*

Surveyed Nov. 19, 18-5.
HOSEA BATEMAN,
NICHOLAS PREPON,
C. C.

STATE OF TENNESSEE,
Tipton County:

I, I. R. Calhoun, Register of said county, do certify that
347 the foregoing instrument is a true and exact copy of the survey found recorded in Survey Book A, page 240, in my office.

I. R. CALHOUN, *Register.*

STATE OF TENNESSEE,
Tipton County:

County Court Room, Covington, Tenn.

I, John Craig, sole and presiding judge of the county court of said county, certify that I. R. Calhoun, who gave the foregoing certificate of attestation, is now, and was at the time of signing the same, Register of said Tipton county, Tennessee, and as said Register he is the official keeper of the record of deed and other instruments of and title in said county, and as such register is authorized by law to make and certify to copies of all instruments recorded in his office, which certified copies are admissible as evidence in all courts of Tennessee, and that his said certificate of attestation is in due form of law, and his signature thereto is his true and genuine official signature, and his official acts as such register are entitled to full faith and credit.

Witness my hand this 5 day of Feb'y, 1901.

JOHN CRAIG, *Judge.*

STATE OF TENNESSEE,
Tipton County:

I, E. H. Peete, clerk of the county court of said county, certify that Hon. John Craig, whose genuine official signature appears to the above and hereto annexed certificate is, and was at the time of signing the same, sole and presiding judge of the county court in and for the county and state aforesaid, duly commissioned and qualified, and that all his official acts, as such, are entitled to full faith and credit.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Covington,
348 this 5 day of Feb'y, 1901.

[SEAL.] E. H. PEETE, *Clerk.*

70. Certificate of John W. Gates, Register of the Land Office for Weste Tennessee, dated Jackson, Tennessee, Dec. 7th, 1901, reciting and describing the failure of the former register- to copy the seal of the State of Tennessee on the grants recorded by them.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Affidavit of John W. Gates, Register of the Land Office for West Tennessee.

Filed Dec. 7, 1901.

STATE OF TENNESSEE,
Madison County:

I certify that the various registers of the Land Office for the Western District of Tennessee, from the establishment of said office, at Jackson,, January 1st, 1826, to the present time, have not, in a single instance copied in the record book (containing the original grants or recorded copies thereof) the Great Seal of the State, affixed to said grants; nor have they made any fac simile representation of said seal, nor anything, as a sign or semblance of the same.

In four of the volumes, to wit: Nos. 1, 2, 3 and 4, there are small printed scrolls, like this (L. S.) on the upper left hand corner of each page. I don't know whether these were intended to represent a seal, or were merely a fancy of the printer; none of the other volumes, 28 in all, contain even this semblance of a seal. I
349 further certify that I have been register of the Land Office, for the Western District of Tennessee, since 1871—thirty years—have made out a great many certified copies of land grants, to be used as evidence in the state courts of this state, and, so far as I remember, no question has been raised on account of absence of seal in the copy.

In witness whereof, I hereunto subscribe my name and affix my private seal (there being no seal of office), in Jackson, Tenn., Dec. 7th, 1901.

JNO. W. GATES, [L. S.]
Register of the Land Office for West Tennessee.

71. A certified copy from the office of, and made by the Register of Tipton county, Tennessee, of the entry made by H. W. Stockley in the office of Entry Taker of Tipton county, Tennessee, on the 20th day of April, 1901.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
VS.
W. A. CISSNA.

Entry No. —, by H .W. Stockley, Tipton County.

Certified Copy. Filed Dec. 3d, 1901.

STATE OF TENNESSEE,
Tipton County:

Know all men by these presents, that I, H. W. Stockley, a citizen and resident of Tipton county, Tennessee, by virtue of the payment of the fees of his office to the Entry Taker of Tipton county, Tennessee, and the payment of all other fees to the officers necessary in obtaining a grant from the State of Tennessee and under
350 and by authority of the laws of the State of Tennessee made and provided for the entry and granting of the public lands by the said State to its citizens, have entered and do by these presents *do* hereby enter in the office of said entry taker of Tipton county, Tennessee, and declare my intention of applying to the State of Tennessee for a grant of the same, the following described tract or parcel of land lying and being in the eleventh civil district in said Tipton county, Tennessee, and more particularly described as follows: Beginning at the northeast corner of grant number 21206, made by the State of Tennessee to Simon Huddleston for 2000 acres. The east part of which is now owned by the said H. W. Stockley, and which grant or tract is situated in section- five (5) and six (6), in range nine (9), in the eleventh (11) surveyor's district in said county and state, and which said northeast corner is seventy-eight (78) chains north of the southeast corner of said Huddleston 2000 acre tract, and running from said northeast corner thence with said Huddleston's or Stockley's north line, north 41 degrees, west thirty-five (35) chains; thence with said Huddleston's or Stockley's said north line south 82 degrees, west thirty-four (34) chains; thence with said Huddleston's or Stockley's said north line north 71 degrees, west fifteen and thirty-two hundredths (15.32) chains; thence north 8½ degrees, west sixty-six (66) chains to the southeast corner of the (640) acres entry on Island Thirty-seven in the name of N. Potter, now owned by the said H. W. Stockley; thence north fifty-five (55) chains to the northeast corner of the 100 acre entry on Island Thirty-seven in the name of John Trigg; thence east sixty-one (61) chains to the middle or thread of the old main channel of the Mississippi river, and which channel is now dry land and which middle of said old channel of the Missis-

sippi river is the boundary line between the states of Arkansas
351 and Tennessee; thence with said thread of said old river which is the boundary line between said states, south 18 degrees, east seventy-one (71) chains; thence with said middle of said old river with said boundary line, south 31 degrees, east sixty-two (62) chains; thence south 49 degrees, west forty-two chains to the point of beginning, containing one thousand and fifty (1050) acres of land, more or less. Where said old main channel of the Mississippi is named in said foregoing description of said tract of land, it is meant the old channel of the Mississippi river which was the boundary line between the States of Tennessee and Arkansas as it existed before the Centennial cut-off in 1876, and which said old channel is now filled up and dry land.

In testimony whereof, I have hereunto set my hand on this the 20th day of April, 1901.

H. W. STOCKLEY.

STATE OF TENNESSEE,
Tipton County:

I, W. O. Menifee, Entry Taker of Tipton county, Tennessee, hereby acknowledged the receipt from H. W. Stockley of the fees due me as Entry Taker of Tipton county, Tennessee, for making the foregoing entry of the above and therein described tract of land for the said H. W. Stockley, and I certify that said fees have been paid by the said H. W. Stockley and that he, the said H. W. Stockley, has fully complied with all the requirements of law necessary for the valid making of said entry and that the said land is now duly entered in my office by the said H. W. Stockley.

Witness my hand this the 20 day of April, 1901.

W. O. MENIFEE,
Entry Taker of Tipton County, Tennessee.

Filed in my office at Covington, Tennessee, April 20th, 1901, at 10:30 o'clock A. M. W. O. Menifee, E. T. T. C.

352 STATE OF TENNESSEE,
Tipton County:

I, I. R. Calhoun, Register of said county, do certify that the foregoing entry and certificate are a true and exact copy of an entry recorded in Entry Book B, in my office.

I. R. CALHOUN, *Register,*
By K. H. WHITTEN, *D. R.*

72. The original grant by the State of Tennessee to H. W. Stockley of 942 acres of land, dated and signed by the Governor on the 26th day of November, 1901. It being the grant based upon the foregoing entry.

(The clerk will please insert it here.)

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Grant No. 17348, 942 *Acres, Tipton County.*

Filed Dec. 3d, 1901.

No. 17348.

The State of Tennessee to all to whom these presents shall come, Greeting:

Know ye, That for and in consideration of the sum of the fees of office, paid into the office of the entry taker of Tipton county, and entered on the 20th day of April, 1901, pursuant to the provisions of an Act of the General Assembly of said State, passed 2nd day of November, 1847, by No. —, there is granted by the said State of Tennessee unto H. W. Stockley a certain tract or parcel of land containing 942 acres, by survey bearing date the 10th and 11th days of October, 1901, lying in said county. Beginning at a stake, the N. E. corner of Simon Huddleston's 2000 acre grant No. 1206; thence north 41 degrees, west following the old bank of the Mississippi river 35 chains; thence south
353 82 degrees, west 34 chains; thence north 71 degrees, west 15.32 chains; thence leaving old bank and running across the old chute of Island 37 66 chains to a stake near the S. E. corner of a 640 acres in the name of N. Potter; thence north 46.78 chains to the true corner of a 100 acres in the name of John Trigg, which is 5 chains east of the supposed corner and the N. E. corner of said 100 acre tract; thence east 56 chains to the old channel of the Mississippi river (now dry); thence with the supposed old channel of said river, which divides the States of Tennessee and Arkansas, south 14½ degrees, east 60 chains; thence south 38¼ degrees, E. 67.33 chains to a stake; thence south 49 degrees, west, crossing to the old Tennessee bank 42 chains to the beginning.

With the hereditaments and appurtenances. To have and to hold the said tract or parcel of land, with its appurtenances to the said H. W. Stockley and his heirs forever.

In witness whereof, I, Benton McMillan, Governor of the State of Tennessee, hath hereunto set *his* hand and caused the Great Seal of the State to be affixed, at Nashville, on the 26th day of November, in year of our Lord one thousand nine hundred and one, and of the Independence of the United States one hundred and twenty-sixth.

By the Governor:

BENTON McMILLAN.

[L. S.] JNO. W. MORTON,
Secretary of State.

STATE OF TENNESSEE,
Tipton County:

REGISTER'S OFFICE, Nov. 29, 1901.

I, I. R. Calhoun, Register of said county, do certify that the foregoing instrument was filed in my office at 8:30 o'clock A. M. on the 29 day of Nov., 1901, and entered for registration
354 in Entry Book G, page 162, and together with this and the above certificate is this day duly registered in Book 67 of Deeds, page 480.

I. R. CALHOUN, *Register,*
By K. H. WHITTEN, *D. R.*

Endorsed: Grant No. 17348. 942 acres. Tipton county.

I certify that H. W. Stockley is entitled to this grant. This Oct. 28th, 1901.

JNO. W. GATES,
Register Land Office for West Tenn.

STATE OF TENNESSEE,
Tipton County:

I certify that the within instrument was filed in my office for registration on the 29 day of Nov., 1901, at 8:30 o'clock A. M., and was recorded in Deed Book No. 69, page No. 450. Register's fee, $1.50, P'd.

I. R. CALHOUN, *Register.*
K. H. WHITTEN, *D. R.*

The defendant objected to the introduction of the foregoing grant because it was executed after the bringing of the suit. The court overruled the objection; to which the defendant excepted and asked that his exception be noted of record, which the court allowed.

Here the plaintiff rests.

Motion by Defendant to Direct a Verdict, by Counsel for Defendant.

Upon the completion of the testimony offered on behalf of the plaintiff the defendant moves the court, upon the evidence of the plaintiff, to direct the jury to return a verdict in favor of the defendant.

Ruling of the Court.

The court stated that it would not hear the motion at this time for the reason that if it should direct a verdict for the larger
355 tract marked "A" the smaller tract marked "B" would still be in controversy and it would still be necessary to go on with the proof in reference to this smaller tract, therefore he asked

counsel for defendant to withdraw the motion at this time, but that it might be made at the conclusion of the defendant's proof.

To maintain the issues on his part the defendant introduced the following testimony:

E. E. WINSLOW, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by counsel for defendant:

Q. Please state your name to the court?
A. Eben Everlin Winslow.
Q. In what business are you engaged?
A. Captain of engineers United States Army Corps, stationed at Memphis, in charge of the work of the Missouri river commission for the first and second districts.
Q. Do you know where Dean's Island is?
A. Yes, sir.
Q. Is it in your district?
A. Yes, that is in my district.
Q. Now, Capt., I hand you this map and ask you in what year does this represent Dean's island and the country around there as it is shown here?

Defendant here introduced chart No. 18 of the survey of the Mississippi river made under the direction of the Mississippi river commission.

(The clerk will here please insert it.)

Counsel for plaintiff objects to this because it has not been identified or proven to be correct.

356 The court overruled the objection, to which counsel for the plaintiff excepted and asked that the exception be noted for record which was by the court allowed.

A. It represents it in the various years in which this work was done.
Q. In what years was the work done?
A. In 1883 and 1884. In December, '83, and January, '84.
Q. Commencing at Pecan Point, the river runs this way does it not?
A. Yes, sir; it does.
Q. What do these figures represent that I see here?
A. These figures represent the depth of the water in the channel when the river was at 14.4 feet on the Fulton gauge.
Q. Upon what is the gauge at Memphis based?
A. The gauge at Memphis does not read exactly like the gauge at Fulton, their readings are not very far apart. What we call low water is 3.9 feet with a possible difference of two feet. At high water mark they are practically the same, within two or three feet.
Q. As to medium low or high water?
A. That would be below medium and yet not low water. Low water on the Fulton gauge is 3.9 feet, the difference between low

water and high water I do not remember exactly, between thirty and forty feet.

Q. Commencing right here at the figures 220, what does that line represent?

A. This is what we call the 220 contour line, when the survey of the Mississippi river was made between Cincinnati, Memphis and New Orleans, they wanted to find the level of the gulf, but there had been no accurate surveys made to determine the level of the gulf and therefore they assumed that low water mark at Memphis was 190.84 feet above the gulf level. Now, when these maps were made these lines were drawn with a distance of five feet in
357 elevation between them. A line drawn right here would be 220 feet above the gulf level and 30 feet above the gauge at Memphis. If the river stood about that line the contour line would be under the water.

Q. The next line is 225?

A. That line is five feet higher than the 220 line.

Q. This contour line appearing all the way and over here the figure represents that the line is five feet higher than the other, does it.

A. They are drawn five feet apart. By the lines you can tell approximately by reference to these lines the height of the bank above the Memphis gauge. This level here is 235 feet, that means that it is forty-five feet above zero on the Memphis gauge, but there is slope from this point down to Memphis, so that you have to take out that slope in the river from forty-five feet, that approximately ten or twelve feet, so that line would — between thirty and thirty-five above the water surface at low water.

Q. Which bank is the high bank and which is the low bank?

A. Where the contour lines come far apart in measures that it takes that distance to make the five feet, therefore, the bank is almost straight up and down, so where these contours come pretty close together they show a steep and caving bank. When they are far apart there you find that the bank is very flat and probably sand bar or mud.

Q. Now, do you know what that represents in here?

A. That represents the river as it ran prior to the cut-off in 1876.

Q. Have you in your possession the original map drawn under authority of law of the river as it ran in the year 1874 around Dean's Island?

A. I have in my office lithograph maps made under direction of law and under the immediate direction of War Department of the river of 1874. I have that map from Cairo down below Vicksburg.

358 Q. I will ask you if this is a copy from your office?

A. I have the original in my office. This document that I have in my hands is public property, and is, therefore, out of my possession. I have allowed this to go to the jury temporarily for the purpose of comparing.

Q. I will ask you to examine this copy and state whether this

paper I hand you is a correct copy of the original which you have prepared?

At this point the counsel for plaintiff made an objection to the map going to the jury, because it is public property and cannot be put in evidence and filed in this cause.

The court overruled the objection and counsel for plaintiff excepted and ask- that his exception be noted for record, which was accordingly done.

Witness continues:

A. That is the original; this map was printed in 1875, and is now out of print.

Q. Is this a part of the record of your office?

A. This is a part of the record of my office, it is furnished to the officers by the commission. It is a lithograph print from the original, it was issued about that time to the officers and engineers; they have need of it. It comes from the office of the commission.

At this point counsel objected to the introduction of the map because it is but a copy and its accuracy cannot be attested by the witness.

The Court overruled the objection, to which the plaintiff excepted and asked that this exception be made of record which was allowed.

(By the Court:)

Q. Is this copy of the map on file in your office, the copy of the original?

A. That I cannot say. I know that there are a number of copies printed to be distributed among the officers having use for
359 them, for I know of a number of officers having these maps. Where the original drafts are, I do not know. They are made for the purpose of study of the Mississippi River.

Q. Have you any present knowledge of the original?

A. None whatever.

Counsel for plaintiff objected to the introduction of the map for the reason that it was a copy of a copy which last copy had not been proven to be an accurate copy of the original, the witness saying that he had no knowledge on that subject.

Objection overruled by the court to which plaintiff excepts and asks that his exception be noted of record, which is by the Court allowed.

The defendant having introduced in evidence the map purporting to give the Mississippi in the neighborhood of Dean's Island as it was in 1874, and said to have been made by the government. It being the same map previously spoken of by the witness and to which plaintiff had noted his several exceptions.

(The clerk will please here insert it.)

Herewith attached to back of transcript.

Q. I will ask you to state what this dotted line represents?

A. That dotted line represents the channel of the river in the year 1874.

Q. Do you remember when the cut-off took place?

A. It took place in 1867. It is generall- known as the Centennial cut-off, from which the island there took its name.

Q. Just state where the cut-off took place?

A. The cut-off took place approximately here (indicating on the map). My idea of the cut-off is this, the current comes against this bank, and by these two banks caving the river runs over and breaks through, then the river reversed itself here and the main river runs this way.

Q. Is the stream in the same place since the cut-off as before.

A. The map shows it so.

Q. I will ask you what this means. I notice dark coloring towards Dean's Island?

A. It is shading, the different shading represents sand bars, vegetation along the river.

360 Q. These things have fixed meanings?

A. Yes, they have fixed meanings.

Q. Will you please mark the cut-off of 1876?

A. (Here witness indicates the cut-off on the map.)

Q. Take that paper and state whether or not it is a correct copy of the original filed in your office, making the examination here in the presence of the jury and mark it Exhibit "A?"

Counsel here renewed his former objections to this map, which were by the Court overruled, and exceptions noted by the plaintiff.

A. It is correct but there have been a number of blue lines put on it that are not on the original in my office.

Q. The blue lines to which you refer are certain blue pencil marks, are they what you had in mind?

A. Yes, I suppose so.

The witness here states to the court that the copy of the map which he has in hand is part of the record in his office and he can not part with its possession, and asks the court to be allowed to withdraw it, which the court granted, and to which ruling plaintiff excepted and asked that his exceptions be noted of record, which was allowed.

Q. How long have you been engaged in your present profession?

A. I have been an officer in the corps of engineers for twelve years. I have only been in Memphis three years. I took charge of this office informally in November, 1898.

Q. Has your business been such as to give your experience in noticing the caving of banks and the effect of flowing waters?

A. It has.

Q. I will ask you to state from the map of 1874, from Pecan Point just above Dean's Island to the southeast corner of 37 which is the caving bank and in which direction the river would go?

A. This map shows the caving in the left bank of the river on the Tennessee side, it shows that the bank was caving where the

current struck against the bank. It does not follow that was caving at any point below. Wherever you see a bend like this it
361 shows that the bank is caving unless the curvature is too great.

Q. From this you would conclude it to be a fact that it was caving opposite Dean's Island and the island was following it?

A. As this bank was caving away the river would follow it to keep its channel within the limits it would follow up.

Q. Will you please, now, upon the copy of the map, draw the point of the cut-off in 1876, and describe it?

To which plaintiff excepts because the witness has shown that he has no knowledge of the facts as they transpired and there is no government record of the same hence it would be mere speculations on his part of locate the cut-off.

The Court overruled the objection to which ruling the plaintiff excepted and asked that his exception be allowed, which was accordingly done.

A. (The witness draws on the map to indicate the point in question, and says these maps by comparison seem to show this island to be the same as that island.)

Q. What are the names of the two islands?

A. This is Brandywine Island on the large map is B— on the other map. This part of the river is the same on this map.

Q. What is that called?

A. It is not called by any name, by comparison of these two maps which are designated as A. & B., it is approximately the same.

Q. Did you make that drawing of the cut-off by comparison of the maps after the cut-off and that of 1874?

A. I made that by comparison before and after the cut-off. I have been over the river here many times.

Q. Your drawing of the cut-off is made upon your knowledge and from a comparison of the maps before and after the cut-off is that correct?

A. Yes sir.

Cross-examination by Counsel for Plaintiff:

Q. Were you present on March 7, 1876, when the cut-off occured?

A. I was not.

Q. You- knowledge of the river at this place bagan when?
362 A. In December, three years ago.

Q. In other words, you had no knowledge of the river until 1898?

A. I had no knowledge except what is derived from the records.

Q. Then you had no personal knowledge?

A. No, I had no personal knowledge.

Q. The knowledge of the matter about which you have testified was derived from what purported to be records?

A. Yes, from the records and reports of the officers who have been engaged in the matters of the Mississippi River before the time as well as from the maps made by Humphreys and Albert.

Q. When was the Mississippi River Commission organized?
A. In 1879.
Q. Three years after the cut-off?
A. Yes, sir.
Q. Who made this map?
A. It is made under the authority of the chief engineer of the United States Army Corps.
Q. I will ask you if it is not a fact that no survey of the Mississippi was made between 1858 and that made since the Mississippi River commission was organized?
A. None except that in 1874 under the instructions of the Department of the interior when a rapid survey was made of the river below St. Louis. This rapid survey is what we call a steamboat reconnois-ance. We embark on a steamboat and tie up at different places and make such observations as they think necessary. They then re-embark and proceed down the river a certain distance and tie up again.
Q. Do you know whether or not the survey made in 1874 was of that character?
A. Yes, that is what is called a statement reconnois-ance.
Q. Does this map here show the minute details of the country, such as the land lines between the different owners along the bank?
A. No, it does not show any such things.
Q. Then, can you say that that was an accurate survey of that country?
A. It was not.
363 Q. Is it not a fact that it is a mere casual survey?
A. Yes, that is my understanding.
Q. The only accurate and authentic way of surveying is by actual measurment, is it not?
A. The question of accuracy is not a question of method and method is more or less inaccurate.
Q. Then all surveys are more or less inaccurate?
A. Yes sir.
Q. Then, the reconnoissance which you have testified about must be less accurate than an actual survey?
A. Not necessarily for the purpose for which it was instituted.
Q. For what purpose and to obtain what information was that reconnoissance made?
A. It was taken for the purpose of studying the channel and location of islands.
Q. What was the purpose of learning the channel and does that *purpose* to give that with accuracy so that a steamboat could follow it?
A. A steamboat could follow it with safety.
Q. Were any more made of it for the purpose of guiding steamboats?
A. No.
Q. A steamboat channel is shifting constantly, is it not?
A. But these channels shift regularly, following a fixed law any map as far as the channel is only good for the time it is made.

Q. You spoke of certain laws, what are these laws?

A. One of them is that a channel follows a caving bank.

Q. Being a member of the river commission, I will ask you if it would have been safe for the steamboats to have used that channel six months after the map was made?

A. Probably not absolutely.

Q. Then a steamboat would not have used that map?

A. It would probably not, its inaccuracy would increase with time.

Q. Before this map introduced here, which shows the steamboat channel by the dotted lines, I will ask you if it was made for the purpose of showing the seamboats the channel of the river?

A. No, it was made for the purpose of affording a preliminary study of the river.

364 Q. Did that survey purport to be an actual survey by cha-n and compass measurement?

A. It was not that kind of survey. It was as I have said a steamboat survey, by that I mean that a party of surveyors would embark on a steamboat, leave their boat at intervals and take such instruments and make such observations and measurements as they thought proper.

Q. Do you know whether any actual measurement was made?

A. I do not.

Q. I will ask you if the purpose of that map was not to show the general effect of the water?

A. No doubt it was.

Q. Did it intent in any way to give the channel at that time?

A. The line that was put on it was intended to show the channel of the river, that is the line of the deepest water.

Q. How do you know it was intended for that purpose?

A. Simply because it is marked in places "channel."

Q. Where is it marked on that map?

A. It is not marked on that map. It is marked on the index sheet.

Q. They are all drawn in that way?

A. I do not know.

Q. I believe as a matter of fact that pilots are required to serve three years before getting their license?

A. I know nothing about that.

Q. Don't you know that the United States Government requires a certain period of apprenticeship of pilots?

A. I know that there is some such regulation; the details I do not know.

Q. I will ask you if you do not employ a great number of pilots?

A. Not a great many, some.

Q. Do you not require a pilot license from the government?

A. No, we do not; not in every instance. As a general rule we do employ license pilots, but it is not required by the rules of our department.

365 Q. Does your office purport to give information as to the channel of the river to boat men?

A. No, it does not.

Q. Could you now, from the information filed in your office, plat the steamboat channel from St. Louis to Memphis?

A. No, I could not.

Q. Then so far as being able to show the channel of the river your office in powerless?

A. Yes, it is in a general way.

Q. This is not the purpose of your office?

A. No, that is not its purpose; while it is not in the line of my duty to obtain it I may some times do so, but is not our object to get such information.

Q. The information of which you would come into possession would not be of practical value would it?

A. No, not of practical value except under certain conditions.

Q. You are a member of the St. Francis Levee Board?

A. No, I am a regular United States Army Officer.

Q. When did you graduate at West Point?

A. In 1889.

(By the court:) And he also graduated No. 1 in his class.

Q. How long after that before you went into the service of the Mississippi river board?

A. My first practical work was in the fall of 1892.

Q. You have been connected with the Mississippi River commission three years?

A. Three years, that is all.

Q. Now, you have shown what lines indicate the bank of 1876?

A. Yes sir.

Q. How did you obtain the knowledge from which you drew these lines?

A. By comparison of the two maps and the information that I otherwise had.

Q. That is the survey of town 10, and 9?

A. Yes, it was the same as this, only made on a reduced scale.

Q. What was the date of the survey from which this large map was made.

A. December 1883.

366 Q. That was seven years after the Centennial Cut-off?

A. It was.

Q. I will ask you if there has been any considerable changes there?

A. Yes, considerable changes.

Q. I will ask you if you knew the land lines of the different tracts at the place where the cut-off was made at the time of the cut-off?

A. I did not know them at that time, nor do I know them now.

Q. You had no knowledge of the situation of the Trigg place?

A. None whatever.

Q. Do you know whether the lines you have drawn were on the Trigg or Massey place?

A. I do not know where the Trigg or Massey places are, I only knew the cut-off approximately.

Q. How do you know that that was correct?

A. I mean that I can state the way that this water crossed there and the way the cut-off took place. The places a half mile up on down the river I do not know about.

Q. What is the direction that you have given it?

A. General direction east and west, a little south of west.

Q. Northeast and southwest approximately?

A. Yes sir.

Q. Do you mean to say that it did not cave up from the west, and south towards the east when it went through?

A. I do not know anything about the manner in which it went through.

Q. This survey was made seven years later?

A. It was.

Q. You have no knowledge except what you have obtained from this map?

A. From these two maps.

Q. These two maps then furnish the only information that you have as to how this cut-off took place?

A. Yes, I base my idea upon those maps and the formation of the banks here. Wherever you see a curving bank it is very likely to cave. Here we have a bend above and a bend below, if
367 both sides constantly cave there must at some time come a period when they will join together and the river will go through. Then again by the course of the river it was much lower on the underside than it would be on the upper of the narrow neck until the water had risen so high as to cover the land entirely, therefore when the water first poured across this narrow neck it would naturally cave very rapidly.

Q. You do not mean to say that this was the caving bank of 1876?

A. I mean to say that from my knowledge of the Mississippi River and for other reasons that this point around here was at that time and for some time before and for some time afterwards was a caving bank and it might have been caving rapidly.

Q. You, of course, have no knowledge of that fact. Would not the caving depend upon the character of the soil and would not the caving there be affected by it?

A. Of course it would be affected largeld by that.

Q. What is the fall of the Mississippi River to the mile at that place?

A. At this place I do not know, it is generally a half foot to a mile.

Q. Do you know the distance from this point here where you say the cut-off went through around the elbow here to the opposite side of the neck?

A. It is about fifteen miles.

Q. What would be the level of the river below as compared to that above across this neck?

A. Before it got out of its banks and covered its banks I would say the difference would be six or seven feet.

Q. In other words the level of the water above at that point is six or seven feet above that below at a given stage?

A. Yes sir; it is.

Q. Would not cause the bank to cave very rapidly on the lower side where the water fell over it?

A. Possibly it might, and it might not, probably it would when the water first got out of the bank above and began to run over, that would depend entirely upon the character of the soil.

368 That would continue until the river below had filled up to the level.

Q. I will ask you Captain, in what State Island 37 is?

A. I am doubtful of that for this reason: We have a map in our office that shows that the main channel of the river at one time run between island 37 and Arkansas, and I do not know what the laws are that govern such matters.

Q. Do you know in what State this Brandywine Island is?

A. It is my impression it is in Arkansas.

Q. Do you know in what State this Centennial Island is?

A. I believe that to be in Tennessee.

Q. What is the source of your knowledge?

A. It was simply joined to Tennessee land and the cut-off would not change it from one State to another.

Q. What is that line along there?

A. It marks the bank of the river.

Q. Does it not mark the bank of the river on the lower side of the neck before the cut-off?

A. It probably does along there, but this point may have been lower.

Q. Now will you draw on this map the north bank of the river here south of Corona before the cut-off?

A. Before the cut-off, the north bank of the river was probably down here, probably right there. (Here witness draws a line on the map.)

Q. On what scale is this map drawn?

A. On the scale of twenty thousand to the inch.

Q. That would be how many inches to the mile?

A. That would be a little less than four inches to the mile.

Q. Then will you take your pencil and measure four inches northeast from the line you have drawn as the north bank of the lower river before the cut-off?

A. Yes, it would be right here.

Q. Island 37 was left off the map, was it not?

A. Yes sir.

Q. I will ask you if in making this map any actual measurement was made. Tell us how that is?

369 A. That map was made by measurements taken from the bench marks, base lines were run and the system of triangulation was applied so as to get the distance and fix the points necessary. In getting these distances, an instrument called the

stadimeter was used. By which the distance could have obtained accurately.

Q. Then you did not really run any of those lines by chains and compass?

A. No, but the same results were obtained.

Q. I believe you say you got at all the information that you have of this country from this map?

A. Yes, largely.

Q. What other record have you in your office?

A. We have the reports of the officers in charge of that part of the survey and the originals from which this map was taken.

Q. How was the bank measured?

A. By the observations taken from bench marks to bench marks.

Q. Do the Government officers attempt to measure the bank in detail?

A. No, they would simply locate different points and from observations draw in the immediate banks.

Q. Did they assume to take any actual measurements?

A. They did in regard to the bench marks and the principal points.

Q. Then the banks of that river are only approximately correct, are they not?

A. They are as correct as can be made in a case of this kind.

Q. I think you have given us all the information you have as to the Centennial cut-off?

A. Yes, I think so.

Q. Were you subpœnaed to testify in this case by the marshall?

A. No sir.

Q. Do you not receive a fee for testifying?

A. I do not. I will state how I came to be here. I have in my office maps of the river at various dates; these are perfectly free for the public to examine. Mr. Ewing and two other gentlemen came into the office and looked at the maps. They asked where they could get copies of the maps and I told them. Mr. Smith came, too.

370 Q. Do you know the party in whose interest you are testifying?

A. I do not; he was not in my office.

Q. Do you know Mr. Cissna?

A. I remember seeing him onye before; seeing in Court here,

Q. Did he and Mr. Smith come to your office to examine maps?

A. Yes, that was the first time I ever saw him.

Q. What was the right bank of the river before the cut-off?

A. That is up here, I should judge.

Q. Now, if your idea is that this was the bank of the river in 1876, I will ask you where you think the river was running, and if it was accurately described on the other map?

A. The river went along in this way, following that island around.

Q. Will you please, so that the jury may understand, point out on this map the corresponding position on the other map?

A. This was made in 1874, that was probably changed by caving somewhere up there. I do not know for certain.

Q. The map you marked here is simply the description of this bank and the river run along this way?

A. Yes sir; that part of it.

Q. Captain, have you anything else that would *through* any light on the subject of that cut-off?

A. I have nothing except that map there.

Q. What was the purpose of making that 1874 map?

A. It was just a rapid map made to show the general course of the river at that time, it does not go back far; it was just to show the course of the river, the islands, and the channel.

Q. Why is island 37 not on this map?

A. The reason of it is this: The first survey party ended its season's worth there and when the other began the next year they thought it had been made by the other party, and in this way it was left out.

Q. Do you know of your own knowledge that this map is an actual representation of the country there?

A. No sir.

Q. Its description can only be true for the time it was made, which was in 1883?

371 A. Of course it would only represent the ground at the time it was taken.

Q. And it does not purport to give the lines of the different tracts of land on individuals on the bank?

A. As I have said before, it does not.

Q. This map shows that a great many changes have taken place there, does it not?

A. It shows the parts of the bank that were caved away and the land that has been made in the old channel of the river since then, and the various other changes which took place there.

Q. When Mr. Ewing called you said Mr. Smith was with you. Was he a member of the firm of Caldwell & Smith?

A. Yes, I think so.

Q. Have you had any business or social relations with that firm or the members thereof?

A. Nothing, except that I am acquainted with them and Mr. Smith is a neighbor of mine.

Mr. Ewing: Is it not a fact that about all you know is that Mr. Smith lives within three or four doors of you on the same street and you have only ordinary acquaintance?

A. That is true.

C. C. BAILEY, witness for the defendant, first being duly sworn, testified as follows:

Direct examination by counsel for defendant:

Q. Please state your name?

A. C. C. Bailey.

Q. Where do you live, Mr. Bailey?

A. At Wynne, Arkansas.
Q. What is your age?
A. Twenty-eight years.
Q. In what business are you engaged?
A. Surveying.

Q. Have you, as a surveyor, been employed by Mr. W. A.
372 Cissna to survey Dean's Island and this country up there?
A. Yes sir; I have.

Q. Have you been over it carefully?
A. Yes sir.
Q. Are you familiar with the topography of that country?
A. Yes sir.
Q. I will ask you if you have made any drawings in connection with your work of surveying up there?
A. I have.
Q. Is this a drawing that you made?
A. It is.

D-fendant here offers map marked for identification "C. C. B., No. 1" and map marked "C. C. B. No. 2."
(The Clerk will please here insert them.)

Q. From the survey of 1823 where did the river run in regard to Dean's Island?
A. This red line represents the *red* bank, at the time the *red* bank came down something like this.
Q. Where did you get the information from which you fixed this as the right bank of the river of 1823?
A. From the section corners.
Q. Does that correspond with the survey or plat I hand you marked "No. 2"?
A. Yes sir.
Q. Have you not anything showing where the river ran in 1876, the right bank of the river?
A. Yes sir.
Q. Please point out to the jury?
A. This red line in here goes somewhere near it.
Q. What enabled you to say that this was the right bank of the river in 1876?
A. From the survey, the size of the timber and the difference in the soil.
Q. Now what would be the left bank of the river in 1876?
A. Very near to where this line is drawn here.

373 Q. This was the left bank in 1876?
A. Yes sir.

Q. Now what is this right here?
A. That represents McKenzie Chute.
Q. What is the character of the soil from this point where you have marked the right bank of the river in 1876, out that way?
A. I should say that the timber on the right bank as it is marked is very much heavier than it is on the left bank.
Q. When were those surveys made?



A. November, 1901.

Q. What is the character of the soil of the right bank of the river in 1901, compared to what appears was the right bank in 1884?

A. A greater part of it is sand bar.

Q. Unless this was made then it appears that part of Dean's Island has washed away and the river has changed since 1876 over this way?

A. Yes sir.

(By Court:)

Q. Can you state from the Government Survey of 1823 whether or not Island 37 was in Tennessee or Arkansas.

A. If Island 37 had been in Arkansas it would show on that government map.

Q. Then island 37 in 1823 was in Tennessee?

A. Yes sir.

Q. The river in 1823 ran right around this point?

A. Yes sir.

Q. What is the appearance of the timber right in here?

A. From this point in here there is a gradual change in the timber.

Q. Is it larger or smaller up there?

A. For the greater part the timber is smaller.

Q. Now, what does that represent?

A. That is a map I made of Dean's Island, part of 37 and part of Centennial Island.

Q. Where did you commence to make your survey?

A. In the corner of T. 10 N. R. 10. east.

Q. How did you find that corner?

A. I was informed by people living in the vicinity.

374 Q. Was there anything further to indicate the corner?

A. Yes, there is an iron pipe there about a half in. diameter.

Q. Is this map made from the survey of the tract of land in dispute?

A. Yes sir.

Q. It is an accurate survey based upon the records and run from corners given to you as fixed corners?

A. Yes sir.

Q. Where would you say was the right and left bank of the river in 1876 before the cut-off according to the survey of that property?

A. These dotted lines here represent the right bank as I think.

Q. Where was the left bank in 1876?

A. Along here on the east side of island 37.

Q. What do these black lines represent?

A. They represent the tract of land of 1050 acres.

Q. Did you get the description of this tract of land from the declaration in this case?

A. I did.

Q. Then this land embraced in these remarks is the land described in the declaration in this case?
A. It is.
Q. What is this over here?
A. This is the smaller tract; I took it from the same declaration.
Q. Was this tract properly surveyed and marked on this map?
A. Yes, sir.
Q. The Mississippi River is marked on this map as of what year?
A. 1901.
Q. Is this the correct representation of where the river is and the way it runs?
A. It is.
Q. How much of the land in dispute was on the left bank of the river in 1876, according to your survey?
A. I should say not more than twenty or thirty acres.
Q. Where was that situated?
375 A. Part of it here and another part on the east side of Centennial Island.
Q. Where is Sandy Chute?
A. I was told that this chute here went by the name of Sandy Chute.
Q. Is McKenzie Chute represented correctly on this map?
A. Yes, up to there.
Q. How does that represent where McKenzie Chute was the old 1876?
A. Yes sir.
Q. How did you ascertain that that was McKenzie Chute?
A. From what people say.
Q. Is that what it is generally called up in that country?
A. Yes sir.
Q. Did you hear it called by the name of McKenzie Chute?
A. It seems to be generally known as McKenzie Chute.
Q. Can you tell from the topography of the country as to whether or not this land lying to the left of this right bank was in the bed of the river of 1876?
A. I should say that it was.
Q. Can you say where it was in 1823?
A. I should say that this part in here apparently was out of the water.
Q. This part of it over here was not in the river of 1823?
A. No sir.
Q. What kind of soil is this?
A. There is a large part of that over in here and also a strip there that is a sand bar, along in here it is covered with timber of different sizes.
Q. What do those dotted lines represent?
A. The right bank of 1823.
Q. Running this way?
A. Yes sir.
Q. What has gone with that land in here?

A. It was washed into the river.

376 Q. Can you tell how your map and survey corresponds with the survey of Mr. Humphreys as to the land in dispute?

A. This chute marked Sandy Chute, also what is marked as old river and what is marked as the present channel of the Mississippi River correspond.

Q. What have you where he has marked Sandy Chute?

A. I have it Towhead Chute.

Q. How is it generally known in that country; how was it called to you?

A. I was told that it was named Tow-head Chute.

Q. Did you go along there recently?

A. Yes sir.

Q. What is the condition of the country where you stated to the jury was the left bank of the river in 1876?

A. The greater part of it was a bank from fifteen to twenty feet in height.

Q. Do these dotted lines represent the old bank?

A. These dotted lines that run along the east side of 37?

Q. Have you this old road on your map?

A. Yes, that is the road as it is used to-day.

Q. How close is that to the bank?

A. It is as close to the bank as it is possible to be and make good traveling.

Q. What kind of ground is this in here?

A. It is timber land except a small body in here.

Q. How is it along in here?

A. It is all timber.

Q. Now, in making the survey of this tract here, from what corner did you commence?

A. The corner of 26, 27, 33 and 34.

Q. How did you get this survey from there?

A. I connected to one point here, that was the northeast corner of Simon Huddleston's two thousand acre tract; then I ran this line and ran out here to the northeast corner of the Tripp

377 100 acre tract, connecting that with this, which shows line east to the corner.

Q. How many chains from this point here to that point there?

A. 133 chains.

Q. How many chains shows here on the map? Can you look and see?

A. This does not correspond with this tract.

Q. Does it correspond with the declaration?

A. It does not.

Q. How many chains from point to point as given in the survey of Maj. Humphreys?

A. 142 chains.

Q. How many chains are described in the declaration?

A. 133 chains.

Q. Now, did you go by any survey plats at any time through there?

A. Yes, when I ran this line I followed plat line.

Q. When were these plats made?

A. I should judge at the time the line was run, part of it had been carefully platted.

Q. Do you know who platted it?

A. No sir.

Q. Did you see Maj. Humphreys establishing line there at any time?

A. Yes sir.

Q. Who was present at the time?

A. Mr. Stockley and Mr. Joplin.

Q. Where was he at that time?

A. I can not say exactly, I think it was right in here.

Q. What is the appearance of this land over here on Centennial island right at this chute?

A. It has the appearance of old land in cultivation.

Q. Did you and Maj. Humphreys start at the same place?

A. I had a stake pointed out to me, a wooden stake, which was recently put there, either this year or last.

378 Q. Which way did you go from there?

A. I ran this line here.

Q. You did not run this line here?

A. No, I only run two lines to tie onto my work.

Q. Did you run from any fixed point in running this line to locate the land in dispute?

A. Yes sir.

Q. Was this accepted as Huddleston's corner?

A. I believe so.

Q. How does that correspond with the corner from which you started, is it not practically the same?

A. It appears to be from that map.

Q. Did you have this map when you were drawing yours?

A. No sir.

Q. Have you ever seen his until it was offered in evidence here?

A. No sir.

Q. I will ask you, assuming that the left bank of the river of 1876 on the Humphreys map is along here, and this road is on top of that bank, does that correspond with the way you have it represented on this map, if not in what way does it differ?

A. The left bank, as I have it represented, comes down to right here.

Q. Well, now, what is this right in here?

A. That is what is called old river.

Q. Where did old river extend over this way, this being the left bank, how far this way?

A. Right here, possibly seventy-five or one hundred yards.

Q. From which side, right or left, is the filling going on. So far as appearances indicate, state how the fact is?

A. It does not seemed to have filled any from this side of Centennial island.

Q. Why do you think this?

A. Well, judging from the growth of the timber.

Q. How does that bank compare with the left bank as to height?

379 A. It is very much higher; in some places this bank is practically up and down.

Q. I will ask you if there is any ridge there and a steep declivity?

A. Yes sir.

Q. Did you observe that on last Tuesday?

A. I did.

Q. I will ask you to state which is the low point of this bank in here?

A. This is very much lower here.

Q. What is this document?

A. That is the survey of Town 10 and 9.

Q. Was this document used by you in establishing this corner from which your survey commenced?

A. I did not establish that corner. I took it as it was.

Cross-examination by counsel for plaintiff:

Q. How long have you practiced surveying?

A. About ten or eleven years.

Q. Did you graduate in any school?

A. None except the high school.

Q. You did not study civil engineering or surveying in any school where it was taught especially?

A. No sir.

Q. Where did you get any knowledge of your profession?

A. By working with surveyors and engineers, with several different ones.

Q. Then you just picked it up?

A. Yes sir.

Q. How far do you live from this place, Dean's Island?

A. Across the country about fifty-five miles.

Q. Then you do not live in the immediate neighborhood?

A. No, I was never there until Nov. 4th, 1901.

Q. Have you been there since?

A. Yes, on the 26th of November.

380 Q. How long did you stay there then?

A. From 25th to the 26th.

Q. Have you been there since?

A. No sir.

Q. Then you have never been there more than two or three days altogether?

A. No sir.

Q. Have you any personal knowledge of any land corners there?

A. Yes sir; I have knowledge of one corner there.

Q. What corner is that?
A. That is the corner right here.
Q. How did you get that knowledge?
A. I saw a line running from it corresponding to a line described in the declaration.
Q. What corner is that?
A. Northeast corner of Simon Huddleston's tract.
Q. How did you get that corner?
A. I got it from the declaration.
Q. What declaration was that?
A. It was marked H. W. Stockley vs. W. A. Cissna.
Q. Who gave you this declaration?
A. Mr. Cissna.
Q. Who pointed out that corner to you?
A. I asked a darkey if he knew of any corner there and he showed me this one.
Q. What was the darkey's name?
A. I could not tell you?
Q. Did the darkey tell you it was Huddleston's northeast corner?
A. No sir; he showed me a line in the woods.
Q. Could you not draw any number of such lines?
A. Yes sir.
Q. How did you know that this line was Huddleston's?
A. I saw that the distance agreed.
381 Q. Well, might not that line have been any other line?
A. I think not.
Q. You do not know that that was the northeast corner of the Huddleston tract?
A. Yes sir, because I carried it to another corner described in the declaration.
Q. At what date did you say you ran that line?
A. In between the 6th and 9th of November.
Q. You have no other knowledge of the Huddleston tract except that you have gotten there, that you have just stated, have you?
A. None.
Q. You have no other knowledge of that fact?
A. That is all.
Q. Did you connect this line with your survey?
A. I connected with the line that I ran through the tow head, I ran up old river on the south side of 37 and up the road on the east side of 37 to a point where this north line crosses it and then west, east until I struck my line.
Q. Now, what connection does that line have with this one up here?
A. I connected this point here with this point here by my survey taken from the declaration.
Q. Did you run this line mentioned in the declaration?
A. I ran two of them?
Q. You say you saw Maj. Humphreys running some line there, did he run both lines?

A. One line, from this corner marked on this map west.
Q. Was that corner fixed there?
A. Yes, a wooden stake in the ground, I found it myself.
Q. Do you know whether that was the same Humphreys run?
A. It was run before I ran any line there.
Q. Is not this the line that you ran?
A. Yes sir.
Q. This second line that you found there, did the darkey show it to you?
A. No sir.
382 Q. Did you run that north and south line, and if not, why?
A. No, I did not; all that was necessary was for me to connect in two points, one would have been sufficient.
Q. Who pointed out this place here to you?
A. I do not remember his name.
Q. What place did he tell you it was?
A. He did not say.
Q. You then did not know what corner it was?
A. Only from the declaration.
Q. Did you measure that distance?
A. I measured it from here.
Q. You have stated that this was the Trigg place?
A. This is the northeast corner of the Trigg 100 acre tract.
Q. Does Mr. Trigg own that land?
A. I could not tell you.
Q. Does the declaration describe any particular point here?
A. It describes the northeast corner of the John Trigg tract.
Q. If you did not run these lines there, Mr. Bailey, how could you get at that point?
A. I found the corner here and run a survey from there to another corner described in the declaration.
Q. My understanding is that you ran a line down here in the woods so that you could identify it with the John Trigg corner?
A. Yes sir; I did.
Q. You ran one line and concluded that the other line would run in the same place?
A. Because the intersection with that other line showed it to be the same, being the distance north and west from this line and also frim my line here to make it the same, it shows that this must have been the corner.
Q. The correctness of it is a matter of chance, is it not?
A. There is not a chance in a million.
Q. You mean that you had one chance to get it right?
A. No sir; one chance that it was wrong.
Q. That you say was John Trigg's northeast corner?
A. Yes sir, the northeast corner.
383 Q. You have stated that Maj. Humphreys was running 450 feet from this line?
A. From this corner.
Q. Which direction was it?

A. West.
Q. Now, you started from the same direction corner on Dean's Island?
A. From the corner of 27, 28, 33 and 34, T. 10 R. E.
Q. Who showed you that corner?
A. Mr. Cissna and Mr. West.
Q. How far was it to the river from there?
A. Between nine and ten hundred feet.
Q. Did you examine the bank along there as to its height?
A. I should say it was from eight to ten to one hundred feet.
Q. Do you know whether the bank has caved any since 1823?
A. I do not think it has changed any.
Q. Did you run that bank from 37 up to here?
A. Not up in here.
Q. I mean up here where the course is given here?
A. No sir; I did not.
Q. How did you get it?
A. By doubling on that course.
Q. You did not survey that bank, that is you did not chain it?
A. No sir.
Q. You do not know whether that same distance can be measured across there or not?
A. No, I do not know.
Q. Have you ever surveyed that line in controversy?
A. Yes sir.
A. The line up here and up here?
A. No, sir; I did not.
Q. Did you run this line that you have marked here?
A. No sir.
Q. Did you run that line.
A. No sir.
384 Q. Did you run that line?
A. Yes sir.
Q. I mean did you chain it?
A. I chained it frim my survey.
Q. Did you begin at any particular point?
A. No sir.
Q. Then you did not chain it, did you?
A. No sir.
Q. You have another blue line there. I will ask you what line that is, and if you chained it?
A. That is 78 chains south of this point here.
Q. What is the scale on which this map is drawn?
A. One to twenty thousand.
Q. Will you take your rule and see how far it is from that point here?
A. It is three quarters of a mile.
Q. You have that marked there 1876, what is that intended to indicate?
A. The right bank of the river at Dean's Island.

Q. How do you know that was Dean's Island bank of the river at that time?

A. Well, from the lay of the ground there.

Q. Why, may not that have been the bank of 1870 instead of 1876?

A. Because, in 1876 was the time the river made the cut-off.

Q. Who told you that?

A. I have read the history of it.

Q. What history? Riparian sands.

A. A book called "Reporters' Lines of the Mississippi."

Q. Did that book describe the bank of 1876?

A. No sir.

Q. And is it from that book you located the bank of 1876?

A. Not at all.

Q. What you saw there is all that goes to indicate that this was the bank of the river in 1876?

A. The timber here indicates that this is newer ground than this lying to the right judging from the size of the timber.

385 Q. I will ask you if you did not find a great many willows there?

A. Yes, I noticed some willows.

Q. You have no knowledge except the size of the timber?

A. I inquired about it.

Q. Of whom did you inquire?

A. I inquired of Mr. Kenton.

Q. Was he an old resident?

A. I think so.

Q. Did he claim to have been there in 1876?

A. I think he did.

Q. Is it not a fact that Mr. Kenton came there recently?

A. I could not say.

Q. You do not know the source of his knowledge?

A. No, but I should say that he knew something about it.

Q. Did anyone else tell you anything about it?

A. No, I think not.

Q. Did Mr. West show you the bank of 1876?

A. Mr. Kenton, Mr. West and myself were riding along there, but I don't think Mr. West said anything about it at the time.

Q. All your present knowledge was obtained from Mr. Kenton?

A. And from my own observation, the size of the timber.

Q. Did anyone else tell you besides Mr. Kenton?

A. No sir.

Q. And you judged from the size of the timber?

A. Yes sir.

Q. What was the difference in the size of the timber on one side of that bank and the other?

A. I should say that beyond the curve to the right *of* that time the timber was forty inches, possibly a little more, four feet perhaps.

Q. Where are these trees located?

A. At several points in here.

Q. What sort of trees?
A. Cottonwood and gum.
386 Q. How far from this point here to this point here?
A. I did not measure to the trees; I measured for a line.
Q. You did not run this line?
A. No; I did not.
Q. Then, that is only an approximate line, and yet you have located these trees inside of that line, how far back were they?
A. I should say that these trees that I speak of were seventy yards back.
Q. You did not measure the distance?
A. No, I did not.
Q. You found these trees away up there?
A. Yes sir.
Q. Did you find forty inch trees down here, I am asking about right down here?
A. Let me explain a minute, I connected this red line right there by measurement, but did not run it through.
Q. You don't mean to say that you found forty inch trees down here?
A. Yes sir.
Q. They were right along here, these forty inch trees were?
A. Yes sir.
Q. Did you find any over here?
A. Not of that size.
Q. Now, you have these forty inch trees on the made land?
A. Land that was made some time.
Q. I will ask you to look at this government map and see if you observe these tracings here?
A. I see the figures 235.
Q. What does that mean?
Q. That 235 would call for about 30 feet on the Memphis gauge.
Q. That means that this land on this side of these figures 235 is higher or lower?
A. It is lower.
Q. How much lower?
A. About five feet lower.
Q. Is that in the center or near the line?
A. It is five feet between the lines.
387 Q. May it not in face be five feet higher than the line you have made there, and may that have been the bank of 1876?
A. There is nothing to show it.
Q. Is there any difference in the size of the timber?
A. Yes sir, it is four feet or over in here.
Q. Is there any marked difference in the growth of the timber east and west of that bank?
A. Yes, there is some difference.
Q. What was that difference?
A. I should say the timber is not larger than two feet in here.
Q. Then from 37 to here is covered with timber two feet in diameter?

A. Yes, in places there are trees of that size there.

Q. Now what is the size of the timber down here in the bed of 1876?

A. In here there is no timber whatever.

Q. What is that place there?

A. That is a salt knoll; there are saplings on it three or four inches in diameter.

Q. These are very small saplings are they not?

A. I should say they went from this up to fifteen inches in diameter.

Q. That is quite a marked difference in the size of these trees and these others up here?

A. Yes sir.

Q. I will ask you what is the reason of this difference in the size and growth of this timber, is it the *w*uality of the soil?

A. It probably is.

Q. Is it not a matter of fact that trees on a barren sand bar do not get as large as those on good ground, in one place the timber is fifteen inches and another it is twenty-four; do you consider that difference in timber makes the old river bed?

A. I did not say that there was quite a difference in the size of the timber?

Q. You did not say that there was quite a difference in the size of the timber?

A. I did not say that.

Q. Did you trace that bank out?

A. Not all of it, perhaps some times I was a hundred yards from it; I have seen it from here to this point.

388 Q. Right near that Simon Huddleston corner, was all that level ground?

A. No, right over here is an elevation.

Q. Does that government map show that it is all the same elevation?

A. It shows that there is some difference in here.

Q. That map was made in 1883, was there any bank there?

A. Yes, I think there was; I only had the lines drawn as far as I had seen it; I was asked to sketch it.

Q. The bank of 1876 may have come right around that way, may it not?

A. No, sir; I think not.

Q. Well, can you look at timber and tell the date of its birth?

A. I could by the different sizes get some idea of its age.

Q. Can you go out here in Court Square and tell the ages of those trees?

A. I would not say so.

Q. Would not the size of the tree depend upon the kind of soil and its fertility?

A. Yes, sir; I think so.

Q. Now, point out the spots where you found a perceptible bank?

A. There is quite a perceptible bank here.

Q. Did you take any measurement of it?

A. No, I did not take any measurement of it.

Q. Can you tell from your map, or get that other map, now give me the distance of the perceptibly marked bank?
A. At least one mile.
Q. Where did it begin?
A. Right along here.
Q. You do not mean to say that the distance from there down here is a mile?
A. Yes sir; and then I rode around there at least a half mile.
Q. Is that included in your first estimate?
A. Yes sir; I went over there because I did not follow it out.
Q. Then you do not know whether there is any bank along there?
A. No sir; I do not.
Q. But you do say that there is a bank right here?
A. Yes sir.
389 Q. If that bank was there in 1876, a perceptibly marked bank, why does the government map not show it?
A. I account for it in this way; the first of these surveys do not come until 1883.
Q. Then the government survey is wrong?
A. No sir, it is incomplete as to this point.
Q. Is it not a fact that these other lines show a definite bank along here?
A. They show no bank whatever.
Q. Do they show it level?
A. These maps were not run out.
Q. What did Capt. Winslow mean when he said there was five feet difference between these lines?
A. He meant that the ground within these lines was five feet higher.
Q. Does that apply to all the ground beyond there?
A. It would for the survey plat made from it.
Q. Capt. Winslow is wrong when he states that a plat survey of that country was made?
A. It is not complete.
Q. Your line is quite different from his, then?
A. His line represents a survey given about sea level.
Q. I notice little elevated spots here?
A. Yes sir.
Q. Was there any difference in the timber on them?
A. I could not say, possibly there was.
Q. If that bank is five feet higher there is considerable difference in the age of the timber on it, is there not?
A. Yes sir.
Q. Did you notice that an elevation of five feet made any difference?
A. I could only say that I was on the exact spot here.
Q. Then, you did not notice it?
A. No sir.
Q. Would you say that this spot here was an island in the river?
A. I do not know as to that spot.
390 Q. You think that the difference in the growth of the timber here indicates where the water left last?

A. Yes sir.

Q. You think that the mere growth of the timber indicates that the water covered this land later?

A. Yes, I should say so.

Q. How far is it from the south line of the land in controversy, the middle land right here claimed by Mr. Stockley, to the Mississippi river?

A. At the east corner one and a quarter miles; here at the end of Centennial island it is a little over three-quarters of a mile.

Q. What sort of a country is it here between them?

A. It is woods and covered with heavy timber.

Q. Is any of it in cultivation?

A. Yes sir; there is a field there of about 100 acres.

Q. Has the river a well defined channel over there on the south w-ere it is now with the usual bed and banks?

A. Yes, that is the main river over there. Its bed is plainly marked.

Q. I believe you said the land in controversy here is covered with a dense forect, the trees averaging between two and three feet in diameter.

A. Yes sir, and some of them are larger than that.

Q. You have stated I believe, that the country indicated that the land accreted to this side, have you?

A. I should say so; yes, sir.

Q. Why do you say so?

A. Because against Centennial Island it does not seem to have changed.

Q. Now, did you run any other lines by actual measurement?

A. I think I have pointed them all out.

Q. Is this map as it shows McKenzie's Chute correct?

A. Well, I think McKenzie's Chute comes down in here.

Q. Now, you call that McKenzie's Chute, that was the name by which you heard it called. I will ask you how you learned of this place in here?

391 A. I heard it spoken of by several different persons.

Q. Who were these?

A. Mr. Cissna, Mr. Kenton and Mr. West.

Q. Now, this land, as you have marked it is 37?

A. I only sketched this land.

Q. Does that red line purport to give a correct representation of the bank or 1823?

A. Not except at this point there, that is all.

Witness excused.

Redirect examination by counsel for defendant.

Q. Now, Mr. Bailey, measure and tell me the distance from this point right here on Dean's Island in 1823?

A. Two and onehalf miles.

Q. Now, from corresponding points here what was the distance in 1874?

A. Three and five-eighths miles.

Q. I will ask you to measure from that point here on Dean's Island to the Mississippi River as it existed in 1823 and tell me the distance?

A. One mile.

Q. Now, how far is it from the Mississippi River from the Government survey in 1874?

A. Two miles.

Q. Now, take Map No. 7 and tell me the width of the river at the head of Dean's Island as it existed in 1874?

A. Right there one-half mile wide.

Q. How wide is McKenzie's Chute as represented on your map No. 7?

A. A little more than one-fourth of a mile.

(By Court:)

Q. Mr. Bailey, can you mark on Map No. 7 the land described in this declaration of Mr. McSpadden?

—. —— ——.

(By Counsel:)

Q. Can you take the map of 1874, No. 7, showing Dean's Island and the course of the river at that time and mark upon that map the property described in the declaration filed in this case?

A. I think I can. (Proceeds to do so by reference to the map.)

392 Q. Have you marked upon Map No. 7 the property in dispute?

A. Yes sir.

Q. You have designated the large tract by red lines and the smaller tract by blue lines?

A. Yes sir.

Q. Have you accurately marked it on the map of 1874, No. 7?

A. Yes sir; within the limits of the lines that include it.

Q. Now, Mr. Bailey, I will ask you if to-night you will draw on one piece of paper the river of 1823 according to the Government survey and on the same piece of paper the river of 1874, 1879 and 1880?

A. Yes sir, I can.

Q. I want to ask the witness to draw on one piece of paper for convenience sake the river at these various dates showing Dean's Island as shown by the Government survey?

—. —— ——.

Q. Now, Mr. Bailey, I will ask you if you have drawn the original Dean's Island and the river in 1823 as taken from the certified copy of the Government survey and also from the same scale Dean's Island and the river in 1874 and according to the scale of the river of 1879 and 1880?

A. Yes sir; I have.

Q. Have you done so accurately and carefully?

A. Yes sir.

Q. Have you designated upon the map of 1823 where the land in controversy was situated?

A. Yes sir, I have.

Q. Will you explain to the jury what these lines right here represent?

A. These lines right here represent the larger tract described in the declaration.

Q. It appears that at this time this property in controversy was on the left bank of the Mississippi River?

A. Yes sir.

Q. It appears that part of this tract here was in the river at that time?

393 A. Yes sir.

Q. I will ask you if you have compared these maps with the survey of Maj. Humphreys to ascertain whether this property is situated on his exactly as you have it here with regard to the original river of 1823?

A. Yes sir; it is.

Q. Is the channel between the banks of 1823 and 1874 perceptibly different?

A. It shows a difference east and west, also where the river runs directly west. The river was moved south 66 chains and the width of the island has increased between the two dates.

Q. Now, Mr. Bailey, as to how many measurements you run, you stated that you ran two lines, was it necessary for you to run more than two lines?

A. No, it was not necessary, only a check to my own work.

Q. Will you state if you ever saw this map until it was introduced in evidence?

A. I did not.

Q. Is there any way by which your survey could be wrong?

A. No sir, I think not.

(By the Court:)

Q. Mr. Bailey, if I understand Maj. Humphrey's map these section lines represent the section lines in the Government survey?

A. Yes sir.

Q. In running out this Government line when you made this map did it come to the right bank of the river as it existed in '76 and does it correspond with the lines of Humphrey's map?

A. They correspond exactly.

Q. How about these lines on Dean's Island?

A. They do not correspond at all.

Q. How about the section lines as run from Dean's Island in 1823 with regard to the river of 1874?

A. They do not correspond, at this point here the river bank in 1874 was 96 chains further west than it was in 1823, one and one-fifth miles.

394 Q. Can you designate by section lines where that point is?

A. It is the line between 32 T. 10 and the line between 32

T. 9. R. 10, when it changed west it would take 96 chains more to get to the river in 1874 than it did to get to the river in 1823.

(By the Court:)

Q. Are there any other lines on this map, give us all the lines?

A. If the line between 4 and 5 in T. — N. R. east was continued south to the river of 1874 it would have to go 58 chains further than it did in 1823.

If the line between Sections 3 and 4 T. R. N. R. 10 E. was continued south to the river of 1874 it would have *yo* go 32 chains further than it did in 1823.

If the line between Sections 27 and 34 T. 10 N., R. *D0* E. was continued east to the river of 1874 it would be practically the same as it was in 1823. This right line here between Sec. 34 R. 10 N. 10 E. if continued east to the river of 1874 would also be practically the same as in 1823.

Q. You mean that commencing right here going down the river this line and this one are practically the same, but on this side the difference is as you have stated?

A. Yes sir.

Recross-examination by counsel for plaintiff:

Q. Will you please draw Huddleston's east line from this Government map of 1874 and state what is the distance?

A. Seventy-eight chains.

Q. Now, draw his south line 200 chains due west?

A. (Witness here draws the line as requested.)

Q. Now extend his west line 114 chains due north?

A. (Witness does as requested.)

Q. You have drawn these lines as accurately as you can?

A. With this instrument, yes sir.

Q. Then, this is your idea of how the Huddleston tract lay in 1874?

A. Yes sir.

Q. And this is done as accurately as you have platted the rest?

A. Yes sir.

395 Q. Tell us by what process you fixed these lines on the Arkansas shore and the Tennessee shore?

A. From the corner of Secs. 27, 28, 33 and 34.

Q. Now, did you get these lines from here?

A. I reduced them from this larger map.

Q. Starting from this point did you have any original surveys from the Tennessee shore?

A. No, I had nothing but the copy of the declaration.

Q. Your work, then, does not purport to be corrrect so far as it runs the Tennessee bank, does it?

A. Yes sir.

Q. How did you get this?

A. From this map.

Q. That is how you got the Tennessee shore?

A. Yes sir.

Q. How did you get these lines up here?
A. From the northeast corner of the Huddleston tract and from the northeast corner of the Huddleston 100 acre tract.
Q. How did you find the relationship between these two points?
A. By running from the corner of 27, 28, 33 and 34.
Q. If you are mistaken as to the northeast corner of the Huddleston tract your whole work is wrong, is it not?
A. Yes, sir; it is wrong.
Q. Now, Mr. Bailey, this line of 1876, I believe you stated that down in here was as far as you run?
A. Yes, sir.
Q. Then, you have no knowledge of how it went after that?
A. None at all.
Q. Mr. Bailey, I will ask you as to whether or not that country is covered with timber?
A. Yes, sir; it is.
Q. I will ask you in making your surveys in Tennessee you used any Tennessee records?
A. Nothing except the description that I spoke of in the declaration.

Q. Have you ever examined the records in Tipton
396 County?
A. Not at all.

Q. I will ask you if you used this survey in making any of your maps?
A. I did not.
Q. You had no knowledge of it?
A. None at all.
Q. Now, Mr. Bailey, in drawing this channel of the river of 1876, I will ask you if you accepted the present bank of Centennial Island as the true bank?
A. I did.
Q. Then, if you are mistaken in this your map is wrong?
A. Yes, to a certain extent.
Q. If, in fact, that bank should be a little over in here it is to that extent wrong?
A. Yes sir.

The witness at the request of the court drew a map from the Government map in evidence, maps showing the Arkansas side of the river in 1823, 1874, 1883, etc.
(Here copy *if*.)
Witness excused.

J. A. OSWALS, witness for the defendant, being first duly sworn, testified as follows:

Direct examination by counsel for the defendant.

Q. Where do you live?
A. On Island 37 in Tennessee.
Q. How far do you live from Mr. Stockley?

A. About four miles.
Q. How long have you lived in that country?
A. Sixteen years on the island.
Q. What is your business?
A. Farming.
Q. Were you ever engaged in any other business up there besides farming?
A. I was a fisherman.
397 Q. Did you fish in the Mississippi River?
A. Oh, yes sir.
Q. What is your age, Mr. Oswald?
A. Fifty years old.
Q. For how long a time had you been engaged in this business of fishing?
A. Nearly all my live.
Q. Mr. Oswald, as a firsherman on the river back in 1872 and about that time, were you familiar with the way the river ran its course, etc.?
A. Yes sir; I was.
Q. Where did the river then run with regard to island 37?
A. It ran around Island 37.
Q. On the north part of the island?
A. Yes sir.
Q. Was there one or two channels?
A. Only one at thaa time.
Q. Where was the McKenzie Chute?
A. It was on the south of the island.
Q. Which way did the steamboats go around the island?
A. To the north of the island.
Q. Is the name McKenzie Chute always been given to that place in here that goes by that name?
A. It is called chute of 37; McKenzie chute is the right name.
Q. What is old river known by up in that country?
A. It is known as old river.
Q. How many places are called old river?
A. Only one.
Q. Were you there in 1876 at the time of the cut-off?
A. I was two and a half miles west of there.
Q. Do you remember where the left bank of the river was in 1876 along south *passed* Dean's Island around 37?
A. Yes sir.
Q. Do you remember right there on the bank an old road?
A. Yes sir.
398 Q. Is that road still there and used now?
A. Yes sir.
Q. I will ask you to tell the jury where the left bank of the river was in 1876 with regard to this road?
A. Right where it is now.
Q. I will ask you what portion of this is known as old river with regard to that bank?
A. Where the main river used to be.

Q. Mr. Oswald, look at this map and tell me which was the high caving bank on Island 37?
A. The high bank was at the head of 37.
Q. With regard to the Arkansas and Tennessee side which had the caving bank just below McKenzie chute in 1876?
A. It was not caving much in there in 1876.
Q. Was that a high or low bank?
A. It was a high bank.
Q. Is old river since 1876 an apparent depression in the soil there?
A. Yes sir.
Q. Is there any water in there now?
A. Yes, a pond.
Q. Has it grown up in trees, etc.?
A. Yes sir.
Q. Do you know anything about the location of the land in dis-ute there from what you have heard Mr. Stockley say?
A. No sir; I have never heard his saying anything about it.

Direct examination by counsel for plaintiff:

—. This old road that you spoke of is on the bank of 37?
A. Yes sir.
Q. This as a matter of fact is just a road through the field, is it not?
A. Well, it is a good road.
Q. Like the roads we have in Shelby County?
A. It is not graded.
Q. It is just like any other piece of land around here, is it not?
399 A. Yes sir.
Q. I will ask you if there was a sand bar at the head of Island 37 at the time of the cut-off?
A. There was not.
Q. Was there a sand bar at the northeast corner of Island 37?
A. Yes, there was a bar called middle bar on the Tennessee side of 37.
Q. You have spoken of this 37 bank. I believe you were not there at the time of the cut-off?
A. No sir, I was not there.
Q. Do you know whether this was a caving bank?
A. It was not caving just before the cut-off.
Q. Was it at the time of the cut-off?
A. No sir.

Redirect examination by counsel for defendant:

Q. Mr. Oswald, you- roads up there are just ordinary country roads, are they not; you don't have graded roads, do you, up in that country?
A. No, sir; they are mighty bad sometimes.

Witness excused.

W. A. CISSNA, defendant in this case, being first duly sworn testified as follows:

Direct examination by counsel for defendant:

Q. Please state your name to the court?
A. W. A. Cissna.
Q. Are you the defendant in this law suit?
A. Yes sir.
Q. Where do you live, Mr. Cissna?
A. Chicago, Illinois.
Q. Who is in possession of that property on Dean's Island?
A. I am.
Q. Who is in charge of the island?
A. Mr. West is manager for me there.
Q. Do you know what is called old river?
A. Yes sir.
400 Q. What is now designated by the inhabitants as old river?
A. The old bed of the river between Centennial Island and Dean's Island and Island 37 and Dean's Island.
Q. How many old rivers are there?
A. I never heard of but one.
Q. By old river is meant, as the term suggests the place where the river ran in 1876 prior to the change made by the cut-off?
A. Yes sir.
Q. Do you know about the McKenzie Chute?
A. Yes sir.
Q. Where does it lie?
A. Between Island 37 and Centennial Island.
Q. It is generally known as McKenzie chute, this place between Island 37 and Centennial Island?
A. Yes sir.
Q. Is it known by any other name than that?
A. Not that I know of.
Q. Here is a chute between Dean's Island and the main shore of Arkansas, what is that place called?
A. Dean's chute, or Barger's Chute.
Q. Did you have a conversation with Mr. Stockley prior to the bringing of this suit as to where his boundary line was?
A. Yes sir.
Q. How did you talk with him?
A. Mr. Kent was present and did some of the talking for us, and sometimes we used a pencil and wrote. They came up to see me and said they wanted to show me the line.
Q. When was this?
A. I think it was about a year after I purchased the property there in '99 or 1900; I thing it was in the fall of 1899.
Q. Did he claim the property that he now sues for?
A. No sir, not as I understand it.
Q. Can you tell us where he said was the line of that time?
A. Yes sir.

Q. Please tell the jury so they can understand it.

401 A. Mr. Kenton and Mr. Stockley came to the house where I was and said he would like to show me the line; we took our horses and rode down to a stake which Stockley said was the line. He took the lead and rode down through the woods. Kenton did the talking; after we got to the woods Kenton took the lead and did the talking for us, most of it.

Q. Where was that property; that line?

A. It was on the left side or lower side of Dean's Island.

Q. Where was that line he showed you with regard to the river—old river?

A. It was what I suppose he called the middle of the channel of 1876.

Q. Is that practically the same as the property for which he sues insofar as the line which was run by Maj. Humphreys and Mr. Stockley and Capt. Joplin blazed the woods through there?

A. Not *sp* far west, I should think, by a half or three-quarters of a mile.

Q. Now, Mr. Cissna, did you see Maj. Humphreys and Capt. Joplin and Mr. Stockley in the woods there Tuesday before last, and did you not trace them by the blazes they made running the line through the woods?

A. I don't think I saw Maj. Humphreys.

Q. Was not this line being blazed a half or three-quarters of a mile — to the right than Mr. Stockley claimed when he pointed it out to you in 1899?

A. Yes sir.

Q. Have you had occasion to go over the island and examine the bed of the old river?

—. ——.

Q. Was the line as being blazed by Maj. Humphreys 1876?

A. I do not think so.

Q. How would it be as to the right bank of the river of 1876?

A. It would be much further east.

Q. How much?

A. I should say a half mile or something like that.

Q. Have you ever measured it?

A. No, it is just a guess.

Q. What is the width of old river up there?

402 A. About ¾ mile.

Q. Is the bed of old river grown up in old timber?

A. Yes sir.

Q. From which side does the timber grow?

A. The larger timber is on the right side going down stream, the Arkansas side.

Q. Now, what is the nature of the left bank of 1876 *od* old river?

A. A decided bank.

Q. Is it a bluff bank as compared with the other bank?

A. Yes sir.

Q. When you went there with Mr. Stockley did he point out what he claimed to be the starting point of his line?

A. In 1899, no sir; he did not point out the upper end of it; we rode down the river to the road.

Q. Did he at any time?

A. Yes sir.

Q. When was that?

A. In September this year. Mrs. Stockley was with him, but she did not go down to the stake.

Q. What was the nature of that stake?

A. Just a regular stake driven in the ground.

Q. A wooden stake?

A. Yes sir; a wooden stake.

Q. How did that correspond with the claim he had heretofore made?

A. It was very much further east.

Q. Were you with Mr. Bailey at the time the survey was made?

A. Yes sir.

Q. Did you point out to Mr. Bailey the corner as claimed by Mr. Stockley?

A. I was with him at the time, I don't know whether I pointed it out to him, we were there together.

Q. You were at the wooden stake that Mr. Stockley had pointed out to you as his corner?

A. Yes sir, the same corner.

Q. Do you know whether that is the Huddleston corner or not?

A. I only know from the representations of the map; it is the same corner.

403 Q. The corner as represented on the map?

A. It is the corner that Mr. Stockley took me to.

Q. On the Humphrey map where is that corner?

A. I do not know where it is on this map.

Q. But it is the corner that Mr. Stockley pointed out to you?

A. Yes, sir; in September of this year.

Q. What was the name of the negro that you and Mr. Bailey saw and talked to down there?

A. I cannot say exactly, it was something like Hight.

Q. How old was he?

A. I should say thirty, or thirty-five years old.

Q. What was he doing there?

A. He seemed to be hunting.

Q. How close were you to the corner?

A. We were just on the lower side of the chute.

Q. Did the negro go with you to the corner?

A. Yes sir.

Q. Mr. Cissna, I will ask you to state what was the average size of the cottonwood timber on old river?

A. Well, near Powell's Lake there were small willows and cottonwood trees.

Q. Where is this Powell lake with regard to the left bank of old river?

A. Right next to the shore; the Tennessee side.

Q. Powell's Lake lies right along the bank?
A. Yes sir.
Q. What is the distance between the banks of old river there?
A. I should think ¾ of a mile.
Q. Now, what is the size of the timber in the bed of the old river?
A. The willows, I should say, are six inches to one foot.
Q. How about the cottonwood?
A. Probably two feet to two and a half feet.
Q. Have you had any experience in timber, and are you familiar with the growth of trees?
A. I have never dealt in timber other than selling the timber on this property.
404 Q. Do you know anything as to the growth of cottonwood on this property?
A. My observation is that the young trees grow up very rapidly up to two or three feet in diameter, and after that they do not grow so fast.
Q. How is the timber on the Arkansas bank of the old river between the main land and the original Dean's Island?
A. The timber is some smaller next to the river.
Q. How is it in the old bed of the river?
A. Much larger.
Q. That timber on the right bank of 1876 is larger than the timber in the bed?
A. Yes sir.
Q. What age does that timber indicate?
A. Well, I don't know; it is good large timber from three to four feet thick.
Q. How close is it to the right bank?
A. It is very near to it.
Q. From that right bank how far does the timber land run before it strikes any made land?
A. I should say three-quarters of a mile.
Q. Mr. Cissna, how much cleared land there exclusive of that you own?

At this point plaintiff objected to witness asserting any ownership in land because he had deraigned no title.
Objection overruled by the court and exception noted.

A. About sixty acres.
Q. How much cleared land is there over there?
A. About eight hundred and twenty-five acres.
Q. From the condition of the land can you tell us whether the clearing is of recent date or whether it is old cleared land?
A. I should say it had been cleared many years.
Q. It appears to be old cleared land?
A. Yes sir.
Q. Dean's Island appears upon the government map in this form. I will ask you to examine it, please, and state if the island as it now exists approached to the river at this place?

405 A. No sir.

Q. What is the condition of the island from the head of it here to about this point with regard to where the river runs?

A. I have only owned it since 1896; it has accreted many acres since I have owned it.

Plaintiff again objected to any statements of ownership from the witness.

Objection over-ruled by the court; exception noted by the plaintiff.

Cross-examination by counsel for plaintiff:

Q. Mr. Cissna, are you a timber expert?

A. No sir.

Q. You have stated that they grow at a certain rate up to two feet and then do not grow so fast; how did you find this out?

A. By observation and talking with timber men.

Q. There is a difference after they reach two feet?

A. Yes sir; they do not grow so fast after they reach a certain size and age as when they are young.

Q. After it gets two feet can you tell how fast it grows?

A. Only in a general way.

Q. Can you form any estimate of the age of a tree four feet thick?

A. No, only in a general way.

Q. Tell us what you mean by general way?

A. Just the appearance of the tree.

Q. Take trees four feet thick, how old would you suppose them to be?

A. It would be pretty hard for me to say.

Q. Would you say less than seventy years old?

A. I would think so; yes, sir.

Q. How much less than seventy?

A. Probably fifty years old?

Q. Now, you have spoken of a tree getting two feet thick in a certain length of time and after that they grow more slowly, the difference between two feet and four is two feet and these trees are four feet thick and fifty years old, that is not much

406 difference in the rate of growth is it?

A. All I know about that is from my own observation and I have also been told by timber men, Mr. Gibson and others, that after a tree gets large size they do not grow so fast.

Q. Then these trees may have been seventy-five or a hundred years old?

A. Yes sir; they might have been.

Q. These trees grew there since the water left that land, since 1823?

A. I do not know about that.

Q. You do *you* not know whether they grew there since 1823 or not?

A. No sir; the large trees extend away up into the woods, near the house.

Q. Are there any four foot trees in the made land?

A. No, sir; I do not think there are.

Q. Now, do you mean to say that you did not point out that Huddleston northeast corner to Mr. Bailey?

A. I pointed out the stake that Mr. Stockley showed me.

Q. Did you carry Mr. Bailey to that point?

A. I had to take the horses and go around and when I got there the darkey, Mr. Bailey and Mr. West were at the stake.

Q. Did you tell Mr. Bailey that that was the corner?

A. I told him that Mr. Stockley showed me the stake.

Q. Did you show that to Mr. Bailey?

A. Nothing more than that I was there; I was probably not in ten feet of the stake.

Q. Mr. Bailey knew that you had gone to the stake?

A. He was at the stake himself.

Q. You gave Mr. Bailey the declaration from which he ran those lines, did you?

A. It was in the hands of my attorneys.

Q. At the time Mr. Stockley showed you this corner, was it your purpose to have the survey made?

A. Yes sir; I expected to have it surveyed.

(By the Court:)

Q. Was the corner that the colored man showed Mr. Bailey the same corner that Mr. Stockley showed you?

407 A. Yes sir; the same corner.

Q. You have stated that you did not know the location of the right bank of the river in 1823?

A. Nothing more than what is on the map.

Q. Where is it in reference to the right bank of the river in 1876?

A. Very much further east.

Q. How much further?

A. Well, I should think a half mile.

Q. How far is the house where you live from the right bank of the old river?

A. I should think probably three miles.

Q. How far is it to the bank of '76?

A. About a half mile.

Q. Were you living in that country in 1876?

A. No sir.

Q. You have lived there in recent years?

A. Yes sir.

Q. Would it be possible to locate the banks of the river of 18*wa* from the vegetation growing, the size of the trees, etc.?

A. I think the right bank can be located; it is very perceptible; I have never examined the left bank particularly.

Q. How about the river of 1876?

A. I think that can be located very easily.

Q. Is there a high ridge of land on the north bank of Sandy chute?

A. Yes sir; I think about ten feet high.

Q. That is about as high as the made land?

A. Yes, sir; I think so; the bank runs down Sandy chute.

Q. Does it run due east and west?

A. I think it is east and west.

Q. That does not indicate any bank of 1876 or 1823 of the Mississippi river, does it?

A. It represents the bank as it now is.

Q. You do not mean to say that that bank of Sandy chute is the bank of 1876, do you?

A. I do not know anything about it.

408 Q. Suppose you are right in your contention on the location of the bank of 1876, would this bank along Sandy chute be right in your river?

A. Part of it would; yes sir.

Q. You do not think this bank has any significance as to the bank of 1876?

A. No sir.

Q. Did Mr. Kenton ever point out to you the bank of 1876?

A. Yes sir.

Q. Had you found it before that time?

A. I had not followed it down to where he showed me.

Q. Now, I believe, Mr. Kenton was the man that pointed out this bank of 1876 to you?

A. Yes, sir; the lower part of it.

Q. Can you take this map and show where you located the bank before Mr. Kenton showed you?

A. Right in here. I had been all the way down.

Q. And Mr. Kenton showed it to you down here?

A. Yes sir.

Q. Is it higher than this bank in here?

A. I suppose two or three feet, some places a little lower than others.

Q. This is the bank along here, eight or ten feet high?

A. Yes, sir; in places it is almose even with Sandy chute bank; other places you can ride down it.

Q. That bank agrees with the river of 1876?

A. Yes sir.

Q. Mr. Cissna, you spoke something of a conversation with Mr. Stockley several years ago in which he showed you the extent of his claim; when was that?

A. In the fall of 1899.

Q. What was the subject of that conversation?

A. Mr. Stockley and Mr. Kenton came riding horseback to the field where I was and said he wanted to show me where the lines were—we went riding down into the woods to the point he claimed was his property at that time. I asked him to go in front

409 and show me what he claimed. Mr. Kenton took the lead down through the woods and did the talking.

Q. Was the conversation carried on by the finger language?
A. Partly and partly by writing.
Q. Was there any line there?
A. Nothing more than the road down through the woods.
Q. As a matter of fact wasen't he merely showing you this old line that washed away?
A. He was showing me where his line came to.
Q. You, of course, rode where you found the best riding?
A. Well, I don't know.
Q. I believe you have fenced in the land in controversy, have you?
A. Yes sir.
Q. Show us now where the fence runs?
A. It runs right along here and on around here down to something like this right here. (Indicating it on the map).
Q. When did you put that fence there?
A. This last spring.
Q. Does Mr. Stockley claim to be in possession of the 230 acres?
A. Part of it only.
Q. In your conversation with Mr. Stockley, you were riding through the woods, were you not?
A. Yes, we would stop at different places.
Q. How long had you been acquainted with him at that time?
A. I think I had know him a year or more.
Q. Do you see him frequently?
A. Yes sir.
Q. Can you understand his conversation easily?
A. Yes, sir; pretty well.
Q. Can you understand him riding through the woods?
A. About as well as I can anywhere else.

Redirect examination by counsel for defendant:

Q. Did Mr. Stockley wait until he got into thick places to talk?
A. We stopped at different places.
Q. At a certain distance from your house northwest from your house, across this island you come to a place where there is a steep declivity?
A. Yes sir.
410 Q. What kind of soil is that?
A. It is a black, rich loam.
Q. From that place to the present river how is it, inclined or level?
A. It is level.
Q. Going from there to the right bank of the river as it now exists, what kind of land do you pass over?
A. Very good land.
Q. Is it land that has the appearance of made land?
A. Yes sir.
Q. What is the first marked depression that you find?
A. The right bank of 1823.

Q. Going from the right bank of 23 to the present river you strike field and then woods?
A. Yes sir.
Q. How far is it from the right bank of 23 to the right bank of 76?
A. Half mile.
Q. How wide is the depression in here, this towhead chute?
A. Right in here it is only thirty or forty yards wide.
Q. Is there a bank on this side of the towhead chute?
A. Yes sir.
Q. Is there sufficient space in between here for the Mississippi river to run?
A. I should think not.
Q. Where are these bog trees four feet think?
A. They are up in here, the timber gets smaller as it comes this way.
Q. Gradually gets smaller until it gets to this point?
A. Yes sir; I should think the timber in here was probably two and a half feet thick.
Q. There is a gradual decrease from this point to this point?
A. Yes sir.
Q. In talking about the growth of cottonwood trees and the length of time they take to grow a certain amount you do not mean that you can tell exactly as to each tree?
A. Not at all.
411 Q. Have you ever paid any taxes in Tennessee?
A. No sir.
Q. Have you recently paid any taxes on the Dean's Island property?
A. Yes sir.
Q. Island 37 and Centennial Island are in Tennessee, are they not?
A. Yes sir.

Recross-examination by counsel for plaintiff:

Q. Now, in pointing out the land you understood to be in Arkansas, do you not intend to include this spot?
A. Yes sir.
Q. You say Mr. Stockley showed you the extent of his claim?
A. Yes sir.
Q. And did you not understand that he was claiming land in Tennessee?
A. I only know that Island 37 and Centennial Island was in Tennessee.
Q. Did he not tell you that he claimed this land as accretions?
A. I do not remember whether it was accretions or not.
Q. But you did not know that he was claiming land there?
—. ——.

Witness excused.

W. W. WEST, witness for the defendant, being first duly sworn, testified as follows:

Direct examination by counsel for defendant:

Q. What is your name?
A. W. W. West.
Q. Where do you live, Mr. West?
A. On Dean's Island, Mississippi County, Arkansas.
Q. In what business are you?
A. I am a farmer.
Q. For whom do you work?
A. Mr. W. A. Cissna.
Q. Are you the manager for him?
A. Yes sir.
Q. How long have you been living on Dean's Island?
412 A. Six years; since 1895.
Q. How old are you?
A. Thirty years old.
Q. Where were you reared?
A. In Demopolis, Alabama.
Q. How long have you known the country up there around Dean's Island?
A. Just six years, since I went there in 1895.
Q. What is the character of the soil up at the head of the island?
A. It has the appearance of being old land, old fields being cultivated, and sycamore trees 4, 5 and 6 feet in diameter.
Q. Very large sycamore trees there?
A. Yes sir.
Q. Traveling down this way, what is the first marked characteristic of the country that you find, I am going down this way now?
A. Going in that way, west or southwest direction, the first thing that you strike after you leave the field in very heavy timber.
Q. What banks do you strike?
A. You strike what is said to be the bank of 1823.
Q. What kind of a bank is it, high or low?
A. In places it is 4, 5, 6, 7, 8 feet high, it varies.
Q. After you leave the bank of 1823, how far do you go in this direction before you find another bank?
A. A half mile, more or less.
Q. What is the condition of the timber on the bank of '23 what you understand to be the bank of '23 and the first bank you find going away, the bank of '76?
A. I suppose there is timber between these two banks forty inches more or less.
Q. After you pass over the bank is there any difference in the timber?
A. A good — of timber over there is 36 inches.
Q. Do you know where the road is on the top of that Tennessee bank, do you know of the existence of that road?

A. Yes sir; there is a road along there.

413 Q. Is there any water down in that country?

A. There are several little ponds in the bed of old river.

Q. On which side of what you call the river of '76 does the water extend to these ponds?

A. Right close to the bank along the side of the Tennessee bank.

Q. Point out the right bank of the river of 1876?

A. It is right along here.

Q. What is the tow head chute, where does it run out from down here, the head of it?

A. Tow head chute is along about there.

Q. Where is the left bank of it?

A. Right along down there.

Q. Between the bank is it wide enough for the Mississippi river ever to run?

A. No, sir; I would not think so. It is almost 100 yards wide.

Q. Right down at the tow head chute commencing with the bed of old river, is that part lower or higher than that part between Dean's Island and 37?

A. This is towhead chute, it is lower.

Q. Are you an expert timber man?

A. No, sir.

Cross-examination by counsel for plaintiff:

Q. Can you point out the bank, the Tennessee bank, of the river of 1876?

A. I think I can.

Q. Please do so?

A. Right along about here.

Q. Why do you think that is the Tennessee bank?

A. Because it has heavy timber growing on it.

Q. Is this field on Centennial Island?

A. Yes sir.

Q. Now, do you mean to say that that was the Tennessee bank before or after the cut-off?

414 A. Before the cut-off.

Q. Where did you think the cut-off took place?

A. I do not know that I can point it out to you, this is the river here and this is the old river and here is the right bank.

Q. Now, point out the cut-off, if you can, on the supposition that this is the bank?

A. Let me see, this Centennial Island, I don't think I can point it out to you, I am not a map man.

Q. Well, will you point out where you think the cut-off took place

A. I don't think I could do it at all.

Q. But you still think that this was the Tennessee bank in 1876?

A. Yes sir.

Q. Was there any great caving there?

A. I don't know whether there was any caving or not.

Q. Take right along down there between towhead chute and Mr. Stockley's field, what is the size of the timber?

A. From thirty to thirty-six inches.

Q. Now, you have testified as to the lines of 1823 and 1876. I will ask you how you know the lines of '23 and '76?

A. I do not know them, there is a bank there which I suppose is the bank of 1823.

Q. Why do you think so?

A. Just for this reason, there is a bank there and on top of it going back between there you can find trees just any old size you want from four feet to eight feet thick.

Q. Now is that your only reason?

A. Yes, the size of the trees and general surroundings.

Q. What are the general surroundings?

A. It has the appearance of being older land than this between '23 and '76.

Q. Why do you use the expression '23?

A. Because it was said that that was the bank of the Mississippi river at that time. Maj. Hu-phreys said it was called that.

Q. Did Maj. Humphreys run that line of '23 on Dean's Island.

A. He was running a line there about two weeks ago.

Q. Did he run anywhere around Dean's Island?

415 A. When he was running up there along 23 bank he was not on it, he was right close beside it.

Q. You think the '23 bank is down here?

A. Well, the line that he was running is what I call '23 bank.

Q. This bank there, is located same distance from that, is it?

A. The bank of '23; yes sir.

Q. Then you do not agree with this map that this is the bank of '23?

A. I don't know, he was right alongside of that '23 bank.

Q. Do you think the river ran there?

A. I don't know whether the river ran there or not.

Q. Is that is the bank of '23 didn't the river run there?

A. If that was the bank, necessarily so.

Q. Do you not know whether or not the river was ever there?

A. No, sir; I don't know.

Q. All you mean to say is that Maj. Humphreys ran what you call the bank of '23?

A. Well, yes sir.

Redirect examination by counsel for defendant:

Q. I will ask you whether since this suit was brought about two weeks ago you saw Maj. Humphreys running a line on Dean's Island in the woods?

A. Yes sir.

Q. I will ask you whether he was trying to get the river of 1823?

A. That is what he said.

Q. Can you tell about where you met him?

A. Well, I don't know that I could exactly, but it strikes me it was along in here somewhere.

Q. Have you had any experience in drawing maps?
A. None at all.
Q. Were you with Mr. Bailey and Mr. Cissna the time Bailey began running his survey?
A. Yes sir.
Q. How was the northeast Huddleston corner found?
A. There was a negro in the woods hunting, he came up to us and I asked him something about this corner. I asked him if he could point it out to me, he took us over to *us* and pointed it out to us. He said he was with some surveyors there before.
416 Q. Did Mr. Cissna go with you?
A. Mr. Cissna went around with the horses and came up as we got there.

Cross-examination by counsel for plaintiff:

Q. Was Mr. Cissna present when you were talking about the corner?
A. Yes, sir; but I did the talking myself. I asked the negro if he could point out that corner to us.
Q. Did he go over and show you the stake itself?
A. Yes sir.
Q. Did Mr. Bailey begin the survey on the line or at the stake?
A. He began at the stake.
Q. What was Mr. Cissna doing? Did he say anything?
A. No, sir; I do not know that he said anything.
Q. Did you show Mr. Bailey the section corner on Dean's Island up there where he began from?
A. No, sir; I did not show it to him.
Q. Did you know where it was yourself?
A. I have been to it several times.
Q. Were you certain that he started from the right corner?
A. He started from the Government corner known as 27, 28, 33 and 34 T., 10, N. R., 10 east.
Q. Is that section corner marked?
A. There was a stake there.
Q. Do you know who drove that stake there?
A. No, sir; I do not, it was there at the time.
Q. Did anyone ever tell you where it was?
A. Mr. Beale had been on the island before I went there; he told me about it.
Q. Does it bear any Government mark on it?
A. No sir.
Q. And that is all you know about the corner, is it?
A. Yes, sir; that is all.

Witness excused.

417 The defendant closed his case and rested and the plaintiff offered the following evidence in rebuttal:

O. K. JOPLIN was called and testified as follows:

Direct examination by counsel for plaintiff:

Here one of the jurors asked permission of the court to ask the witness a question, which was allowed.

The Juror: This, you state, represents the cut-off of 1876?

A. Practically so, yes sir.

Q. Is this the present channel of the river? (Pointing to Humphreys' map.)

A. Yes sir.

Q. How did the present channel get over this way back up here and how long has it been coming here?

A. After the cut-off the head of this island washed off and caved west to where it is at the present time. This was at the time of the cut-off.

Q. Has this ground been in the river since 1876?

A. The river receded and came this way rapidly and got over to where it is not.

Q. That represents the original Devil's elbow, where does this water go over this way?

A. This is the channel in its present shape where it reversed itself. In other words, this water comes over in this shape and struck the towhead of Brandywine and was deflected and passed on west and forced an outlet for itself through Fogleman's chute on the other side of Brandywine. That is the main channel now.

Q. Where does the water flow on south?

A. This water flows on and gets back into the channel right here.

Q. Across that old bed?

A. At Fogleman's outlet it hit Brandywine Island and run in here and tried to get back into its natural channel and dammed the water up here going around this way. The water from up stream struck here straight and backed, and in order to get back to the old channel took off this way around by Brandywine.

418 Q. How long has the river been flowing out right up here?

A. Since the cut-off, the river has continued to recede southwest on account of the caving until it has almost come to the line between Tipton County and Shelby County.

Counsel for plaintiff resumed the examination of the witness:

Q. How long after the cut-off till this towhead appeared?

A. I passed over there a few days after the cut-off. We had to lead in order to find our way. We did not know where the channel was, it was all a new part of the river. Shortly after the cut-off a lump of blue mud appeared that I have spoken of which soon developed into the tow-head.

Q. Now, Captain, take the Government map of 1874. You notice that the Massey place is represented. Did you- cut-off go through the Massey place or the Trigg place?

A. It went through the Trigg place and washed most of it away. It also struck the bounds of the Massey place and took most of that. When I first saw it it was about 150 yards wide and was extended across the Trigg place from the northeast and struck the Massey place about where it struck the lower river.

Q. Captain, you heard Mr. West speak of some large trees on the east banf of Contennial Island along old river hered by Mr. Stockley's field. Now, I will ask you if there are any trees in this bank where he said along old river opposite the towhead 36 or 40 inches in diameter?

A. I had occasion to fall out with some of my tenants about cutting some of these trees along this bank at another place. There were none of them more than six or seven inches in diameter. Where he spoke of there was none at all.

Q. You do not know of any such trees?

A. I have never seen any such trees, there.

Q. I believe you stated that you saw that small track of land claimed by Mr. Stockley in this suit and shown here on Maj. Humphreys' map go into the river?

A. Yes, I saw this land go into the river in the spring of 1876; this land has made back since then.

419 Q. How did this land fill up?

A. It made back out in here towards 37 and Dean's Island and this towhead in here and along here east of Centennial island. It all grew up about the same way.

Q. Which direction does Sandy Chute run?

A. Due west.

Cross-examination by counsel for defendant:

Q. You have pointed out here where you say this property fell into the river?

A. Yes, right here where I lay my pencil.

Q. Do you say this property fell into the river?

A. Yes, this property right here went into the river.

Q. But you never said this property here fell into the river?

A. No, sir! I did not.

Q. That was never in the river in your judgment?

A. No, sir.

Q. State whether or not it is true that you did see trees three feet in diameter growing upon this bank along the road there?

A. There is no road on the Centennial side.

A. Is there an old road right along there?

A. Yes, that is the original bank of island 37 before the cut-off.

Q. Was this the left bank of the river in 1876?

A. Yes sir.

Q. On the left bank of the river there are trees three feet in diameter, are there not?

A. There may be some on 37.

Q. Mr. West said there were trees along there 36 inches in diameter?

A. As I understand it he said along the bank of Centennial Island.

Q. Was there any trees of any size along the sloping bank of Centennial Island?

A. No, sir; that was a field.

Q. Was that the bank made by the cut-off?

A. Yes, sir.

Witness excused.

420 Major J. H. HUMPHREYS was here recalled and testified as follows:

Direct examination by counsel for plaintiff.

Q. I will ask you, Major, if you have been to Covington, Tenn., since you have testified the other day?

A. Yes, sir; I have.

Q. Did you examine the records of the old certificates of survey made by the official surveyors of Tennessee of land in the neighborhood of Centennial Island and Island 37 in Tipton County?

A. Yes, I have examined them carefully.

Q. Did you compare the copies of the records of the certificates of surveys from which you made this map with the originals there in the Register's office in Covington?

A. Yes, sir; I did.

Q. Did you find them accurate copies?

A. Yes, they are.

Q. Are these copies from which you made this map the certified copies of the certificates of surveyors which have been introduced here in evidence?

—. ——.

Q. Did these certificates and surveys give the meanders of the Mississippi river on the Tennessee side?

A. Yes, sir.

Q. Do they contain calls for one another which enabled you to accurately construct a map from them?

A. Yes sir.

Q. Could you from them construct a map showing accurately the Tennessee bank of the river as it was at the time those surveys were made about the year 1823?

A. Yes, sir; I could.

Q. Is the map you have made and introduced in evidence here accurately show the bank of the river as it was in 1823?

A. Yes, sir; it does.

Q. I will ask you, major, if this map you have introduced here is a correct exemplification of the surveys of record in the Register's Office at Covington as you found in your comparison?

A. Yes, sir.

421 The defendant here objected to this question and answer for the reason that the record in Covington could only be

proven by certified copies and the answer purporting to give their contents in a different way.

Objection was sustained and the question and answer ruled out by the court, to which the plaintiff excepted.

Q. The black lines beginning at the northeast corner of the Huddleston tract and extending up and down the river is a true representation of the bank of 1823 as shown by these surveys, is it not?

A. Yes, sir.

Q. I believe you have followed these certificates and made your surveys and made your map as correct as you can?

A. Yes.

Q. Major, I will ask you as to the accuracy of platting one map on the other when there is no common point in them. Can it be done accurately?

A. Not without the same starting point, you must necessarily have some starting point in common or your work will be inaccurate.

Q. Did you survey the land in controversy in this suit for Mr. Stockley?

A. Yes, sir; I did.

Q. Did you run by actual measurement the various lines you have designated?

A. Yes, sir; every one of them.

Q. In your survey through the woods of the land in controvercy, did you notice any marked difference at any place in the growth of the timber or any elevation of ground in the shape of a bank?

A. No sir; I never saw any, and I tramped all through the
422 woods, in running this north line here, I crossed the dry beds of three sloughs and ponds. They, of course, had slight banks. These were all the banks that I saw.

Q. Did you notice any marked difference in the growth of the timber on either bank of the ponds down which you ran this line which you call the middle of the old river and the boundary line of the State of Tennessee?

A. No, I did not; if there was it was too slight to be noticed.

Q. Did you notice any marked difference in the growth of timber over there on that made land anywhere?

A. No, sir; I did not, except that along Sandy Chute where the land is sandy the trees are scattered and smaller than back further where the land is good.

Q. I will ask you if you saw over there in that made land between Island 37 and Centennial Island on one side, and Dean's Island on the other, any banks except those of the sloughs and ponds, which you have spoken of?

A. No sir; I didn't.

Q. Did you see any bank or elevation of ground there that would lead you to suppose that it had once been the bank of the Mississippi River?

A. No, I did not.

Q. Did you see any difference in the growth of timber there which would show that there was such a difference between its size and

age as would lead you to conclude that it marked what had formerly been the bank of the river?

A. I did not.

Q. You see here on this map of Mr. Bailey's where he has marked what he calls the Arkansas bank of the river of 1876. Did you see any bank or elevation of ground along there or difference of growth of timber along there?

A. I did not; there is none there. It is practically level ground. There is no difference in the growth of timber there.

Q. Do you think that you went over all the made land between 37 and Dean's Island?

A. Yes sir; a number of times.

423 Q. I will ask you if in running this line last week, which you have marked on your map as the middle of the river, if you saw at any place just east of it, up here at the north, any bank?

A. Yes, there was a bank there which we ran a short distance from for a long space, probably a mile or more, that was the bank of the pond in here, and that bank is shown on the map. It was no higher or better marked than the bank on the other side of the pond. It was just the bank of that old pond there. We ran through it for a considerable distance.

Q. Have you drawn the map that I requested you to draw of that part of the Trigg tract left on the Tennessee side just after the cut off?

A. Yes, here it is, it was drawn from the decree of the Chancery Court, the description in there—to Sledge, McKay & Co.

Plaintiff here introduced the small map spoken of.

(The Clerk will here please insert it.)

Q. Major, I will ask you how far it is from the intersection of this section line to the northeast corner of the Huddleston grant on your map?

A. About one hundred and twelve chains.

Q. How far from the corresponding point there back to this 33 and 34 where they meet over to the northeast corner of the Huddleston tract?

A. It is 182 chains.

Q. How far is it from the same section corner to the right here on the same scale, on Bailey's map?

A. Very near two miles. Two miles is a hundred and sixty chains.

Q. How far does your map show it?

A. 182 chains.

Q. This would be out further over this way than it is on that map?

A. Yes, sir; it would come further over this way a distance of twenty-two chains.

Q. Then, the difference in the distance from Huddleston's southeast corner to the points named between the map and survey you have made and those made by Mr. Bailey is twenty-two chains is it?

424 A. Yes sir.
Q. How much is twenty-two chains?
A. A little over a quarter of a mile.
Q. I will ask you what on your map the line that I now show you represents?
A. That is the Green B. Bateman tract on island 36.
Q. What does it represent with regard to the left bank of the river of 1823?
A. It is the river at the time that the ground was surveyed there. I don't remember the time.
Q. This line here, then, represents the left bank of the river of 1823?
A. Yes, some time within that period; I don't recollect exactly.

Cross-examination by counsel for defendant:

Q. You do not undertake to say that that was the river bank of 1876?
A. I do not.
Q. Where, then, was the river of 1876?
A. I do not know.
Q. Is this pencil mark here on this map where that map shows the river of 1823?
A. Yes, within that line it was, about the period of 1823.
Q. If this was the bank of 1823, then, this could not have been the bank of 1876, unless the river had receded north?
A. No, it could not.
Q. Did the current strike the bank there and make off in this way to this point?
A. I could not say that it struck this bank. Let me explain. I do not say that *that* the river did not recede there from my bank at the point you name and mark an accretion. I merely know nothing about it.
Q. Assuming it to have passed in this way what would you say?
A. Well, of course, assuming that it passed in this way, it might have cut in.
Q. The line which you have undertaken to draw here represents what in your judgment was the center of the river?
425 A. Yes, about that. Some of this ground on the main shore was surveyed here in 1823, but on island 37 the surveys were made in 1836 and '7. Those copies of the records will show the dates.
Q. Right here?
A. Yes sir.
Q. At the time you made this survey was there a negro along named Hight?
A. Yes, sir.
Q. At that time he was with you?
A. Yes, sir.

The witness was here excused.

The plaintiff here closed his evidence in rebuttal.

This was all the evidence in the case.

The Court here requested both counsel for plaintiff and defendant to hand any special instructions to the jury either might wish to give.

Whereupon counsel for plaintiff submitted to the court, in writing, several requests for special instructions, which are as follows: (The Clerk will here please insert them in order in which the are numbered.)

Special Instructions Requested by the Plaintiff.

1. The defendant by plea has raised the question as to the jurisdiction of this court over the land described in the pleadings. The jurisdiction of this Court extends tto the western boundary of the State of Tennessee, and it is for you to determine whether or not that boundary includes the land at issue. The western boundary of the State of Tennessee is the middle of the stream of the Mississippi River. The channel stream and bed of the river are synonymous words and mean the same thing. The bed of the river includes all the territory within the banks that is always covered with water, or so constantly and frequently that it is denuded of vegetation by action of the water and is thus distinguished from the soil upon the adjacent banks. Thus sand bars and mud
426 flats that are exposed to view in low water and that lie within the bank of the river are part of its bed. The banks are the elevations of land which confine the waters of the river, except in times of floods or high water, when they may be temporarily submerged; on top of the banks grow the ordinary timber and other vegetation characteristic of the adjacent country. The sides or declivities of the banks are so exposed to the action of the water of the river that vegetation does grow upon them. These banks bound the bed of the river, which the river occupied with its waters in whole or part, according to its stage. The boundary line between the State of Arkansas and Tennessee *are* the middle of the old channel of the Mississippi River between Dean's Island and the Arkansas shore on the one side and Island Thirty-seven and the Tennessee main shore on the other. That was the main stream of the river at the time the state boundary was fixed. At that point the river now flows through a new channel several miles south of the old one. If that change was a mere gradual and imperceptible recission of the boundary river southward in to the territory of Tennessee the boundary line between the two states followed it and is now midway between the banks on either side. By a gradual and imperceptible change is meant such a change as takes place slowly and by such small units or quantity that it can not be actually noticed at the time it is being done, though it may be easily seen and clearly estimated after some length of time has elapsed. But if the change was by a sudden and visible cut-off whereby the river within a few days made for itself a new bed within the territory of Tennessee, such a cut-off would have no effect upon the boundary of the state and it would still remain at

the middle thread of the old bed of the river, though it may be now filled up and dry land. Therefore, if you find that the change in the river at this place was thus sudden and visible, you will find the boundary of the State of Tennessee to be where it was before the cut-off at the middle of the old bed of the river, between Island Thirty-seven and Dean's Island. And if you find
427 that the land claimed by plaintiff is included within the State of Tennessee by that boundary line your verdict will be for the plaintiff and against the defendant, on the plea in abatement.

Refused.

Special Instruction 11 Requested by the Plaintiff.

If you find that the smaller, or second tract of land described in the declaration and claimed by the plaintiff is a part of the old Huddleston grant or Trigg place, as it was before it was washed away by the cut-off, you will find for the plaintiff as to that tract.

Refused.

Special Instruction III Requested by the Plaintiff.

The plaintiff, Stockley, by reason of his succession of deeds, constituting a perfect chain of title to the Huddleston grant and the original tracts on Island Thirty-seven, from the state to him and by his recent grant from the State to the larger tract sued for and by virtue of the law of accretions, now possesses and is vested with all the title of both tracts sued for that can be derived from the State of Tennessee. Therefore, if you find that the land in controversy is within the State of Tennessee, your verdict will be for the plaintiff, Stockley.

Refused.

Special Instruction IV Requested by the Plaintiff.

If you find that the plaintiff, Stockley, is the owner of the land located on Thirty-seven, and also of another tract formerly on the said shore of Tennessee, and that both tracts were formerly on the banks of the Mississippi river, and that the river has deserted its old channel, is entitled to the land adjoining his original tracts to the middle of the river. And if you find that the land claimed and sued for by the plaintiff lies between the original land and the middle of the old river, your verdict will be for the plaintiff.

Refused.

428 Special Instruction V Requested by the Plaintiff.

If you find that part of the old Trigg or Huddleston tract, was washed away rapidly and rapidly that would work no change in the title, possession and boundaries of its owner and he would still be entitled to his tract of land to the full extent of its boundaries as they were before the land was washed away. If any material

quantity of land went into the river at any one time, or within a short space of time and the caving took place so quickly and was of such extent that the loss of land to the owner was material and worthy of consideration, and the caving was such that the eye could mark it and estimate its quantity and effect, that was visible and rapid within the meaning of the law. If a hundred acres of land caved into the river within the space of five or six days that would be rapid and visible in the meaning of the law.

If the old Trigg or Huddleston land did thus rapidly and visibly wash away the plaintiff is entitled to any land that has since been formed on the site of that washed away, and also to any land that may have been formed adjoining it in both th- bed of the old main river and the chute of Thirty-seven, to the State boundary, under the law of accretions. Therefore, if you find that the old Trigg place, now owned by plaintiff Stockley, was thus rapidly and visibly washed away and that the smaller tract of land he now sues for, is situated on the site of the land that was washed away and that the remaining or larger tract claimed by the plaintiff was formed in the bed of the old main channel of the Mississippi river, and the chute of Thirty-seven adjoining plaintiff original Huddleston or Trigg land that was washed away, and plaintiff's land on island Thirty-seven in the manner required to give a riparian owner a title as accretion as you have been instructed, your verdict will be for the plaintiff for the land to the extent of the State boundary.

Refused.

429 Special Instruction VI Requested by the Plaintiff.

If you find that the land in controversy is in the State of Tennessee in regard to the fixing of whose boundary you have already been instructed, then I charge you the defendant, Cissna, has no right to its accretions to his land in Arkansas. His right to land in Arkansas can give him no title to land in Tennessee, either by accretions, or otherwise. Therefore, he is a mere trespasser on the land in controversy. But he is entitled to set up a valid, subsisting title in any other person than the plaintiff, which is a defense to this action as I have elsewhere instructed you.

Refused.

Counsel for defendant submitted requests for the following special instructions:

(The Clerk will here please insert them.)

"Mislaid; not material. Pierson & Ewing, Counsel, say they shall be omitted."

The defendant here renewed his motion for a peremptory instruction to the jury to find a verdict for the defendant, which motion the Court took under advisement and directed counsel to proceed with the argument, and stated that he would rule on the motion at the close of the argument to the jury. The case was thereupon argued to the jury by counsel for the plaintiff and counsel for the defendant respectively.

At the close of the argument of counsel the court ruled to sustain the motion of the defendant for a peremptory instruction to the jury in his favor and granted the same.

The Court thereupon then and there directed the jury to bring in a verdict for the defendant and ordered the same to be done, which the jury therewith did by the discretion of the court. The plaintiff, through his counsel then and there ex-epted to the action of the Court in directing the jury to return a verdict in favor of the defendant, and asked that his exception be noted of record, which the Court granted and ordered that the exception of the plaintiff to the act of the court in giving peremptory instructions to the jury to find a verdict for the defendant to be noted of record.

430 That the foregoing map appear of record this bill of exceptions is tendered by the plaintiff, examined by the Court, found correct and signed, sealed and made a part of the record on this 24th day of January, 1902, being one of the days of the November term of said Court.

E. S. HAMMOND. [SEAL.]

The Court declines to permit the following objections to be made a part of the bill of exceptions because he was of the opinion that they are mere exceptions to the opinion of the court. The Court signing the bill of exceptions and noting this so far as to save the plaintiff the b-nefit of the exceptions if necessary.

In delivering his opinion the court held that the deed made by Mrs. Narcissa E. Trigg, W. W. Trigg, Lizzie T. Shelton and her husband, T. S. Shelton, to H. W. Stockley on March 1st, 1897, conveying the east fifteen hundred acres of the Huddleston tract was not evidence that the said grantors were the heirs of W. W. Trigg, deceased, the devisee under the will of John Trigg. And that the said devisee was not dead. To this ruling of the court the plaintiff then and there excepted and asked that his exception be noted of record.

Also in delivering the opinion of the court, the court held that the deed dated July 20th, 1883, of Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine E. Sledge, executors of the last will and testament of Norfleet R. Sledge, Sr., and William M. Sledge and Caroline V. Sledge to A. N. McKay was not evidence that the firm of Sledge, McKay & Co., was composed wholly and only of Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay at the time of the purchase of the land described in said deed, to which the plaintiff then and there excepted, and asked that his exception be noted for record, which was by the court allowed. The Court also held that said deed was not evidence that the said grantors, Norfleet R. Sledge, William O. Sledge, Oliver D. Sledge and Catherine E. Sledge were the executors under the last will of the

431 said Norfleet R. Sledge, Sr., at the date of said deed, nor evidence of the death of said testator, to which plaintiff then and there excepted and asked that his exception be noted of record. The court also held that said deed was not evidence that Caroline V. Sledge and William M. Sledge were respectively the widow and

only heir of William M. Sledge, deceased, to which plaintiff then and there excepted and asked that his exception be noted of record, which the court allowed.

In delivering his opinion the Court held that the deed made by Norfleet R. Sledge, Jr., William D. Sledge and Oliver D. Sledge, surviving executors of Norfleet R. Sledge, Sr., deceased, and William M. Sledge, Jr., and Caroline V. Sledge, respectively the heirs and widow of William M. Sledge, deceased, to Mattie A. McKay, Rebecca McKay and A. Randelle Vam Vleet, heirs of A. N. McKay, deceased, dated June 29th, 1886, was not evidence that the firm of Sledge, McKay & Company was composed wholly and only of Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay at the time of the purchase of the land described in said deed, to which plaintiff then and there excepted, and asked that his exception be noted of record, which was by the Court allowed.

And the court held also that said deed was not evidence that Norfleet R. Sledge, Jr., William D. Sledge and Oliver D. Sledge were the surviving executors of the will of Norfleet R. Sledge, Sr., and that the latter was dead at the date of said deed, to which plaintiff then and there excepted and asked that his exceptions be noted of record, which was by the court allowed.

The Court also held that said deed was not evidence that William M. Sledge and Caroline V. Sledge were respectively the only heir and widow of William M. Sledge, deceased, at the date of said deed, to which plaintiff then and there excepted, and asked that his exception be noted of record, which was by the court allowed.

432 In delivering his opinion the court held that the deed to Thos. H. Allen, Jr., of the land therein described by Mattie McKay Carroll and her husband, William H. Carroll, Ramelle Van Vleet and her husband, P. P. Van Vleet and Rebecca McKay, dated January 2nd, 1888, was not evidence that the said Mattie McKay Carroll and Ramelle Van Vleet and Rebecca McKay were the only heirs of A. N. McKay, deceased, and was not evidence that the latter was dead at the date of said deed, to which plaintiff then and there excepted and asked that his exceptions be noted of record, which the court allowed.

Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Assignment of Errors.

Filed January 24, 1902.

Comes the plaintiff and for assignment of errors to the rulings of the court had in the course of the proceedings in the above styled cause, says:

1. The court erred in not submitting to the jury the issues of fact raised by the plea in abatement and the replication thereto.

2. The Court erred in holding that it had jurisdiction over only a small part of the land in controversy.

3. The Court erred in sustaining the motion of the defendant for peremptory instructions to the jury to return a verdict for the defendant, and in directing the same to be done.

4. The Court erred in not holding that the largest tract of land in controversy had been formed against the bank of the riparian land owned by plaintiff, Stockley, on Island 37, and his Huddleston tract formerly on the Tennessee main shore.

5. The Court erred in not submitting to the jury and
433 not leaving them to determine the question of fact of whether or not the largest tract of land in controversy had been formed against the bank of the land owned by plaintiff, Stockley, on the bank of the river on island Thirty-seven, and his old Huddleston tract, formerly on the Tennessee main shore.

6. The court erred in not holding that both tracts of land in controversy had been formed against the bank of the riparian land owned by the plaintiff, Stockley, on the bank of the river on island Thirty-seven and the land remaining of his old Huddleston tract on the east end of Centennial Island.

7. The Court erred in not sumitting to the jury and leaving them to determine the question of fact of whether or not both tracts of land in controversy had been formed against the bank of the land owned by plaintiff, Stockley, on the bank of the river on island Thirty-seven, and the land remaining of his old Huddleston tract on the east end of Centennial Island.

8. The Court erred in not holding that both tracts of land in controversy had been formed in the slow, gradual and imperceptible manner, which under the rule of the law of accretions, would vest the title in the plaintiff Stockley, as the owner of the riparian land against which it had formed.

9. The Court erred in not submitting to the jury and leaving the- to determine the question of fact as to whether or not both tracts of land in controversy had been formed in the slow, gradual and imperceptible manner, which under the rule of the law of accretions, would vest the title in the plaintiff, Stockley, as the owner of the riparian land against which it — made.

10. The Court erred in holding that under the facts proven in this suit the title to both tracts of land in controversy was not vested in the plaintiff, Stockley, by the law of accretions, as owner of the riparian land against which it was made.

11. The Court erred in holding that as a matter of law the larger tract of land in controversy is not an accretion to the riparian land owned by the plaintiff, Stockley, on the banks of the river on island Thirty-Seven, and to his old Huddleston, or Trigg
434 tract, formerly on the Tennessee main shore, and that, therefore, he can have no title to it under the principle of accretions, notwithstanding its manner of formation.

12. The Court erred in holding that as a matter of law, both tracts of land in controversy are not accretions to the riparian land owned by plaintiff, Stockley, on Island Thirty-seven, and the remainder of his old Huddleston or Twigg tract left on the east bank of Centennial island after the cut-off, and that, therefore, he can have no title to them under the principle of accretions, notwithstanding their manner of formation.

13. The Court erred in not holding that plaintiff, Stockley is entitled to the smaller tract of land in controversy had been made by an avulsion and, hence, did — virtue of the original grant of the State of Tennessee to Simon Huddleston, dated January 24th, 1823, and the successive conveyances to Stockley, because the land was washed away at the time of the cut-off in the year 1876.

14. The Court erred in holding that the land in controversy had been made by an avulsion and hence, did not belong to Stockley as the riparian owner of the land against which it formed.

15. The Court erred in not submitting to the jury and leaving them to determine the facts, as to whether or not the land in controversy had been formed by an avulsion.

16. The Court erred in holding that the land in controversy had been formed in such a sudden and perceptible manner as to prevent the rule of accretion from operating to vest the title in the plaintiff, Stockley, as owner of the riparian land against which it — made.

17. The Court erred in not submitting to the jury and permitting them, under proper instructions, to determine the question of whether of not the land in controversy had been formed in such a sidden and perceptible manner as to prevent the rule of accretions from vesting title in the plaintiff, Stockley, as owner of the riparian land against which it had made.

18. The Court erred in holding that because the waters
435 of a navigable river, that is the Mississippi River, at one time covered the land in controversy, the rule of the law of accretions could not be applied, and could not operate so as to give the plaintiff, Stockley, a title thereunder to said land, as an accretion to his riparian land.

19. The Court erred in holding that the land described in the declaration is now a part of the bed of a navigable river, to wit, the Mississippi river, and that it is, therefore, not susceptible of private ownership.

20. The Court erred in not submitting to the jury and permitting them to determine under a proper charge of the court the question of whether or not the land in controversy is now a part of the bed of a navigable river; that is of the Mississippi river.

21. The Court erred in holding that the sudden cut-off of 1876 prevented the plaintiff, Stockley, as a riparian owner, from acquiring a title to the land in controversy under the law of accretions; the court holding that the sudden cut-off prevented the law of accretions from applying to any land that might thereafter be formed on the old bed of the river.

22. The court erred in holding that under the law, in order to give the riparian owner the title to land as accretion it must be

formed by a mere actual and immediate recession of his boundary, right *right* being merely to have the right for a boundary and to follow it, but when the river entirely quits running in the channel the law of accretions can not be applied to the land formed there.

23. The Court erred in holding that the plaintiff, Stockley, was not entitled to the land that formed in the bed of the old river east of his land on Island Thirty-Seven, and east of his old Huddleston tract, after the cut-off, to the middle thread of the old river as it was before the cut-off. That is to the Tennessee boundary line.

24. The court erred in not holding that the boundary of plaintiff Stockley's riparian land, on Island Thirty-seven, and
436 that of his old Huddleston tract, were extended by construction of law to the middle thread of the old bed, or channel of the Mississippi River east of them when it ceased to be a navigable river after the cut-off of 1876.

25. The Court erred in holding that the Arkansas shore has been extended over the land in controversy in the slow and imperceptible manner which would make it under the law, accretions to the riparian land in that State.

26. The Court erred in not submitting to the jury, and leaving them to decide the question of fact, as to whether or not the Arkansas shore had been extended over the land in controversy in the slow and imperceptible manner which would make it, under the law, an accretion to the riparian land in that State.

27. The Court erred in holding that the present east bank of Centennial was the Tennessee bank of the river before the cut-off in 1876.

28. The Court erred in not submitting to the jury and leaving them to determine the location of the Tennessee bank of the river just prior to the cut-off of 1876.

29. The Court erred in not holding that the plaintiff, Stockley, was entitled to the land that had formed as accretions to the Huddleston tract in the chute of Thirty-seven prior to the cut-off and which was suddenly washed away by the cut-off and is now a part of the larger tract described in the declaration.

30. The Court erred in not submitting to the jury and permitting them to determine, under a proper charge, the question of fact of whether or not any accretions had been formed upon and against the old Huddleston tract now owned by the plaintiff, Stockley, in the chute of Thirty-seven prior to the cut-off, and whether or not it was suddenly washed away by the cut-off of 1876.

31. The Court erred in holding that Stockley was not entitled to part of the land in controversy as accretions to the tract on Island Thirty-seven to which his title was not questioned.

32. The Court erred in not submitting to the jury, and having them to determine, under a proper charge, the question
437 of fact as to whether or not Stockley was entitled to any part of the land in controversy as accretions to his land on Thirty-seven; his title to which was not questioned. The question for the jury being as to its manner of formation. If Stockley had

no title to the Huddleston tract he was still entitled to part of the land in controversy as accretions to his island Thirty-seven tract.

33. The Court erred in holding that as a matter of law the plaintiff, Stockley, was not entitled to any land that formed in the manner of accretions to his riparian land in the bed of such streams as the old main channel of the river and the chute of Thirty-seven were after the cut-off; that accretions could not be formed in such streams so as to vest the title in the owner of the riparian land.

34. The Court erred in holding that the grant conveying the title to the larger tract of land in dispute, from the State of Tennessee to the plaintiff, H. W. Stockley, dated November 26th, 1901, was void and did not vest him with a valid legal right.

35. The Court erred in holding that the entry of the larger tract of land in controversy made by H. W. Stockley on April 20th, 1901, on which the grant was based, was void and did not vest in him any title.

36. The Court erred in refusing to admit in evidence the examined copies prepared by Miss Sue E. Murphy, of all the deeds in the chain of title to the tract of land on island Thirty-seven, and to the old Huddleston tract, showing the various conveyances by which the title passed to Stockley; and the certificates of survey of all the tracts in Tennessee shown in Humphrey's map. The accuracy of these copies was *shown* to by the witness. The Court held that because the Legislature of Tennessee had provided for the admission of certified copies it thereby prohibited any other method of proof.

37. The Court erred in not admitting the deposition of E. W. Massey in evidence.

438 38. The Court erred in holding that the plaintiff, Stockley's title to his riparian land on the main shore of island Thirty-seven was derived through W. W. Trigg and his heirs and through the decree of the chancery court of Shelby County, Tennessee, vesting title in Sledge, McKay & Company, and also through the heirs of Norfleet R. Sledge, Sr., and of William M. Sledge and of A. N. McKay.

39. The Court erred in holding that the plaintiff Stockley, had no title to the east fifteen hundred acres of the old Huddleston or Trigg tract.

40. The Court erred in holding that the plaintiff, Stockley had no title to the part of the old Huddleston or Trigg tract that remained on the east end of Contennial Island after the cut-off of 1876.

41. The Court erred in holding that there was no evidence to show that Mrs. Narcissa E. Trigg, W. W. Trigg and Lizzie T. Shelton, the grantors in the deed dated March 1st, 1897, conveying the east fifteen hundred acres of the Huddleston tract to H. W. Stockley, were the widow and only heirs at law of W. W. Trigg, deceased, the devisee, under the last will of his father, John Trigg; and in holding that the recitals in said deed were not evidence of said facts, and that there was no proof of the death of W. W.

Trigg, the devisee of John Trigg; and in further holding that the said grantors in said deed to Stockley were not in fact the widow and heirs at law of the said W. W. Trigg, deceased, and that the latter was not dead.

42. The Court erred in not submitting to the jury the question of whether or not Mr. Narcissa E. Trigg, William W. Trigg and Lizzie T. Shelton, the grantors in the deed to H. W. Stockley of the east fifteen hundred acres of the Huddleston or Trigg tract, dated March 1st, 1897, and were not in truth and in fact widow and only heirs of W. W. Trigg, deceased, the son and devisee under the will of John Trigg, and whether or not the said devisee, W. W. Trigg, was dead at the date of the making of said deed.

439 43. The Court erred in holding that the deed of Mattie McKay Carroll and her husband, William H. Carroll, Ramelle Van Vleet and her husband, P. P. Van Vleet, and Rebecca McKay to Thos. Allen, Jr., dated January 2nd, 1888, was not evidence that R. N. McKay was dead at the time of the execution of said deed, and that the said grantors, to wit, Mattie McKay Carroll, Ramelle Van Vleet and Rebecca McKay were his only heirs, and in holding that Mattie McKay Carroll, Ramelle Van Vleet and Rebecca McKay were not the heirs of A. N. McKay, and that he was not dead.

44. The Court erred in not submitting to the jury and permitting them to decide the question of whether or not Mattie McKay Carroll, Ramelle Van Vleet and Rebecca McKay were the only heirs of A. N. McKay, and whether the latter was dead at the time they jointly, with William Carroll and P. P. Van Vleet made the deed to Thos. H. Allen, Jr., on January 2nd, 1888.

45. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine E. Sledge, executors of the last will of Norfleet R. Sledge, Sr., deceased, and William H. Sledge and Caroline V. Sledge, respectively, the only heir and widow of William M. Sledge, Sr., deceased, to A. N. McKay, dated July 20, 1883, was not evidence that the firm of Sledge, McKay & Company was composed wholly and only of Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay at the time of the purchase of the land described in said deed, and at the time the title was vested in said firm by the decree of the chancery court of Shelby County, Tennessee, made on December 4th, 1879, in the case of T. A. Nelson, executor, vs. M. L. Trigg, et al., R. D. 775, and in holding that said firm was not then composed solely of said Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay.

46. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge and Oliver R. Sledge, surviving executors of the last will of Norfleet N. Sledge, Sr., deceased, and William M. Sledge, Jr., and Caroline V. Sledge, respectively the heir and widow of William M. Sledge, deceased, to Mattie M. McKay, Rebecca McKay and A. Ramelle Van Vleet, heirs of A. N. McKay, deceased, dated June 29th, 1886, was not evidence

440 that the firm of Sledge, McKay & Company was composed wholly and only of Norfleet R. Sledge, Sr., William M.

Sledge, Sr., and A. N. McKay, at the time of the purchase of the land described in said deed and at the time the title was vested in said firm by the decree of the Chancery Court of Shelby County, Tennessee, made on December 4th, 1879, in the case of T. A. Nelson, executor, M. L. Trigg, et al., R. D. 775, and in holding that said firm was not then composed solely of said Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay.

47. The Court erred in not submitting to the jury and permitting them to decide the question of whether Norfleet R. Sledge, Sr., William M. Sledge, Sr., and A. N. McKay, and they only, did not compose the firm of Sledge, McKay & Company, at the time the decree of the Chancery Court of Shelby County, Tennessee, was pronounced on December 4th 1879, in the case of T. A. Nelson, executor, vs. M. L. Trigg, No. 775 R. D., vesting title in said firm.

48. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine V. Sledge, executors of the last will and testament of Norfleet R. Sledge, Sr., deceased, and William M. Sledge and Caroline V. Sledge, respectively, the heir at law and widoc of William M. Sledge, Sr., deceased, to A. N. McKay, dated July 20th, 1883, was not evidence that the grantors therein, to wit, Norfleet R. Sledge, Jr., Wm. D. Sledge, Oliver D. Sledge and Catherine E. Sledge, were the executors under the last will and testament of Norfleet R. Sledge, Sr. with full power to convey the land described in said deed, and in holding that said Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine E. Sledge were not the executors under the last will of Norfleet R. Sledge, Sr., and that he was not dead then.

49. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge and Oliver D. Sledge, surviving executors of the last will of Norfleet R. Sledge and Oliver D.
441 Sledge, surviving executors of the last will of Norfleet R. Sledge, Sr., deceased, and William M. Sledge, Jr., and Caroline V. Sledge, respectively the heir at law and widow of William M. Sledge, Sr., deceased, to Mattie A. McKay, Rebecca McKay and A. Ramelle Van Vleet, heirs of A. N. McKay, deceased, dated June 29th 1886, was not evidence that the grantors therein, to wit, Norfleet R. Sledge, Jr., William D. Sledge and Oliver D. Sledge were the surviving executors of the last will and testament of Norfleet R. Sledge, Sr., deceased, with full power to survey the land described in said deed, and in holding they were not such surviving executors under the last will of Norfleet R. Sledge, Sr., deceased, and that he was not then dead.

50. The Court erred in not submitting to the jury and permitting them to decide the *w*uestion of whether or not Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine E. Sledge, were t*j*e executors under the last will and testament of Norfleet R. Sledge, Sr., deceased, with power to convey his realty, and whether the deed to A. N. McKay, dated July 20th 1883, and at the time they made the deed to the heirs of A. N. Mc*M*ay, to wit, Mattie A. McKay, Rebecca McKay and A. Ramelle Van Vleet, dated *H*uly 29th, 1886.

51. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge, Oliver D. Sledge and Catherine E. Sledge, executors of the last will of Norfleet R. Sledge, Sr., deceased, and William M. Sledge and Caroline V. Sledge, respectively the only heir at law and widow of William M. Sledge, Sr., deceased, to A. N. McKay, dated July 20th, 1883, was not evidence that the grantors therein William M. Sledge and Caroline V. Sledge were respectively the only heir and widow of William M. Sledge, deceased, and in holding that the said Caroline V. Sledge was not the widow and William M. Sledge, Jr., was not the heir of William M. Sledge, Sr., deceased, and that he was not then dead.

52. The Court erred in holding that the deed of Norfleet R. Sledge, Jr., William D. Sledge and Oliver D. Sledge, surviv-
442 ing executors of the last will of Norfleet R. Sledge, Sr., deceased, and William M. Sledge, Jr., and Caroline V. Sledge, respectively the heir and widow of William R. Sledge, Sr., deceased, to Mattie A. McKay, Rebecca McKay and A. Ramelle Van Vleet, heirs of A. N. McKay, deceased, dated June 20th 1886, was not evidence that the grantors therein, to wit, William M. Sledge, Jr., and Caroline V. Sledge, Sr., deceased —, and in holding that the said Caroline V. Sledge was not the widow, and that said William M. Sledge, Jr., was not the only heir of William M. Sledge, Sr., and that the latter was not then dead.

53. The Court erred in submitting to the jury and permitting them to decide the question of whether or not William M. Sledge, Jr., and Caroline V. Sledge were respectively the only heir and widow of William M. Sledge, Sr., deceased, and whether the latter was dead at the time they jointly, with others, executed the deed to A. N. McKay, on July 20th, 1883, and at the time the executed the deed to the heirs of A. N. McKay, to wit, Mattie A. McKay, Rebecca McKay and A. Ramelle Van Vleet.

54. The Court erred in holding that the decree of the Chancery Court of Shelby County, Tennessee, pronounced in the case of T. A. Nelson, executor vs. M. L. Trigg, et al., on December 4th 1879, vesting title in Sledge, McKay & Company, was void and of no effect to carry a legal title.

55. The Court erred in not holding and instructing the jury that the continued, adverse, open and notorious possession for seven years by the plaintiff, Stockley, under his deed from Thos. H. Allen, Jr., and wife, of the part of the Huddleston or Trigg tract left remaining after the cut-off, on the east end of Centennial Island, specifically described in said deed constituted a valid, legal title to the same.

56. The Court erred in not submitting to the jury and permitting them to decide, under proper instructions, the question of fact as to whether or not the plaintiff, Stockley, had been in such continuous adverse, open and notorious possession for seven years under the deed from Thos. H. Allen, Jr., and wife of the part of the
443 old Huddleston or Trigg tract, left remaining after the cut-off of 1876, on the eastern end of Centennial Island as

would vest in him a valid, legal title thereto, under the laws of Tennessee.

57. The Court erred in not holding and instructing the jury that a legal title to the tracts or riparian land on island Thirty-seven, claimed by the plaintiff, Stockley, was to be presumed from Stockley's possession of it, if they found that he was in possession before the defendant entered as against the defendant, who is a mere trespasser and permitting the jury to find the facts.

58. The Court erred in not holding and instructing the jury that a legal title to the old Huddleston or Trigg tract claimed by the plaintiff, Stockley, was to be presumed from Stockley's possession of it, if they found he was in possession of it before the defendant entered, as against the defendant, Cissna, who is a mere trespasser, and permitting the jury to find the facts.

59. The Court erred in not holding and instructing the jury that the plaintiff was in constructive possession of the land in controversy at the time defendant entered, by reason of the various deeds to him, conveying by apt words the accretions made to the riparian land which was thereby conveyed by specific description and by the possession of such riparian land, to wit, the island Thirty-seven and the Huddleston tracts, and from such constructive possession of the land in controversy a legal title was to be presumed to be in the plaintiff, as against the defendant who is a mere trespasser without any title, and in not leaving the jury to determine the extent of the land in controversy thus constructively in the possession of the plaintiff, and the other facts involved in the case.

Wherefore, the said plaintiff, H. W. Stockley, prays that the judgment of the said Circuit Court of the United States for the Western Division of the Western District of Tennessee against him, in favor of the said defenadnt, W. A. Cissna, be reversed and the suit be remanded to said Circuit for a new trial.

G. J. McSPADDEN,
Attorney for H. W. Stockley, Plaintiff in Error.

444 Circuit Court of the United States, Western District of Tennessee.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Petition for Writ of Error.

Filed Jan'y 24, 1902.

And now again comes the plaintiff, H. W. Stockley, by his attorney, and says that on December 13th, 1901, this Court entered in the above entitled suit a judgment in favor of the defendant therein

against this plaintiff in which said judgment and proceedings in said suit certain errors are committed to the prejudice of this plaintiff, all of which will more fully appear in his bill of exceptions and assignments of errors filed in this suit herewith.

Wherefore, this plaintiff prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and assigned, and that the writ of supersedeas — issuance of an execution on said judgment, and that the said judgment against plaintiff be reversed and that this suit be remanded to said Circuit Court for a new trial.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said district, on to wit, the 24th day of January, A. D., 1902, in the following cause, to wit:

445 No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Order Granting the Writ of Error.

On this day again came the parties to this suit, by their respective attorneys of record, and the said plaintiff H. W. Stockley, having filed herein his petition for a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, held at Cincinnati, Ohio, to review the judgment heretofore rendered and entered herein against him, and having in such behalf filed his bill of exceptions, and assignments of errors, and given a supersedeas bond, which has been duly approved as required by law, it is hereby ordered for reasons satisfactory to the court appearing, that the prayer of the said petition be and the same is hereby granted and such writ of error awarded and directed to be issued, which writ of rror was duly issued by the clerk of this court and allowed by the Honorable E. S. Hammond, one of the judges thereof, which said writ of error, together with a copy thereof for the said W. A. Cissna, is now lodged with said Clerk in his office. Thereupon the said defendant procured a citation to be signed by the Honorable E. S. Hammond, one of the Judges of said Circuit Court of Appeals, who at the time of

signing the same, approved the supersedeas bond tendered by the defendant herein and the same is accordingly filed.

UNITED STATES OF AMERICA,
Western District of Tennessee:

This day personally appeared before the undersigned, W. B. Weisiger, D. C., of the Circuit Courts of the United Sattes for said Western District of Tennessee, C. A. Stockley, of Tipton County, Tennessee, one of the sureties on the supersedeas bond herein, who, being by me first duly sworn, according to law, makes oath and
446 says that he is a resident of the Western District of Tennessee, and of the county hereinafter named, and is worth the sum of five thousand dollars, in unincumbered real and personal property, in his own name and right, over and above his legal debts and liabilities and exemptions, and subject to execution under the laws of the State of Tennessee; that said property is situate in Tipton County in the 11th Civil District of the county of Tipton and State of Tennessee, in said district, and described as follows:

500 acres of land on Island 37 and Centennial Island; also a store and stock of merchandise valued at four thousand dollars at Corona, Tenn.

C. A. STOCKLEY.

Subscribed and sworn to before me, this 20th day of January, A. D. 1902.

W. B. WEISIGER,
D. C. of the Circuit Courts of the United States for said District.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Supersedeas Bond.

Filed Jan'y 20th, 1902.

Know all men by these presents, that we, H. W. Stockley as principal, and C. A. Stockley as surety, is hereby held and firmly bound unto said W. A. Cissna in the full and just sum of one thousand dollars, lawful money of the United States, to be paid to the said W. A. Cissna, for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators, by these presents.

Signed by us, sealed with our seals, and dated at Memphis,
447 Tennessee, this 20th day of January, A. D., 1902.

Whereas the above named principal has prosecuted a writ of error to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment rendered in the above entitled suit against said principal by the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that is the above named principal shall prosecute said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

H. W. STOCKLEU. [SEAL.]
C. A STOCKLEY. [SEAL.]

Signed, sealed and delivered, taken and acknowledged before me at Memphis, Tennessee, this 20th day of January, A. D., 1902.

JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court,
By W. S. WEISIGER, *D. C.*

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between H. W. Stockley, plaintiff and W. A. Cissna, defend-
448 ant, a manifest error hath appeared, to the great damage of the said H. W. Stockley, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things, concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the twenty-first day of February next, in the said Circuit Court of Appealsn to be then and there held that the record and proceedings

aforesaid being inspected the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court the 24th day of January, A. D., 1902, and of the Independence of the United States of America the 125 year.

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States
for the Western District of Tennessee.
DAN F. ELLIOTT, *D. C.*

Allowed by
E. S. HAMMOND,
United States District Judge.

Acknowledgement of Service.

W. A. Cissna, the defendant in error in the within suit of error, hereby acknowledges due and legal service of the same, the said writ of error, and that a copy thereof, duly certified, had been filed in said cuit in the clerk's office of the said Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis, Tennessee.

Service accepted at Memphis, Tennessee, this January 24th, 1902.

W. A. CISSNA,
By STERLING PIERSON, *Att'y.*

449 In the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio.

No. 3601.

H. W. STOCKLEY
vs.
Q. A. CISSNA.

Citation.

To W. A. Cissna, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Sixth Judicial Circuit, at a session of said Court to be held in the city of Cincinnati, in the State of Ohio, in said Circuit, on the 21st day of February, A. D., 1902, pursuant to a writ of error filed in the office of the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein H. W. Stockley is plaintiff in error and you are defendant in error to show

cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of January, A. D., 1902, and of the Independence of the United States, the 126 year.

E. S. HAMMOND, [SEAL.]
U. S. District Judge for the Western District of Tennessee.

Acknowledgment of Service.

The said defendant, W. A. Cissna, named in the within citation, hereby acknowledges due and legal service of the same, and that he has received a duly certified copy of the same from the clerk. Service accepted at Memphis, Tennessee, this January 24th, 1902.

W. A. CISSNA,
By STERLING PIERSON, *Att'y.*

450 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D., 1901, at the United States Court House in the City of Memphis, in said District, on to wit: the 21st day of February, A. D., 1902, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

In this cause for sufficient and satisfactory reasons appearing to the Court thirty days' (30) additional time is allowed for making the transcript and filing the same in the United States Circuit Court of appeals for the Sixth Circuit at Cincinnati, Ohio, and the same length of additional time is allowed the plaintiff in error for docketing this case and filing the record thereof and depositing thirty-fice dollars ($35.00) as surety for costs, as required in such cases, with the Clerk of said United States Circuit Court of Appeals for said Sixth Circuit at Cincinnati, Ohio.

E. S. HAMMOND,

No. 3601. Circuit Court of the United States, Western District of Tennessee. H. W. Stockley vs. W. A. Cissna. Order of Court. Entered and Filed 21st day of Feb'y, A. D., 1902. John B. Clough, Clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

451 In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D., 1902, at the United States Court House in the City of Memphis, in said district, on, to wit; the 20th day of March, A. D., 1902, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

In this cause for sufficient and satisfactory reasons to the court appearing twenty (20) days' additional time is allowed for making the transcript and filing the same in the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, and the same — of additional time is allowed the plaintiff in error for docketing this case and filing the record thereof and depositing the thirty-five ($35.00) dollars as surety for costs, as required in such cases with the Clerk of said United States Circuit Court of Appeals for said Sixth Circuit at Cincinnati, Ohio.

The said twenty days' (20) additional time here granted shall extend from and connect with the additional time heretofore granted the plaintiff; that is extended from March 23rd, 1902, to April 12th, 1902.

E. S. HAMMOND.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, John B. Clough, Clerk of the Circuit Court of the United States, for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are a full, true, perfect and correct copies of the originals and of

452 the entire record and proceedings, including the original writ of error and citation in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

No. 3601.

H. W. STOCKLEY
vs.
W. A. CISSNA.

In testimony whereof, I have hereunto written my name and affixed the seal of said Court, at my office in the city of Memphis, Tennessee, this 24th day of March, A. D., 1902, and of the Independence of the United States the 125 year.

[SEAL.] JOHN B. CLOUGH, *Clerk.*
DAN F. ELLIOTT, *D. C.*

Authentication.

I, E. S. Hammond, a Judge of said Court, do hereby certify that John B. Clough, the genuine signature of whose deputy appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation by Dan F. Elliott, deputy aforesaid, is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

No. 3601. Circuit Court of the United States, Western District of Tennessee. H. W. Stockley vs. W. A. Cissna.

453 And afterwards towit on March 27th 1902, præcipe for appearance of counsel was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term 1901.

No. 1088.

H. W. STOCKLEY
vs.
W. A. CISSNA.

To the Clerk of said Court:

Please enter my appearance as counsel for the plaintiff in error.
G. J. McSPADDEN.

And afterwards towit on October 14, 1902, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1088.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Before Lurton, Day & Severens, Circuit Judges.

This cause is argued for appellant by Mr. G. J. McSpadden and continued until to-morrow.

And afterwards towit on October 15, 1902, an entry was made upon the Journal of said Court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

H. W. STOCKLEY
vs.
W. A. CISSNA.

This cause is further argued for the appellant by Mr. G. J. McSpadden and for the appellee by Mr. Caruthers Ewing and is submitted.

454 And afterwards, to wit, on November 10, 1902, a judgment was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1088.

H. W. STOCKLEY
vs.
W. A. CISSNA.

Error to the Circuit Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the Western District of Tennessee and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

And afterwards towit on December 11, 1902 an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1088.

H. W. STOCKLEY, Plaintiff in Error,
vs.
W. A. CISSNA, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted Oct. 15, 1902; Decided Nov. 10, 1902.

Before Lurton, Day and Severens, Circuit Judges.

This is an action of ejectment to recover some twelve hundred acres of land described as situated in Tipton county, Tennessee. The subject matter of the suit is land lying substantially between
455 the eastern bank and middle thread of an old and dried up bed of the Mississippi river.

The Plaintiff claims the whole of this land as accretions to land owned by him, originally bounded by the Mississippi river, as well as under a grant from the State of Tennessee to himself, for about one thousand acres thereof, issued in 1901.

The declaration sues for the land in controversy as two contiguous tracts, one containing 1050 acres, or threre about, and the other 131 acres, more or less.

The first or larger tract, which will hereafter be described, as the "Island 37 Tract," in as much as it is now adjacent to the plaintiff's land on Island 37, is claimed both as an accretion to land on Island 37 and by virtue of the very recent grant from the State of Tennessee mentioned above. The other or smaller tract is now part of "Centennial Island," and will be hereafter called "Centennial Island Tract," is claimed only as an accretion to the plaintiff's land on Centennial Island.

The defendant relied upon the general issue of not guilty. After the evidence for both sides had been concluded the court below instructed the jury to find for the defendant. This instruction has been assigned as error. From the observations made to the jury by the learned trial judges, we are advised that this instruction was predicated upon the supposed invalidity of the grant under which the plaintiff claimed the greater part of the premises, and upon his failure to show a perfect legal title to contiguous lands bounded by the river to which the parcels at issue were claimed as accretions.

The premises in dispute is a body of new made land resulting from a remarkable change in the course of the river by the sudden formation of a new and short channel across the narrow neck of a great

bend of the river, known as the "Devil's Elbow," some thirty or forty miles above Memphis, Tennessee. This cut off channel, now known as the "Centennial Cut" occurred in a single night in
456 March of 1876. The distance by the old channel of the river around the bend was from fifteen to twenty miles. The distance across the neck, where the new channel was cut, was somewhat less than two miles. The general course of the river in the vicinity of this cut, before the new channel was formed, is very well shown by a reconnoissance survey made by the War Department in 1874, which is set out opposite (Map No. 7.).

The deep water channel of the river at the date of this map is shown by the dotted black line. The cut off of 1876 occurred at the point on the map where the neck of the bend in narrowest, and upon which appears the name of "Massey," a then occupant of part of the land which was washed away by the river. The land claimed on the dry land of Island 37 by the plaintiff is about the point indicated by the name "Mrs. Smith" one of the remote grantors under whom plaintiff claims.

The elbow cut off from the eastern shore of the old channel by the "Centennial Cut Off," constituted, for a time, an island, and has ever since been known as "Centennial Island." This island was originally separated from Island 37 by McKenzie's Chute, being the channel immediately after the cut-off in favor of the deeper and shorter channel formed by the "Centennial Cut Off," and shown in the map above east of island 37. There was evidence tending to show that the main channel of the river around Island 37, as well as McKenzie's Chute, continued to be navigable for possibly one or two of three years by very small boats—after this cut-off, but that both channels were substantially abandoned by navigation in that since about 1880 both channels have gone substantially dry, except in high water, and that Centennial Island, Island 37, and the Arkansas shores constitute now substantially one body of dry land, capable of being crossed dry shod, except in high water. Much of this new land is now grown up in willows and cottonwoods from eighteen inches to two feet in diameter, and both of the parties to this litigation claim to have fields now in cultivation within
457 what, before the cut off, was the bed of the old river.

An official survey of the river made in 1883-4, under the supervision of the Mississippi River Commission, shows the new course of the river through the "Centennial Cut Off." This survey is set out opposite (Chart No. 18.)

The outlines of old Island 37 are not shown on this map, as the work done by the commission did not include the surface between the northerly lines of Centennial Island, as bordered on what was McKenzie's Chute and the old Arkansas bank of the river. Island 37 is, therefore, represented on this map by the blank space between the Arkansas shore line and Centennial Island. But to understand the issues involved it becomes necessary to show the relation of the riparian lands claimed by the plaintiff at the time when they were granted, and at successive periods between his remote and immediate grantors. All of the lands on both Island 37 and Cen-

tennial Island were granted by the State of Tennessee, about 1823. For the purpose of showing the course and channel of the river, as it is supposed to have existed at the time of the old grants under which he claimed, the plaintiff caused a map to be constructed by Mr. J. H. Humphreys, a local civil engineer, in which the banks of the river, as this engineer supposed them to have existed in 1823, are set down from data obtainable from two sources; first, the government survey and plot of the government lands on the west or Arkansas shores; second, from the calls and plots of Tennessee surveys, and grants of land on the Tennessee side of the then channel of the river. The map, in reduced form, is set out herewith (see Humphrey's map opposite.)

On this map the old banks of the river are represented by black shaded lines, as are also the collateral channels, or chutes, called McKenzie's Chute and Dean's Chute. The channel now occupied by the river is shown by black lines shaded with blue. The land in dispute is that shown between red lines, though the western lines are not indicated.

458 The Centennial Island tract of 131 acres is indicated by the lines marking off a tract of 131 acres on the northwest corner of Centennial Island. This is claimed by the plaintiff to have been upland included within the lines of deeds under which he holds his Centennial Island lands, and that it was washed away by the river when its new channel was formed and has been since restored by accretion. This Centennial tract is, by the evidence indisputably shown to be included within the boundaries of a two thousand acre grant to Simon Huddleston. As we shall have occasion to refer to the lines of that grant more than once, we here set them out:

"Beginning at a willow marked S. S. Stephen Slade's northeast corner, on the bank of the Mississippi River; thence south with his line one hundred and fourteen chains to a mulberry marked S. H.; thence east two hundred chains to a mulberry marked S. H.; thence north seventy-eight chains to a white oak marked S. H., on the bank of the Mississippi River; thence down said river with its meanders north 41 degrees west thirty-five chains, south 82 degrees west thirty chains, north seventy-one, west thirty-two chains, south 70 degrees west sixty-two chains; thence north 72 degrees west fifty-two chains to the beginning."

This grant bears date January 22, 1824. The eastern fifteen hundred acres of this tract was conveyed to John Trigg in 1837 by deed duly recorded, and this deed plainly includes the 131-acre tract now in dispute.

The plaintiff claims to deraign title from this John Trigg, and for this purpose introduced the following conveyances:

1. Will of John Trigg, 1865, giving the east fifteen hundred acres of Huddleston grant to his son, W. W. Trigg.

2. Quit-claim deed of certain persons claiming to be the widow and only surviving children and heirs of W. W. Trigg to plaintiff Stockley. This deed is dated March, 1897.

3. A decree of December 4, 1879, of the Shelby County, Ten-

nessee, chancery Court, entitled as follows: "T. A. Nelson,
459 Ex., v. M. L. Trigg, et al.," and reciting that "Sledge, McKay & Co., a mercantile partnership," had purchased two certain tracts of land in Tipton County, Tennessee, one containing 33.75 acres and the other 305.75 acres, belonging to the estate of John Trigg, deceased, sold under the former decrees of this court, herein described as follows:

"Portions of a certain tract of about 1,300 acres of land situated in Tipton County, Tennessee, which has been surveyed by C. C. Burke, who reports that the "Centennial Cut Off has placed nearly 1,000 acres under the X of the Mississippi River, and which is in Range 9, Section 5, on said river, the said cut-off leaving 33.75 acres on the main land and 305.75 acres on the island. (*a*) The tract containing 33.75 acres begins at a stake on the bank of the Mississippi river, thence down said river with its meanders north 75 degrees west 16 chains, north 76½ degrees west 32 chains, south 50½ degrees west 3 chains and 8 links, south 43 degrees, west 11 chains and 50 links, thence east 56 chains and 80 links to the point of beginning, all open land, etc.

(*b*) The tract containing 305.75 acres begins at a stake on the bank of the Mississippi River, on "Centennial Cut Off" at the dividing line between C. A. Stockley's and John Trigg's land; thence north 97 chains and 14 links to a small cottonwood, marked T. on the bank of old river, thence up old river south 71 degrees east 11 chains, south 50 degrees, east 13 chains, south 40½ degrees, east 12 chains, south 22 degrees east 17 chains, south 10 degrees east 7 chains, and 60 links, south 9 degrees east 9 chains, south 18½ degrees east 9 chains, south 7 degrees east 2 chains, south 12 degrees east 6 chains and 44 links, south 30 degrees east 6 chains, south 7½ degrees west 6 chains and south 28½ degrees east 5 chains and 29 links, south 3 degrees east 5 chains and 30 links, to a point of entrance of "Centennial Cut Off"; thence down said cut off north 86¾ degrees west 8 chains, south 83 degrees west 8 chains, north 85 degrees west 9 chains; south 84¾ degrees west 11 chains and 60 links, south 69 degrees west 5 chains and 13 links, south
460 69½ degrees west 9 chains and 30 links, to the point of beginning, of which there is 175 acres open land and in cultivation, with eight tenant houses, fencing moderately good, etc."

The decree then proceeds to divest out of "the parties to this suit" all their right, title, claim and interest, and vests the same "in the said partnership of Sledge, McKay & Co." No other part of this record is introduced and there was no evidence as to who were parties to the suit, nor as to who constituted the partnership of "Sledge, McKay & Co." These deeds were made in 1883.

4. Deeds of persons describing themselves as the heirs and executors of Norfleet R. Sledge, Sr., and heirs of Wm. M. Sledge, conveying their interest in settlement of partnership affairs to A. N. McKay, described as surviving partner of the late firm of Sledge, McKay & Co.

5. Deeds from persons describing themselves as executors and

devisees under the will of A. N. McKay, and also as his heirs at law, to Thos. H. Allen, Jr. This is dated January 2, 1888.

6. Thos. H. Allen, Jr., to plaintiff H. W. Stockley, January 2, 1888.

The land claimed on Island 37 by the plaintiff is embraced in a single deed from one W. J. Caesar to him, under date of April 18th, 1898.

The description is as follows:

"A certain tract, pieces or parcel of land lying, being and situate on Island No. 37, in the Mississippi river, in said Tipton county, Tennessee, and more particularly described as follows, to-wit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of the same to the northeast corner of same, a stake in the north boundary line of N. Potters 640 acres, and in
461 the south boundary line of 610 acres in the name of T. P. Hall; thence east in said line 350 poles, more or less, to the northwest corner of entry No. 8, for 152 acres in the name of John Trigg; thence south along west boundary line of said John Trigg's 152 acres to the bank of the Mississippi River; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. H. Byrne; thence north on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that w-ere said river is named as a boundary line it is understood to mean where said river once ran, which course of bed is now dry and known as McKenzie's Chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands. This deed is made and delivered in lieu of the deed heretofore executed by W. J. Caesar to the grantee herein, covering the same premises, and which was lost or destroyed before its delivery."

The plaintiff's title is connected by several conveyances back to Robt. I. Chester, who in February, 1869, conveyed same to Mrs. Martha P. Smith, who was the owner and occupant at date of the origin of the "Centennial Cut Off", in 1876. The intermediate conveyances between Chester and the plaintiff all contain recitals and boundaries identical with those set out above. The deed from Chester omits the paragraph set out above, beginning, "It is hereby understood, etc.," and contains no reference whatever to the fact that the Mississippi River had gone dry, or to any accretions. There was evidence tending to show considerable encroachment of the river upon lands bounded on McKenzie's Chute and lying on Island 37. Just when this washing away occurred, and its extent, was not very clearly shown, though there were some evidences that considerable parts of the small grants shown by the Humphreys plat to
462 to lie south of the southern boundary of the 640-acre grant to Potter, and had been lost by erosion. The evidence also showed very conclusively that the two small grants to J. Trigg, one

for 152 acres and one for 37 acres, and shown on the Humphreys plat, had been washed away prior to the cut-off of 1876, except a narrow strip of the 152-acre tract, along which a public county road ran. This remaining strip of the 152-acre tract is shown on the Humphreys map. The evidence shows that at that point the bank was high and firm, and that the high bank bent westward and passed the western line of the 152-acre tract, and is found then on the eastern end of the plaintiff's land, a corner of which, shown fairly on the Humphreys map, had likewise been washed away prior to the cut off of 1876. In this manner a part of the eastern boundary was on the river as it existed at time of the cut-off, although the eastern boundary called for the western line of the Trigg 152-acre tract and not the river.

Accretions.

There was evidence tending to show that immediately after, and as a direct consequence of, the "Centennial Cut Off", land began to form all along the eastern border of Island 37, and along the northern and eastern corner of Centennial Island, and that within a few years the entire bed of the river was dry, except during very high water, or because of the presence of ponds or sloughs in the deeper holes of the old bed. There was evidence, also, tending to show that prior to the cut-off land was forming rapidly on the western shore of Dean's Island, an island, on the Arkansas side of the middle thread of the river, and that as a result of the change in the course of the river at the cut-off of 1876, this formation went on with accelerated rapidity until the land resulting from such accretion united Dean's Island to the southern and northeastern shores of Island 37.

There was also evidence tending to show that after the cut-off the river ceased to flow either around Island 37, or through McKenzie's Chute, save in very high water, and that the water
463 at once shallowed and that shoals, and island appeared in the body of the stream as well as along both shores, and that the bed of the river became rapidly dry, because the water had ceased to flow between the old banks. Certain it is that the whole bed of the river was substantially dry land within from three to ten years after the cut off.

LURTON, *Circuit Judge*, having made the foregoing statement of the case, delivered the opinion of the court.

1. Jurisdiction of the Court below.

There was the requisite diversity of citizenship, and the jurisdiction of the circuit court was obvious, provided the locus in quo was within the boundaries of the State of Tennessee.

When the territory now constituting the State of Tennessee was ceded by the State of North Carolina to the United States, the center of the main channel of the Mississippi River was the boundary separating North Carolina from the Spanish territory west of that river. Moss v. Gibbs, 10 Heisk. (Tenn.) 283; Treaty of Paris,

Sept. 3, 1782; 8 Stat. at Large, 81; Act admitting Arkansas, June 15, 1836; 5 S. L. 50; Missouri v. Kentucky, 11 Wall., 395, 401.

The sudden change in the channel made in 1876 by which the river abandoned its long course around the bend known as the "Devil's Elbow," and cut a new straight and short channel across the neck of that bend did not operate to change the boundary between Tennessee and Arkansas. The new channel was the result of a sudden and uncontrollable change in the direction of the main current of the stream. In cutting the new channel some two thousand acres of cultivated river bottom land was washed away in the course of about sixty hours. Within that time a new channel, some twenty to forty feet deep, in ordinary water, was permanently established, being the channel now known as "Centennial Cut Off". This channel shortened the distance around the bend some fifteen miles.

As another direct result the old channel of the river so long
464 the boundary between the two States of Tennessee and Arkansas was completely deserted by the river, and in a short time became dry land.

Thousands of acres of dry river bottom within the jurisdiction of Tennessee, as land lying on the east side of the main channel of the river, were, by this sudden formation of this new channel, placed upon the west side of the Mississippi River and the inhabitants of nearly an entire civil district of Tipton County, one of the counties of Tennessee lying in the Mississippi river, found themselves living on the west instead of the east side of the great river. But this sudden change in the channel of the river did not effect the title to the land thus transferred from one side of the river to the other nor did it alter the boundary between the states. The middle of the main channel which the river abandoned was the boundary before the formation of the cut off channel and that line in the dry and abandoned bed of the river remains the line unaffected by the new course of the river.

The doctrine is well settled that when lands border on navigable rivers and the banks are changed by that gradual and imperceptible process known as accretion, the boundaries of the riparian proprietor still remains the river, although as a consequence of such change in the shore line the area of his possession may change. A boundary on a river implies a boundary changing as the shore line changes by accretion or erosion, in the absence of definite intention to the contrary. Posey et al., v. James et al., 7 ea (Tenn.), 98; New Orleans v. United States, 10 Peters, 662, 717; Jones v. Soulard. 24 How. 41; Bank v. Ogden, 2 Wall. 57; Saulet v. Shephard, 4 Wall. 502; St. Clair County v. Livingston, 25 Wall. 46; Jefferies v. East Omaha Land Co., 134 U. S. 178; St. Louis v. Rutz, 138 U. S. 226; Nebraska v. Iowa, 143 U. S. 359, 367.

The rule applicable to private riparian title is likewise applicable to the boundaries of nations situated upon opposite sides of a river.

465 In Nebraska v. Iowa, cited above, the rule as stated by Vattel, was adopted and applied in a disputed boundary be-

tween two states. After stating that every estate bounded by a river enjoys the right of alluvion, Vattel applies the same law to sovereign states, saying:

"As soon as it is established that a river separates two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it; or whether, in short, it belongs entirely to one of them their rights with respect to the river are no way changed by the alluvion. If it happens, then, that by natural effect of the current, one of the two territories receives an increase while the river gains by little and little on the opposite bank; the river remains the natural boundary of the two territories, and each preserves the same rights upon it notwithstanding it is gradually changing its bed; so, that for instance, if it be divided in the middle, between the persons on each bank, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains; but nature alone produces this change, it destroys the land of the one; while it forms fresh land for the other. This can be no otherwise determined, since they have taken the river alone for their limits." Vattel's Law of Nations, Sec. 269.

But if the change in the channel of the stream be not gradual and imperceptible, but sudden and violent, so that a new channel is suddenly cut when there had been none before, and the old channel deserted for the new, there is no change in the boundaries of states or nations bordering on the river. The boundary remains where it had been, in the middle of the old abandoned main channel of the river. Vattel's Law of Nations, Sec 270; Nebraska v. Iowa, 143 U. S. 359, 3667, Posey et al., v. James, et al., 7 Lea (Tenn.), 98; Moss v. Gibbs, 10 Heisk., 283.

After fully reviewing the authorities, Mr. Justice Brewer, in Nebraska v. Iowa, cited above, says: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between the two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit: The center of the abandoned channel."

The evidence in this case made it clear, that, whatever may be said in respect to the formation of new land within the banks of the old channel, the new channel called "Centennial Cut Off" was an avulsion. This was the clear admission of both parties upon this question of fact before the court and jury below, and in conse-
466 quence of which evidence was stopped—having no other purpose than to show the suddenness and violence of the change in the course of the river. As much as two thousand acres was carried away in the course of about sixty hours upon which stood farm houses, -tables, cotton gins, warehouses, etc., and so rapid was the process of washing away the farms through which the river ran as to make it, in some cases, impossible to remove household effects rapidly enough to avoid the caving banks.

It is clear whatever the interpretation placed upon the ambiguous judgment relied upon to show that the defendant withdrew his plea to the jurisdiction, that the lands in dispute are on the eastern side

of the middle line of the channel of the old river, and, therefore, within the boundary of the State of Tennessee, although now west of the present channel of the Mississippi river.

2. As to the small parcel of 131 acres.

The questions upon which the plaintiff's right to recover this tract depends are not precisely the same as those in respect to the other and larger parcel, though many of the questions are common to both. There was evidence quite satisfactorily establishing the fact that this parcel, while owner by John Trigg, the second grantee in the line of title, was rapidly washed away by the sudden change of the course of the river in 1876, and that it has since been restored by accretion or some other process, by which the submerged land has again emerged above the water. The plaintiff claims that this parcel as plotted on the Humphrey map, was included within the grant of 1824 to Simon Huddleston, and in the deed of Huddleston to John Trigg of the fifteen hundred acres, forming the eastern end of the Huddleston grant.

Speaking of this 131-acre tract, the Court below said:

"Wholly on the bank as that was, and wholly above the low water mark as it was in its original form, the plaintiff would be entitled to recover that 131 acres down to the low water mark of 1876, when it was hid away by the flood of the cut-off of that year, if he had not failed to show title by deraignment, etc."

467 Plaintiff did deraign title down to John Trigg, who was in possession of the premises at the time of the flood of 1876. His trouble is to show how he has acquired the John Trigg title. A paper purporting to be a copy of the will of John Trigg, giving the 1,500 acres of the Huddleston grant owned by him to his son, W. W. Trigg, was put in evidence. This operated to put title in W. W. Trigg, if of any effect whatever. How did the title get out of W. W. Trigg? The plaintiff undertook to show this by two lines of proof.

First, he put in evidence a deed dated March, 1897, purporting to be made by certain persons describing themselves as being "all the heirs of W. W. Trigg, deceased", one of the grantors describing herself as his widow while the others describe themselves as his "only surviving children." This deed describes the property conveyed by the same description as that of the deed from Huddleston to Trigg.

Second, he put in evidence a certain copy of a decree purporting to have been made by the Chancery Court for Shelby County, Tennessee, entitled in a cause styled "T. A. Nelson, Ex., v. M. L. Trigg et al.," divesting the title to certain portions remaining above water after the flood of 1876 of the Trigg 1,500-acre tract of land out of the parties to that suit, and vesting it in a partnership styled Sledge, McKay & Co. The boundaries of the tr-cts of land thus divested and vested have been heretofore set out. This decree was made December 4, 1879.

The next link is a deed conveying the right and title of the grantors as heirs and executors of Norfleet R. Sledge, and as heirs of W. M. Sledge, in the land described in said decree, "in settlement of the partnership affairs of Sledge, McKay & Co.," to A. N. McKay,

as the "surviving member of that firm." This deed purports to have been made in 1883, and describes the land as bounded by the Chancery decree, before mentioned. This is followed by a conveyance made in 1888 to Thos. H. Allen, Jr., by certain persons who describe themselves as executors, devisees and heirs-at-law of A. N. McKay. Thos. H. Allen and wife in the same year conveyed to the plaintiff.

468 The last two deeds described the land by metes and bounds, identical with those of the decree of 1879, and for the first time refer to accretions by adding to the description the words, "and all accretions thereto". There are a number of difficulties in the title as thus made out. If the will of John Trigg operated to vest the title in W. W. Trigg, which we may assume, it devolved upon the plaintiff to deraign title from W. W. Trigg. This he claims to have done by the production of a deed from persons who describe themselves as the heirs of W. W. Trigg. There was no evidence of either the death of W. W. Trigg or that the persons claiming to be his surviving children and heirs were in fact his children or heirs.

The deed is practically a quitclaim, as it warrants only against persons claiming under the grantors. Being made in March, 1897, it is such a recent instrument as to carry with it no presumption in favor of the authenticity of the recitals as to heirship. That recitals in an ancient deed may be evidence as against persons who are not parties to the deed and who do not claim under it may be regarded as well settled. Carver v. Jackson, 4 Peters, 1; Crane v. Astor, 6 Peters, 598; Deery v. Gray, 5 Wall., 795; Fulkerson v. Holmes, 117 U. S. 389; Hodge v. Palms, 68 F. R. 61, 15 C. C. A. 220.

The fact necessary to be established in order to give effect to this deed, is that the persons making it were in fact the children and heirs of W. W. Trigg. The fact was one of pedigree, and this is a fact which may, upon grounds of necessity, be established by hearsay evidence, contrary to the general rule excluding evidence of that character.

Now, the makers of this deed recite therein that W. W. Trigg is dead, and that they were his only children and heirs. Undoubtedly they were competent to prove these facts. But the plaintiff, instead of introducing them or other persons acquainted with the family and proving their relation and the death of W. W. Trigg intestate, insists that the self-serving declaration of the grantors constitute- evidence per se sufficient to make at least a prima

469 facie case to go to the jury. We are not aware of any rule which attaches evidential value to recitals of this character in deeds not ancient unless supported by circumstances tending to establish their authenticity.

In Carver v. Astor, 4 Peters, 1, 83, Justice Story, after speaking of the value of a recital in deeds between the parties or their privies as estoppels, said of such a recital:

"It does not bind persons claiming by an adverse title, or persons claiming from the parties, by a title anterior to the date of the re-

citing deed. Such is the general rule. But these are cases, in which such a recital may be used as evidence against strangers. If, for instance, there be the recital of a lease in a deed of release and in a suit against a stranger, the title under the release comes in question, this recital of a lease, is not per se evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which can not otherwise be explained, and under such circumstances a recital of the fact of such a lease, in an old deed, is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession."

The rationale of the subject is, that unless the recitals in connection with other circumstances are such as to raise a natural presumption of the truth of the facts recited, they are not evidence per se. The more ancient the deed the less the necessity for circumstances in support. Jackson v. Canby, 8 John., is supposed to justify the admission of very recent recitals as evidence per se. But in that case there was evidence tending to support the truth of the recitals of heirship contained in the deed, and these circumstances were held strong enough with the recitals to make a prima facie case for the plaintiff. The rule seems to clearly be, that recitals in a deed of recent origin, that the makers are the heirs of a former owner, without circumstances in support, are not evidence against a stranger. Jones v. Sherman, 56 Miss. 560; Castello v. Burke, 63 Iowa, 361; Porter v. Washburn, 13 Vt., 558; Watson v. Gregg, 10 Watts, Pa., 289. Yahoola v. Irby, 40 Ga., 479.

470 We do not find that the Tennessee Supreme Court has ever decided the question here presented. The cases cited from that state are for the most part cases in which the effect of recitals as estoppels between parties and privies or recitals against interest or recitals by officials in statitory deeds were involved.

There is nothing in any of the cases in conflict with the rule we have stated, and the reasoning in Wilcox v. Blackburn, 99 Tenn., 352, and Henderson v. Calloway, 8 Hum., 692, is in line with the authorities we have cited.

In the case at bar there was no evidence that W. W. Trigg was dead, and none that the grantors in this deed were his children. There was, in fact, no evidence that these grantors had ever been in possession of any part of the premises conveyed. The deed itself was a quit-claim, a circumstance not tending to support the claim of title and heirship. There was, therefore, a chasm in the chain of title through W. W. Trigg. But plaintiff did no better in his effort to deraign title from John Trigg, through the judicial

sale under decree of the Shelby County Chancery Court. No part of the record was introduced, except the final decree vesting and divesting title. The decree undertakes to divest title out of "the parties" to the cause, but does not recite who were parties.

How are we to know that the heirs and devisees of John Trigg were parties? There is not even a recital that they were, and there is no presumption that they were arising under the vague and indefinite recitals of the decree put in evidence by the plaintiff. There is no reason in such a case of indulging presumptions in favor of the jurisdiction of the court or the regularity of the proceedings, for there are no recitals in the decree from which we can even guess who were the parties over whom the court claimed to have jurisdiction.

We need go no further, for if the subsequent links were made out these chasms were fatal to the effort to deraign title from John Trigg. The plaintiff has failed to show that he has asquired the title of John Trigg which appears to be the only legal title to either the lands *on* the bank of the river or the new made land included in the 131-acre parcel once submerged, but now restored.

471 *Possessory Title.*

But it has been very erroneously insisted that if the plaintiff in error has failed to deraign title from John Trigg he has nevertheless had such possession of the premises in dispute as to entitle him to recover in this action, and he has assigned it as error that the court did not intruct the jury that plaintiff had had such a continuous adverse possession under his deed from Thos. J. Allen, Jr., as vested him with as indefeasible fee simple title in the lands therein conveyed including the accretions thereby conveyed.

He has also assigned as error that the Court did not submit to the jury under proper instructions the question as to whether plaintiff had shown an actual adverse possession for a period of seven years of any part of the land described in the conveyance of Allen to him. We have already called attention to the fact that the plaintiff Stockley's deed from Thos. H. Allen, Jr., conveys two distinct parcels. One is described as a tract of thirty-three acres and a fraction, and the other as a tract containing, by survey, three hundred and five acres and a fraction. These tracts are not connected and the smaller one with its accretion is not here involved in any way. The parcel of 131 acres which is claimed as an accretion is not included within the specific boundaries described, but is conveyed by Allen, if at all, by operation of the added words "and all accretions thereto."

This 131-acre parcel is not an accretion to the 305-acre tract, conveyed by Allen to Stockley, inasmuch as it is but a restoration of a part of the 1,500 acres conveyed by Huddleston to John Trigg which was washed away as a first effect of the "Centennial Cut Off." But if we regard the conveyance as operating to convey this tract of new formed land under the description of "all accretions thereto,"

we are then to inquire whether there was any such conclusive evidence of a continuous adverse possession for the full term of seven years by the plaintiff and those under whom he claims as would justify the court in withholding the question of title by possession from the jury or in the alternative, such a conflict of evi-
472 dence tending to show such a continuous possession as would require the submission of the question to the jury.

There was evidence tending to show that plaintiff was in the actual possession of some part of the tract of 305 acres and some evidence that he is also in the actual possession of some part of the accretion south of the 131-acre parcel, and south of what is called Sandy Chute, on the Humphreys map, which accretion is not here involved. There is no evidence that he has now or ever had any actual possession of any part of the 131-acre accretion other than that constructive possession which results from his possession of other parts of the land included in the Allen deed. We shall assume for the purposes of this case that the plaintiff's possession of the 305-acre parcel was a constructive possession of the 131-acre parcel although the two trusts may be claimed by different titles.

The contention upon this state of facts is that we must presume and that it would have been the duty of the jury to presume, if the case had been submitted to the jury, that this actual possession which is shown to have existed when the defendant entered, began at the date of the deed from Allen, which was in January 1888, and that thus the plaintiff has, through this presumption shown an actual adverse possession for more than seven years under the deed of Allen, which at l-ast was color of title under the Tennessee Statute of Limitations, and that by operation of such adverse possession he had at the commencement of this suit in 1901, an indefeasable fee in all the lands so held by and under an instrument so purporting to convey the fee. Milliken & Vertrees, Tennessee Code, Sec. 3459; Blanton v. Whitaker, 11 Hum. 313; Belote v. White, 2 Head, 705, 712; Bliedorn v. Pilot Mountain Co., 5 Pickle, 167. There is no legal presumption that the plaintiff's actual possession began at the date of his deed from Allen and there is no evidence from which the jury could reasonably and legally infer that his actual possession be-
gan then or at any other date far enough back to constitute an
473 adverse actual possession for more than seven years before the defendant's entry. To sustain his claim that the law raises a presumption that the plaintiff took actual possession of the land conveyed to him by the deed of Allen, he cites Lafferty v. Whitesides, 1 Swan, 123-8, and Fowler v. Nixon, 7 Heisk. 719-727. These cases fall far short of sustaining any such contention. A deed or lease may constitute part of the evidence of possession as showing its extent, as well as characterizing it, but there is no authority for the contention that an actual adverse possession such as will start the Statute of Limitations is presumed from the mere fact that the plaintiff, at a particular date, took a deed, grant or lease to the land in question.

A title by seven years' adverse possession under a deed purport-

ing to convey the fee, requires an actual adverse occupation for the entire period of seven years, and no such evidence of a continuous adverse possession for that period by either the plaintiff or those under whom he claims—was shown as to justify or require the submission of the case to the jury on that question.

But the plaintiff insists that inasmuch as the plaintiff has shown a possession under color of title, which constructively extended to the 131-acre parcel as included within the Allen deed, and inasmuch as the defendant exhibited no paper title whatever, that he is entitled to recover as against the defendant, even though he has not shown a perfect legal title by deraignment or otherwise.

The defendant claims the premises in dispute as accessions or accretions to Dean's Island upon which he appears to be a riparian proprietor. The land being now made land, lying between occupants of opposite banks of the old channel of the river, each seems to have advanced claims, based upon the law of accretions. True, the defendant has not shown a legal title to the old Arkansas bank. But he has taken actual possession of the res, and thus forced the plaintiff to all the hazards of an action of ejectment. The
474 plaintiff has not chosen to resort to the Tennessee statutory action of unlawful entry. That is an action which tries only the immediate right of possession, and lies whenever there has been actual trespass resulting in a tortious dispossession.

On the contrary he has brought a straight action of ejectment, which, in Tennessee, is something more than a mere possessory action, inasmuch as the judgment, contrary to common law, is conclusive upon the parties, saving to persons under disability another action within three years after the removal of the disability. Shannon's Tenn. Code, Secs. 5000 and 5001. Whatever may be the right of a plaintiff in other jurisdictions to recover in ejectment upon proof of mere possession at the time of the defendant's entry, in Tennessee, the rule is well settled that the plaintiff cannot recover in ejectment, unless he shows a perfect legal title, either by deraignment from the state or by evidence of actual occupation under deeds purporting to convey the title for the full term of seven years. Polk v. Henderson, 9 Yerg., 312; Kimbrough v. Benton, 3 Hum., 129; Cambell v. Cambell, 3 Head, 325; Walker v. Fox, 85 Tenn. 154; Evans v. Belmont Land Co., 92 Tenn. 355; Hubbard v. Godfrey, 100 Tenn. 150, 156, 161; Stinson's Lessee v. Russell, 2 Tenn., 447.

The precise question here involved received a full and elaborate reconsideration by Associate Justice McAlister, in Hubbard v. Godfrey cited above.

A judgment of the Chancery Court of Appeals, holding that the complainants might recover, although they had failed to show a complete legal title or seven years' adverse possession, because the defendant had shown no title in himself and was a trespasser, was reversed and the rule restated and fortified by a consideration of a long line of Tennessee decisions constituting a well settled part of the land law of the state. There was in the suit now under examination no evidence of such long and continuous possession under deeds purporting to convey the disputed premises by the

plaintiff, and those under whom he claims, as to justify the submission of the case to the jury upon the question of a title by adverse possession. A possession for less than seven years continu-
475 ous and adverse, would not confer a title upon which ejectment may be maintained. The question is plainly one of local law and we are constrained to follow the Tennessee rule in respect to the title necessary to maintain ejectment. The case of Sabariego v. Maverick, 124 U. S. 261, 296, et seq., is therefore not controlling.

3. The Plaintiff's Title to Lands on Island 37.

Before the plaintiff can recover the new formed land on the margin of the solid land composing Island 37, he must be able to establish his ownership of the bank against which the accretion has formed. Until he does this he has no shadow of claim as a riparian proprietor. The right to accretion depends upon the contiguity of the claimant's estate to the river. Bates v. I. C. Rd. Co., 1 Black, 204; Saulet v. Shepherd, 4 Wall., 502; The Ocean Ass'n v. Shiver, 64 N. J. Law, 550. Accretion is an addition to riparian land made by the water to which the land is contiguous. Posey v. James, 7 Lea, 98; County of St. Clair v. Livingston, 23 Wall.

In Tennessee it is well settled that a riparian proprietor of land upon a navigable stream owns only to ordinary low water mark. If the stream be non-navigable and his title call for the stream as a boundary his title extends to the center of the stream. The title to the lands constituting the bed of a navigable stream in the legal sense is in the state, which it holds for the benefit of the public. Hobert v. Edens, 5 Lea, 204-8; Elder v. Burns, 6 Hum. 358; Martin v. Nance, 3 Head, 649; Goodwin v. Thompson, 15 Lea, 209.

Conceding for the purposes of this case that the plaintiff has shown a title from the State or by adverse possession to the lands conveyed by the deed of April 18, 1898, from W. J. Cæsar to him, it by no means follows that he has shown either himself or those under whom he claims to have been riparian proprietors. Plaintiff's chain of title goes back to Rob't I. Chester, who, in 1869, conveyed the lands now in question to Mrs. Martha P. Smith. While
476 Chester's southern boundary was that branch of the Mississippi River called McKenzie's Chute, yet his eastern line was the western line of a tract of 152 acres granted to John Trigg, and this Trigg tract lay between Chester's eastern line and the bank of the main channel of the Mississippi river. Mrs. Smith, Chester's vendee, was the owner when the "Centennial Cut Off" occur-ed, and, in 1889, we find her conveying the same land conveyed to her by Rob't L. Chester to a grantee in the plaintiff's chain of title, in which she conveys the land by the identical calls of the Chester deed, but adding these significant words:

"It is hereby understood and agreed that at the present time the Mississippi River has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as Mc-

Kenzie's Chute, and it is further understood and agreed that this conveyance carries with it all accretions now formed or sodded to said above described lands."

The metes and bounds of Chester's deed and of all the intermediate conveyances are identical with those in Cæsar's deed to the plaintiff already set out in the statement of the case. There was evidence tending to show that prior to the great flood of 1876, the greater part of this John Trigg tract of 152 acres had been washed away. When this occur-ed does not appear in any such conclusive way as to justify a refusal to let the question go to the jury if a matter of any importance to the solution of the case.

So there was like evidence as to the washing away of another small tract of 37 acres granted to John Trigg, lying south of Trigg's 152-acre grant, and east of the southern part of the tract conveyed by Chester to Mrs. Smith. Both these Trigg tracts have been platted upon the Humphreys map. The evidence tended to show, also, that McKenzie's Chute had encroached greatly upon the lands bordering upon its northern bank prior to 1876.

By the partial washing away of the Trigg 152-acre tract, the south-
eastern corner of Mrs. Martha P. Smith's tract was partially
477 washed away, at some time prior to 1876, date not shown.

The plaintiff has in no way deraigned title from John Trigg to either of his small grants lying between the lands granted to his predecessors in title and the main branch of the river east of his eastern line.

From all that appears the title to these parcels which interpose between him and the old bank of the river as it existed when the Trigg grants were issued is outstanding in Trigg's heirs.

The deeds under which plaintiff claims, call for the western line of the John Trigg 152-acre grant as plaintiff's eastern line. If the land lying east of Trigg's western line is to be regarded as included within the boundaries of the deed under which plaintiff holds it is because it is included by the added words of description, "this conveyance carries with it all accretions now found or sodded to said above described lands." It is plain that these Trigg lands are not accretions to the lands described by metes and bounds but restorations of the submerged John Trigg lands. But if we regard these words as mere words of description and operative as a conveyance of the two Trigg parcels, it will at most make the deed mere color of title, for neither Cæsar nor any of his predecessors in title had acquired the John Trigg title. Nor is there any evidence of any actual possession of an*t* part of the lands included within either of the two grants to John Trigg lying east of the land conveyed by Chester to Mrs. Smith. Possession wholly within the limits of the grant to Potter or the deed of Chester to Mrs. Smith would not be a possession operating to set the *State* of Limitations in motion as against the heirs or assigns of John Trigg as owner of the 152-acre and 37-acre parcels. To defeat the outstanding Trigg title the plaintiff would have to show an adverse possession for the full term of seven years within the boundaries of both these grants. Possession of some part of the John Trigg grant is necessary to oust

Trigg or his heirs or assigns and until an actual possession of some part of those small grants is shown there is not shown any
478 such adverse possession which would toll the Trigg title.

Smith v. McCall's heirs, 2 Hum., 163; Stewart v. Norris, 9 Hum., 715; Tilghman v. Broad, 2 Sneed, 196; Bates v. Smith, 1 Shannon's Tenn. Laws, 149; Coal Creek Co. v. Neck, 15 Lea, 497.

The law gives the constructive possession to the legal title and this constructive possession was not disturbed by a possession not within the boundaries of the grants to Trigg, although within the boundaries of a conflicting title which included the Trigg lands.

As a consequence of the changed course of the river, in 1876, these submerged Trigg lands have been restored through accretion or some other process and are now dry land. It cannot be pretended that because the surface of these two bodies of Trigg land was washed off that Trigg lost his title to the land so submerged beyond recovery. The law is otherwise. Land lost by erosion or submergence is regained to the original owner of the fee when by reliction or accretion the water disappears and the land emerges.

It is said in Sir Matthew Hale's De Jure Maris, republished in 16 Am. Rep., et seq.: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet, if it, by situation and extent of quantity and bounding on the firm land, the same can be known, though the sea leave this land again, or it be by art or industry, the subject does not so lose his property, and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." "But if it be freely left again by the reflex and recess of the sea, the owner may have his land as before, if he can make it out where and what it was, for he can not lost his propriert-y of the soil, though it be for a time *became* part of the sea."

In Mulry v. Norton, 100 N. Y. 426, a beach was washed away and afterwards restored. The original owner was held to have regained his own. In that case the court said:
479 "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to *re*quire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main-land have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sover-ignity over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual

retirement therefrom or the elevation of the land, by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Angell Tide Waters, 76, 77; Houck Rivers, p. 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Angell Tide Waters, 77-80, and cases cited."

In St. Louis v. Rutz, 138 U. S. 226, 246, a question of title to land formed by accretion to the bank of the Mississippi river arose. The plaintiff's land on the eastern shore had been washed away and restored. The court said:

"When land was formed again on the place where the plaintiff's land had been washed away, it became the property of the plaintiff and, although the land thus newly formed, extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff as a deposit on that part of the bed of the river which was owned by him in fee and not to the state of Illinois or to any third party. Otherwise, the plaintiff would be cut off, without his fault, from the river front and from his riparian rights."

The location of the Trigg lands is not a matter of dispute. It is, therefore, a matter of no importance how long they have been submerged.

The heirs of John Trigg, or those to whom he conveyed same are the beneficiaries of the restoration. Accretions east of the Trigg lands must be accretions to Trigg's title as a riparian proprietor, for he did not lose his benefit because for a time his own lands were submerged or wasted by erosion. The new land forming where his land had been inured to him by virtue of his title to the bed upon which the accretion was deposited. But if the accretion extended beyond his original shore line it became an addition to his
480 firm land by the slow and imperceptible movement of his boundary calling for the river.

4. Accretions to the 131-acre parcel.

Accretions are apportionable among riparian proprietors according to the lateral lines of the firm land possesses by them. 3 Wash., Real Estate, 58; Gould on Waters, Secs. 162, 163, 164, 165; Deerfield v. Arms, 17 Pick., 43; Mulry v. Norton, 100 N. Y., 426; St. Louis v. Rutz, 138 U. S., 226, 250.

The plaintiff's right to accretions accruing to the 131-acre tract heretofore considered plainly depends upon establishment of his title to that parcel. This he has failed to do, consequently he has failed to show any right to recover the accretions between its said lines extended.

5. The grant to plaintiff of 1901.

This grant issued in 1901 and after this action had been brought. It was based upon an entry made in April, 1901, just before the action was begun. The grant relates back to the entry and it is no objection that the grant did not issue prior to the suit, provided the action was after the entry. Bliedorn v. Pilot Mountain Co., 5 Pick. 175; Wood v. Ellege, 11 Heisk. 612.

The grant covers the land lying between the middle of the old channel of the river as the river ran before the "Centennial Cut Off," and the bank of the river, not as it was in 1823 and 1824, but as plaintiff claims the bank to have been in 1876, just prior to the cut off, and for an indefinite time prior thereto. It, consequently, includes the land covered by the two older grants to John Trigg, containing respectively 152 and 37 acres. It does not include the 131-acre tract on Centennial Island, but bounds on that parcel.

The claim of plaintiff now is that if he has not the title to the new made land described in his declaration as a riparian proprietor, the title was in the State of Tennessee, and has been granted regularly and lawfully to him.

481 Under the well settled law of Tennessee the soil below low water mark of the navigable rivers of that State, as well as the use of the stream for purposes of navigation, belongs to the public and the title is vested in the State for the use of the public. Goodwin v. Thompson, 15 Lea, 209; Elder v. Burrus, 6 Hum. 98; Martin v. Nance, 3 Head. 649; Stuart v. Clark, 2 Swan, 10; Posey v. James, 7 Lea, 98.

Under this rule of property applicable in this case the title of John Trigg extended only to low water mark, and the title to the submerged land under the water and below low water mark remained in the state for the use of the public. The lands previously granted to Trigg having been regained by accretion or otherwise, having again become dry land, was land regained, and was not subject to grant as the State had parted with its title. Curle v. Barrell, 2 Sneed, 66.

Plaintiff's grant is, therefore, void as to the land previously granted to John Trigg on the bank of Island 37, and can by no reasonable suggestion be valid for any land except that which lays between low water mark of 1824 and the middle of the old channel of the river. This strip between the two lines mentioned was prior to the flood of 1876, submerged land, and constituted the bed of the main channel of the Mississippi River.

Although the titles of owners of land bounded by the Mississippi river extend only to low water mark under the well settled law of Tennessee, yet, as we have already seen, low water mark is an indeterminate and movable line, and if by imperceptible additions made by the river to the shore the area of firm land is insensibly extended, such additions are nevertheless included within the boundary of the grant or deed calling for the river as one of its boundaries. New Orleans v. United States, 6 Peters, 662, 717; Jefferies v. East Omaha Land Co., 134 U. S. 178, 188; Nebraska v. Iowa, 143 U. S. 359, 361.

In Jefferies v. East Omaha Land Co., cited above, the rule was thus stated:

482 "Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary,

continues to be the boundary, and a deed of the lot carries all of the land up to the water line."

This is also the law in Tennessee, and was applied in respect to accretions annexed to land bounded by low water mark on the Mississippi river. Posey v. James, 7 Lea, 98. The question as to whether the title of a riparian proprietor extends only to high water or low water mark or to the center of the stream is a question to be settled by the local law as a rule of property. Barney v. Keokuk, 91 U. S. 324, 328; St. Louis v. Rutz, 138 U. S. 226, 242.

It must follow from these principles that if the plaintiff's contention that the land included in his grant and lying between low water mark and the center of the river as it ran prior to 1876, is an accretion made against the bank of the river on Island 37, and Centennial Island, that such accretion would constitute when formed an addition to the riparian titles, against which it has been built up, and within the boundaries of the grants to John Trigg on Island 37 and the grant to Huddleston, on what is now called Centennial Island. If this is the case, the state had no title to grant, for, as in Posey v. James, already cited, the accretion constituted an addition to the earlier grants calling for the river as a boundary.

But it is also a well settled rule of law that if a river should suddenly change its course and abandon its original channel the boundary line of lands bordering on the stream and extending only to low water mark remain as they were before the desertion of the original channel. St. Louis v. Rutz, 138 U. S. 226, 245; Nebraska v. Iowa, 359.

In the case last cited, the court, after stating the effect of an insensible growth by accretion to be, that the owner of the shore to which the gradual addition is made shall still hold the added soil by the same boundary, said:

483 "It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould v. Waters, Sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two states.' Murry v. Sermon, 1 Hawks (N. C.) 56; Hagan v. Campbell, 8 Porter (Ala.), 9; Trustees of Hopkin's Academy v. Dickinson, 9 Cush., 544; Angell on Water Courses, Secs. 57, 58 and 59; Warren v. Chambers, 25 Ark. 120; 2 Black. Comm. side page 262; Gould on Waters, Sec. 158, 159."

If then the fact was that the bed of the old stream was suddenly deserted so as to constitute a case of reliction rather than the formation of land by the slow processes of accretion, the riparian owners would not profit, for the title to the land so suddenly become dry by the stream deserting its old bed, would continue in the State, in

such jurisdictions as hold that the title to the submerged beds of navigable streams is in the state in trust for the public.

In the latter event the learned trial court expressed the opinion that, under the Tennessee law providing for the granting and entering of the vacant lands belonging to the state, this desserted river bed was not open for entry and grant and that the grant of November 26, 1901, to the plaintiff by the state was invalid. The law under which the grant in question issued is Ch. 20 of the Act of 1847, Whitney's Tennessee Land Laws, 303.

The question as to whether the law of the state providing for the granting of "Vacant lands" applies to the bed of a great navigable river, suddenly exposed by a change in the course of the river depends upon whether such a new made dry land resulting from recession is "vacant land" within the meaning and policy of the land law of the state.

In Goodwin v. Thompson, 15 Lea, 209, it was held that the title to the soil under the waters of streams navigable in a legal sense, could not be acquired by individuals under the general land laws of the state, and a grant which expressly covered the bed of
484 the French Broad river was held void. The opinion of the court was by Associate Justice Cooper, a very able and discriminating Judge, and is founded upon a consideration of the policy of the state.

In conclusion the learned judge said:

"We think that the public use of our navigable rivers imperatively requires that the soil under the water should be in the state in trust for the public; that the title to the soil under such streams was not intended to be secured by individuals under our general land laws; and that any person setting up a claim thereto must be able to show an express legislative grant."

The case in its general meaning is in accord with Morris v. United States, 174 U. S. 196, and The State v. Pacific Guano Co., 26 S. C. 50.

But it is said that even if the sale and disposition of the soil below low water mark on the navigable rivers of the state was not contemplated by Ch. 20 of the Tennessee Act of 1847, that if at the time the grant to plaintiff was issued, the waters had so far withdrawn from the old bed of the river as to permit occupancy and cultivation they were thereby brought within the scope and meaning of the law providing for the sale of the ordinary vacant lands belonging to the state. To support this proposition plaintiff's attorneys cite: Tatum v. Sawyer, 2 Hawkes, N. C. 226; Hatfield v. Grimstead, 7 Iredel, N. C., 139; and Allegheny City v. Reed, 24 Pa. St. 39.

Tatum v. Sawyer involved a grant to a salt marsh, made in 1819. The contention was that the grant was void, because it was not land within the meaning of the North Carolina Act of 1717, providing for the granting of the vacant lands of the state. It was shown "that the whole marsh on which the plaintiff's grant lies, has formed gradually since the year 1802, up to which time it was a sandy beach always covered at flood tide and dry at ebb."

In the Court below, it was, among other things, insisted that the

premises were not subject to the entry laws, "as it was not land when the Act of 1717, regulating entries, was enacted." The trial judge held the grant void. The Supreme Court affirmed the case, saying upon this point only this:

485 "Lands covered by navigable waters are not subject to entry under the entry laws of 1777. It is the legtit-mate object of a particular description in a grant, to designate with more certainty and precision what the parties suppose to be vague and ambiguous in the general one, and, therefore, wherever the particular description restrains the general one to natural boundarie- upon those boundaries being shown, the general description is confined to them."

In Hatfield v. Grimstead the grant covered a shallow salt marsh, or shoal. "These shoals," said the court, "were not fit for any purpose, save that of hunting grounds for wild fowls that resort there in large numbers to feed on the water grass and moss." The court held that it was subject to entry, at the common law, because there was no regular ebb and flow of the tide in Currituck sound since the closing of the inlet, and that the provisions of the entry acts of the state directing how lands should be surveyed or navigable waters which might have forbid such an entry were not in force at the date of the entry in question, and that "while those provisions were dormant the common law was alone in force."

Allegheny City v. Reed, cited above, turned alone upon the provisions of the Pennsylvania Statutes describing the character of islands which were subject to entry, the court holding that the character of the island sought to be entered was to be ascertained at the time of the entry, and that if the conditions prescribed then existed the island was subject to entry. The question of whether subject to entry or not was by the statute made to turn upon whether the island had a soil subject to cultivation.

None of these cases deal with the case of a sudden and extraordinary recession of the waters of a navigable stream exposing the bed of the river as a consequence of the adoption of a new channel, which is the case now under consideration. The well settled law as declared by the Supreme Court of the United States, is that the ownership of and dominion over lands covered by the navigable rivers and lakes of the United States within the limits of the several states, belong to the several states within which they are found, and

486 that if a state, having such title and dominion, see fit to dispose of the title to private persons, it may do so, subject only to the paramount interest of the public in such waters, and of Congress to control their navigation. Ill. Cent. Rd. v. Ill., 146 U. S. 387; Morris v. United States, 174 U. S. 196, 236; Scranton v. Wheeler, 6 C. C. A., 585.

Nevertheless, it is now settled that, although Congress has the power to grant lands below high water mark of any navigable river within the limits of any territory of the United States, the policy of the United States has been not to do so, and that the general laws should not be construed as extending any grant below high water mark in the absence of an affirmative statute, and that grants by the

United States of public lands within a territory, though bordering on a river or lake, convey of their own force, no title or right below high water mark. Shively v. Bowlby, 152 U. S. 1.

In Morris v. Tacoma Land Co., 153 U. S., 273, it was held that land script issued by the United States to be located on any unoccupied and unappropriated lands could not be located on lands covered and uncovered by the ebb and flow of the tide. In the same case it was held that the words "public lands" in the general legislation touching the disposition of vacant lands should not be construed as applicable to such tide water lands.

In Morris v. United States, 174 U. S., 196, is a case much more clearly in point than any to which our attention has been called. The locus in quo there involved was a part of the raised lands known as the "reclaimed flats," lying along the bank of the Potomac river in front of the city of Washington. The land at the time of the cession of the District of Columbia, to the United States was a part of the bed of the Potomac River. The title to the submerged lands constituting the bed of the river was, under the Royal Charter and laws of Maryland, in the State of Maryland at the date of the cession, and this title passed to the United States at the time of cession, as well as the Maryland title to all other vacant domain of the state, within the ceded district.

487 The acts of the State of Maryland for securing title to vacant lands were continued in force by a resolution of the Congress, passed in 1839, and the Secretary of the Treasury, through the General Land Office, was required to execute them by issuing warrants and receiving pay for same according to the law of Maryland and to complete the sale of such vacant lands under the law of Maryland in force at date of cession by issuance of patents in usual form of such patents. In 1869, one Kidwell procured a patent under this resolution for a tract of 57 acres lying in the Potomac river and known as Kidwells Meadows.

The contention of the United States was that this patent, issued without authority of law, and was null and void. This claim was mainly rested upon the proposition that the land covered by the patent was exempted from the operation of the resolution of 1839, because the land was at the time of cession, and at date of said resolution, subject to overflow by the tides. In reference to this the court held:

First, that the resolution of Congress should be construed as applying only to such vacant lands, "for securing title to which the laws of Maryland, which were in force in 1801, had made provision," but which were inoperative after the cession for want of appropriate officers and authority within the district for their execution.

Second, that by the terms of description in the Maryland Acts, these laws were intended to apply to lands susceptible of some cultivation, and that they did not contemplate a disposition of any lands covered by tide water, the natural and primary use of which was public in its nature for highways of navigation and commerce.

It was claimed, however, that the waters having receded from the Meadows in question, the reasons for exemption from the operation

of the resolution of Congress had ceased. To this the court replied, saying:

488 "It cannot, we think, be successfully claimed that even if, in 1839, the lands embraced within the Kidwell patent were exempt from the jurisdiction of the land office yet they were brought within that jurisdiction by the fact that the waters had so far receded in 1869 as to permit some sort of possession and occupancy. Not having been within the meaning of the resolution of 1839, they *they* would not be brought within it by a subsequent change of physical condition, but a further declaration by Congress of a desire to open them to private ownership would be necessary.

"Besides, the facts of the case show that Congress is asserting title and dominion over these lands for public purposes. Whether Congress should exercise its power over these reserved lands by dredging, and thus restoring navigation and fishery, or by reclaiming them from the waters for wharfing purposes, or to convert them into public parks, or by subjecting them to sale, could only be determined by Congress, and not by the functionaries of the land office. If, then, there was an entire want of authority in the land office to grant these lands held for public purposes, a patent so inadvertently issued, under a mistaken notion of the law, would plainly be void, and afford no defence to those claiming under it as against the demands of the government."

The locus in quo presents circumstances of a character quite as unusual as any which appears in the case of Morris v. United States.

The lands included in the grant were at the time of the enactment of the law under which the grant was issued, plainly and clearly not within the terms of the law.

There were not unoccupied "vacant lands" within the meaning of the Tennessee Act, as determined by the highest court of that state. They have since become dry land, capable of occupation by a most extraordinary natural phenomenon, the sudden abandonment by a great river of its natural channel for a new and shorter one. The situation is one which could not have been reasonably contemplated by the law-maker, when providing for the ordinary vacant lands belonging to the public domain. The lands in question were not, at the date of the Act of 1847, within the meaning and purview of the makers of the law, because it was the policy and purpose of the state to reserve for the public use the beds of such navigable rivers.

Who shall say that, because by a sudden recession of the waters, the lands thus exposed are no longer to be reserved for public purposes?

Non Constat, but that the river may be turned back, by
489 Congress on the State, into its old channel, or the old channel dregged so that it will continue to be a highway of commerce. Is the state to be prohibited from converting such a body of land into a highway or public park.

Not having been within the meaning of Tennessee Acts, which provided for the disposition of the unoccupied and ungranted land of the state at the time these acts were passed, the locus in quo had not been brought within the terms of these acts by the subsequent

extraordinary physical change which has occur-ed. The dry river bed is public property, held by the state for public purposes, but some further legislation by the state is necessary before such a property will become open to private ownership. There was no such state of evidence as would justify the court in instructing the jury that the premises included in the grant below low water mark of 1824, was an addition by accretion to the lands granted prior thereto and bounded by the river, or that the change which had occur-ed had been so sudden as not to be regarded as an accretion.

But in either case the grant was ineffectual to give title to the plaintiff. There was, therefore, no error in an instruction to find against the plaintiff.

Judgment is accordingly affirmed.

490 And afterwards to wit on January 8, 1903, a petition for rehearing was filed which reads and is as follows:

Petition for Rehearing.

United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati.

No. 1088.

H. W. STOCKLEY, Plaintiff in Error,
vs.
W. A. CISSNA, Defendant in Error.

Error to the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Petition for Rehearing.

T. B. Turley, G. J. McSpadden, Attorneys for Petitioner.

(Filed Jan 8, 1903. Frank O. Loveland, Clerk.)

491 United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati.

No. 1088.

H. W. STOCKLEY, Plaintiff in Error,
vs.
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Error to the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Petition for Rehearing.

To the Honorable the United States Circuit Court of Appeals for the Sixth Circuit:

The petitioner, H. W. Stockley, most respectfully shows unto this Honorable Court that he is the plaintiff in error in the above styled

cause. That on November 10, 1902, this Court filed an opinion in this case, affirming the judgment of the Circuit Court of the United States for the Western District of Tennessee. That the printed copies of said opinion were filed herein on December 11, 1902. And now comes your petitioner and most respectfully prays that a rehearing of this case be granted him, upon the following grounds:

1.

First. The Court erred in holding that none of plaintiff in error's predecessors in title ever had any title to the John Trigg 152 and 37-acre tracts on Island 37—the court holding that there was no deraignment of title, or other evidence, in the record, and that the title was still outstanding in John Trigg, or his heirs.

This is an error of fact. There is a perfect deraignment of title to those tracts in the Record, which escaped the attention of the Court (pp. 174 to 200, inclusive).

492 We respectfully submit that a correction as to this error of fact will entitle your petitioner to a new trial, under the principles of law as laid down by the Court in its Opinion in this case. The Court held that either John Trigg, his heirs, or vendees, is entitled to those tracts after they had been restored by the alluvial deposits of the river. (See p. 22 of Opinion.) Stockley is his vendee, by virtue of successive conveyances, and that fact is proven in the record. Upon this point the court, in part, said:

"Conceding, for the purposes of this case that the plaintiff shown a title from the State, or by adverse possession, to the lands conveyed by the deed of April 18, 1898, from W. J. Caesar to him, it by no means follows that he has shown, either himself or those under whom he claims, to have been riparian proprietors. Plaintiff's chain of title goes back to Robt. I. Chester, who, in 1869, conveyed the lands now in question to Mrs. Martha P. Smith. While Chester's southern boundary was that branch of the Mississippi river called McKenzie's Chute, yet his eastern line was the western line of a tract of 152 acres granted to John Trigg, and this Trigg tract lay between Chester's eastern line and the bank of the main channel of the Mississippi river," etc., etc. (Opinion, pp. 18 and 19.)

The metes and bounds of Chester's deed and of all the intermediate conveyances are identical with those in Caesar's deed to the plaintiff, already set out in the statement of the case. There was evidence tending to show that, prior to the great flood of 1876, the greater part of this John Trigg tract of 152 acres had been washed away. When this occur-ed does not appear in any such conclusive way as to justify a refusal to let the question go to the jury, if a matter of any importance to the solution of the case."

"So there was like evidence as to the washing away of another small tract of 37 acres, granted to John Trigg, lying south of Trigg's 152-acre grant, and east of the southern part of the tract conveyed by Chester to Mrs. Smith," etc., etc. (Opinion p. 19.)

493 "By the partial washing away of the Trigg 152-acre tract, the southeastern corner of Mrs. Martha P. Smith's tract was partially washed away, at some time prior to 1876, date not shown. The plaintiff has in no way deraigned title from John Trigg to either of his small grants, lying between the lands granted to his predecessors in title and the main branch of the river east of his eastern line. From all that appears the title to these parcels which interpose between him and the old bank of the river, as it existed when the Trigg grants were issued, is outstanding in Trigg's heirs." (Opinion, pp. 18 and 19.)

"The law gives the constructive possession to the legal title, and this constructive possession was not disturbed by a possession not within the boundaries of the grants to Trigg, although within the boundaries of a conflicting title which included the Trigg land."

"As a consequence of the changed course of the river, in 1876, these submerged Trigg lands have been restored through accretions or some other process, and are now dry land. It cannot be pretended that, because the surface of these two bodies of Trigg land was washed off, that Trigg lost his title to the land so submerged beyond recovery. The law is otherwise. Land lost by erosion or submergence is regained to the original owner of the fee when, by reliction or accretion, the water disappears and the land emerges." (Opinion, pp. 20 and 21.)

The Court here discussed at some length the law pertaining to
] restored after having been submerged.
i he heirs of John Trigg, or those to whom he conveyed the same, are the beneficiaries of the restoration. Accretions east of the Trigg lands must be accretions to Trigg's title as a riparian proprietor, for he did not lose this benefit because for a time his own lands were submerged or washed by erosion. The new land, forming where his land had been, inured to him, by virtue of his title to the bed upon which the accretion was deposited.

494 But, if the accretion extended beyond his original shore line it became an addition to his firm land by the slow and imperceptible movement of his boundary, calling for the river. (Opinion, p. 22.)

Hence, it is clear that the court had not noticed from the Record that a valid legal title had been proven in Mrs. Martha P. Smith to these tracts. However, that fact had been pointed out in petitioner's reply brief (pp. 5 to 8).

As stated in the Court's opinion, John Trigg was the original grantee from the State. (Record, pp. 171-174, 248 and 251.) In 1838, Trigg conveyed a one-half interest to Hall (Record, pp. 174 to 176). Hall conveyed his one-half to Chester in 1848 (Record, pp. 177 to 179). Chester conveyed the same one-half back to John Trigg in 1854 (Record, pp. 180-182). Trigg thus again became the sole owner. In 1857 Trigg conveyed to Fred R. Smith, but his deed was evidently never recorded, or probated, for upon petition of his widow and heirs, Martha P. Smith, Fred R. Smith and Mary A. Davidson and her husband, the deed was established by the Chancery Court of Shelby County, and the said parties found and

declared by decree of court to be his heirs at law. This decree fully recites these facts and establishes them, and thereby vests the title in said petitioner. (Record, pp. 183 to 186.) The decree specifically recites that the petitioners, Mrs. Martha P. Smith, Fred R. Smith and Mary A. Davidson are the heirs—being the widow and children of Frederick R. Smith, deceased—and vests the title in them. (Record p. 185.) This decree was never objected to and, *and* by acquiescence, the title was conceded to have passed to the said petitioners. Indeed, there is no possibility of an objection. The decree imparts absolute verity in Tennessee, Martha P. Smith, Fred R. Smith and Mary A. Davidson and her husband made a trust deed to the Clerk and Master of said Chancery Court as trustee, to secure Chambers. (Record pp. 187 and 188.) No objection to this trust deed has ever been made. There is no question as to the sufficiency of this deed. The trustee conveyed to Chambers (Record, pp. 189 and 191). This deed is valid and sufficient in every
495 particular. It has never been objected to. Chambers conveyed to Mrs. Martha P. Smith (Record pp. 195 and 196). This last conveyance is dated June 3, 1882. No objection was ever made to this deed. It is valid and sufficient in every particular. These conveyances vest in Mrs. Smith all of John Trigg's title; he was the grantee from the State. Not the least objection has ever been made to any instrument in this chain of title. Its validity has gone unquestioned. It is unimpeachable. Hence, the Court was in error in holding the title to be still in Trigg.

On the 1st day of October, 1889, Mrs. Smith and Fred R. Smith made the deed to Jarvis to secure Cæsar. (Record, pp. 222 and 226.) While the title was in Mrs. Smith, Fred R., joined with her in the deed. He was one of the parties in whom the decree vested title. While he had parted with his title, and Mrs. Smith had acquired it, as shown above, nevertheless he joined in this deed. This deed contained the following description: "A certain tract, piece or parcel of land lying, being, situate on Island No. 37, in the Mississippi River, in said Tipton County, Tennessee, containing six hundred acres, more or less, and more particularly described as follows, towit: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of same to the northeast corner of same to a stake in the north boundary line of N. Potter's 640 acres, and in the south boundary line of 610 acres in the name of T. P. Hall; thence east on said line three hundred and fifty (350) poles, more or less, to the northwest corner of Entry No. 8 for 152 acres, in the name of John Trigg; thence south along the west boundary line of said John Trigg's 152 acres to the bank of the Mississippi river; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. H. Byrne; thence north on said line to the place of beginning.

496 It is hereby understood and agreed that at the present time, the Mississippi river has changed its course, and does

not now touch any of the above described lands, and that where said river is named as a boundary *lune*, it is understood to mean where said river once ran, which course or bed is now dry, and known as McKenzie's Chute, and it is further understood and agreed that this conveyance caries with it all accretions *how* formed or added to said above described lands." (Record, pp. 223 and 224.)

Under the powers of the trust deed, Jarvis appointed Maxwell substitute trustee, by a deed containing the same description. (Record, p. 228.) Maxwell conveyed to Cæsar by a deed containing the same description. (Record, pp. 230 and 233.) Cæsar conveyed to Stockley by a deed containing the same description (Record, pp. 236 to 245). Hence, all the deeds from Mrs. Smith to Stockley contain identically the same descriptions and the only question is whether the words quoted above carried any of the land in controversy.

It was proven that all of the Trigg 37 and 152-acre tracts, except fifteen or twenty acres in the northwest corner of the latter, had been washed away long before the cut off. All of the Chalmers 135 acre tract and part of the Trotter tract had also been washed away long before the cut-off. All of the Chalmers 135 acre tract and part of the Potter tract had also been washed away. (Record, pp. 43, 44, 45, 47, 65, 66, 67, 68 and 87.) The land expressly deeded to Stockley bordered on the river for several years before the cut-off, and was at that time riparian. (Record, pp. 67, 68, 81 and 133; 87, 93, 94 and 96; 331, 332, and 333.) The old bank of the river still remains there, the most notable object in the topography of the country. (Record, pp. 44, 45, 65 and 66.) By the direct terms of the deed—quoted above—this old bank is made Stockley's east and south boundaries. It says south to the bank of the Mississippi River," not McKenzie's Chute.

497 Maj. Humphreys says this bank is reached 32 chains from the northwest corner of the 152 acres. (Record, p. 41.) For a considerable distance this bank is Stockley's east boundary. (Humphreys' Map.) This made land is made right against and adjoining this bank of Stockley's; one rides directly from his field on to it. (Record, pp. 44, 45, 46, 47 and 67.) To any one entering Stockley's field, the locus in quo appears to be an accretion to his land; it lies right by and against his bank; is covered with tall timber; attracts the attention of any one, and manifestly appears to be an accretion to his land. (Record, pp. 44, 45, 46 and 48.) There is no other land to which the term "accretions" used in the deed, can be applied, as on the south the remains of the old river lie right against the high, original bank of Island 37—washing the south side of the Potter tract—and there is no made land at all. (Record, pp. 40, 41 and 45; 65 and 66.) All of the Burns 200 acres, the Trigg 30 acres, and most of the Chalmers 135 acres, apparently included in Mrs. Smith's deed, are on Centennial Island, and belonged to other parties at the date of that instrument. Therefore the proof shows:

(1) That the locus in quo is land made by the deposits of the waters of the Mississippi River, since the cut-off, and is correctly

described by the term "accretions." (2) It was then (in 1889) formed and added to the land conveyed to Cæsar, so far as the physical aspect of the case is concerned, (3) It is manifestly the land intended by the word "accretions," as it lies there in plain view attached to the main tract. (4) It is the only land to which the terms of the description can be applied, hence it was expressly conveyed by Mrs. Smith, through his intermediate vendors, to Stockley.

On page 20 of the Opinion, the Court holds that this description would include the part of the locus in quo claimed by petitioner as accretions to his Island 37 land, but for the supposed fact that neither Cæsar nor any of his predecessors in title had ever
498 acquired the John Trigg title. Hence, this was the only land to which those terms of the deed could apply, and it is the land, which, under the Opinion of this Court, belonged to Mrs. Smith. Mrs. Smith, also, owned the Chalmers 135 acre tract, her deraignment of title being shown on pages 214, 216, 218, 220 and 255 of the Record. No objection was made to it.

Construction of Mrs. Smith's Deed to Cæsar.

It is beyond question that Mrs. Smith had every possible title to the land in controversy; whether it be considered as an accretion to that washed away, or to that which remained. She owned the restored 152 and 37 acre tracts, under the Opinion of the Court in this case. We submit that she expressly conveyed it to Mr. Stockley through the several intermediate conveyances. Her deed in trust to Jarvis (Record, p. 223) contains this description: Beginning at the northeast corner of a 204½ acre tract in the name of R. H. Byrne, the same being also a corner of a 1,010 acre tract sold by R. I. Chester to L. Speck and John V. Wise; thence north with the line of same to the northeast corner of same, to a stake in the north boundary line of N. Potter's 640 acres, and in the south boundary line of 610 acres, in the name of T. P. Hall; thence east on said line (350) three hundred and fifty poles, more or less, to the northwest corner of Entry No. 8 for 152 acres, in the name of John Trigg; thence south along the west boundary line of said John Trigg's 152 acres to the bank of the Mississippi River; thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. H. Byrne; thence north on said line to the place of beginning. It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and where said river is named as a boundary line it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's Chute, and it is further under-
499 stood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands."

The power of attorney of Jarvis to Maxwell (Record, p. 228);

the deed of Maxwell to Cæsar (Record, p. 230), and the deed of Cæsar to Stockley (Record, p. 236), all contain the same description. A reference to the map of Maj. Humphreys will enable the Court to follow the description. Therefore, the question before the Court is the construction of these deeds.

The deed in trust of Mrs. Smith to Jarvis is dated October 1, 1889. The description it contains applies to the situation as it then was, and it must be interpreted as of that time. It was then thirteen years after the cut-off, no caving had taken place since that event, the old bank of the river remained as the cut-off had left it, and the bed of the river had filled up. The Trigg 37 acres and the Chalmers 135 acres, and all of the Trigg 152 acres except fifteen or twenty acres in the northwest corner had all been washed away before the cut-off. But the old bank of the river still remained there in plain view, the most notable object in the topography of the country. (Record, pp. 44, 45, 65, and 66.) It is evident that the draughtsman of the deed had no recent survey to guide him in his descriptions. Mrs. Smith was certainly aware that all of this land had been washed away. It was under these circumstances that the deed was drawn.

The second call in the description is, "thence east on said line"—T. P. Hall's 610 acre tract—"three hundred and fifty poles more or less to the northwest corner of Entry No. 8 for 152 acres in the name of John Trigg." So far it is clear and has followed the old lines. The third call is the vital one. It proceeds: "Thence south along the west boundary line of said John Trigg's 152 to the bank of the Mississippi river." The Court will observe that this call does not follow the old west line of the Trigg 152-acre tract. That line went south 220 poles (Record, 248; i. e., N. 220 poles) where it struck the Chalmers 135 acre tract.

500 It never reached the river at all. Hence, this line was only to be followed until it struck the bank of the river, as it then was in 1889. This is the old bank as it was left after the cut-off. Maj. Humphreys says that it reaches the old river bank at a distance of 32 chains from the beginning, which is, also, the northeast corner of the Trigg 100-acre tract. (Record, p. 41.) Therefore, the west line of the 152 acre tract is only the boundary of that sold to Stockley for the distance of 32 chains.

The fourth call proceeds: "Thence down said river as it meanders to the east or upper boundary line of said 204½ acre tract in the name of R. H. Byrne." This call makes the Mississippi river the east and south boundary of the Stockley tract from the point where the west line of the 152th acres struck it, 32 chains from the northwest corner of that tract. The intention to make the river the boundary is clear. If this language does not make Stockley's land riparian, it is hard to imagine the effect it does have. The third call says south to the Mississippi River. It does not say McKenzie's Chute. It further adds that the river bed is now dry land, showing that the old river bank was intended for the boundary. After having made the old river bank the east and south boundaries the deed proceeds further; "and it is further

understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands." Accretions can only be formed to the bank, to riparian land. As shown above, the Record shows beyond question that the land in controversy was made right by and against this bank, thus made Stockley's east and south boundary. These descriptions can only be followed by tracing them on the Humphreys map.

Therefore, the deed of Mrs. Smith makes the land now owned by Stockley riparian land, because it calls for the bank of the river. She was the owner of the washed away land, and is bound by this description, calling for the river bank. The description in the deeds make that evident. It is error to suppose that the line of the Trigg 152 acre tract formed the whole east boundary
501 of Mr. Stockley's land; for, in fact, the old bank of the Mississippi river is his east boundary for a considerable distance.

The supposition that Stockley's Island 37 tract was not riparian, and not, therefore, entitled to accretions, is annihilated by this further description and these conveying words in Mrs. Smith's trust deed: "And it is further understood and agreed that this conveyance carries with it all accretions now formed or added to said above described lands." Defendant must wipe this expression from the deed to sustain his proposition. These words conclusively show that Mrs. Smith considered the land sold to Stockley's vendors to be riparian, and that the land in controversy was an accretion to it.

As stated above the land in controversy is the only accretion to the land deeded to Jarvis. On the south the remains of old river lie right against the high, original bank of Island 37—washing the south side of the Potter tract—and there is no made land at all. (Record, p. 45; also pp. 40 and 41; 65 and 66.) The tracts that formed the south side of Island 37, at the time of the original surveys, washed away before the cut-off and are now a part of Centennial Island. There is no other land to which the above quoted words can apply except the locus in quo. They must convey it or fail absolutely to have any meaning and effect. It must be held either that the clause conveyed the land in controversy to Stockley's vendors, or that it had no meaning, force or effect whatever. There is no other alternative. The deed includes this land or nothing.

A well established rule of construction is, that a deed should be considered as intended, to have some effect, and a construction making it operative will be preferred to one rendering it void. Of course all the terms of the instrument will be given effect.

Deevlin on Deeds, sec. 850.

502 The locus in quo lies right against and adjoining Stockley's land. One has only to ride out of Stockley's field on to the made land. It lies in plain view and is apparently a part of it. (Record, pp. 41, 45, 46, 48 and 67.) It is clearly the accretions that were then made and added to the land conveyed by Mrs. Smith to Jarvis, as described by the deed. It is beyond question that it was added, or formed to the land conveyed and the deed

says all of such accretions. Not the least bit of made land can be excluded.

Another rule of construction is that the Court will be guided by the appearance of the property at the time of the sale in order to determine the intention of the parties.

Devlin on Deeds, Sec. 841.

It must not be supposed that where the words Mississippi river are used in the deed it means McKenzie's Chute. The words are: "It is hereby understood and agreed that, at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary it is understood to mean where said river once ran, which course or bed is now dry and known as McKenzie's Chute." It will be observed that the Mississippi river is spoken of; it is designated in each particular. McKenzie's Chute is not named as a boundary of the land. It is merely remarked that now—in 1889—the dry bed of the Mississippi river was known as McKenzie's Chute. Whether or not that statement is true, is of no importance. The old McKenzie's Chute had long since disappeared and most of the witnesses speak of the south boundary of island 37 as old river. It is likely that the draughtsman of the deed had but a vague idea of the chute. It is clear that the expression is an inadvertence. That only plainly-marked high bank is clearly the boundary intended to be set forth. It does not matter what the stream was called. That was made Stockley's boundary, and the land in controversy was then formed or added to that.

503 The Court will remember that at the time Mrs. Smith made the deed to Jarvis—1889—these small tracts, which defendant seeks to resurrect, had caved into the river, and had, at least twenty years before, passed out of existence. This is the most salient fact to guide us at getting at the intentions of the parties. It cannot be assumed that she intended to reserve these tracts, when they did not exist. It is clear that her only claim to the land was based on the law of accretions, and that she intended to include the locus in quo when she used the words under consideration.

A well established rule of law is that the deed must be construed in the way less favorable to the grantor, where there are two methods of construction.

Devlin on Deeds, sec. 848.

Jackson vs. Myers, 3 Johns. (N. Y.), 388.

Defendant seeks to strip the grantee, Stockley, of all accretions, and thereby render one clause of the deed inoperative. Not, indeed, in favor of Mrs. Smith, but for the benefit of Mr. Cissna, a trespasser, who has ruthlessly seized the property.

The contemporaneous construction of the parties themselves is an important consideration in construing a deed.

Devlin on Deeds, sec. 851.

In this case we find that Mrs. Smith does not lay any claim to the land in controversy, but has even put her vendee in possession of the small part of the Trigg 152-acre tract that was not washed away. This shows clearly that she intended Stockley's north line to run entirely to the old river bank and to include all of the land in controversy.

In construing deeds the courts have but one object and rule of construction, that is to determine the intention of the parties.

Devlin on Deeds, sec-. 836 to 840.

Reed vs. Proprietors of the Locks, 8 How. (U. S. 274).

This intention will be determined sol-y from the deed, if that is possible, and the whole instrument will be considered in doing so.

504 Id. "The true rule is to look to the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties, and not to permit antique technicalities to override such intentions."

Fogarty vs. Stack, 2 Pickle (Tenn.), 612.

Deeds similar to the trust deed to Cæsar, and the succession of deeds to Stockley, have come before many of the American courts and have been construed as giving the grantee the accretions, as Stockley claims.

In the case of St. Louis vs. Rutz, the deed to the plaintiff, gave the then bank of the river as one boundary. Before that the river had caved back nearly half a mile, engulfing several hundred acres of the tract belonging to the grantor in the river. This land had been restored, and several hundred acres in addition in the old bed of the river, beyond the original bank, had been added by accretions. At the time the suit was brought the land was made back and one of the defenses was that the title of the plaintiff was limited by the terms of his deed to the bank, as it was when the deed was made, and that he had no title to the land that had formed in the old river bed, beyond the old bank, because the original owner retained title to the restored land between the original bank and the bank existing at the date of the deed. The court held that he took the entire tract and the accretions thereto. 138 U. S., 242.

The government surveys laid off lot 4, bounded by the Missouri river, in 1854. It was patented to Jeffries in 1855, and many conveyances had been made prior to 1870. Before the patent, and between each successive conveyance, the lot had largely inc-eased by accretions, having quite a large strip of land in addition between it and the river at the date of each instrument, it was held that the patent and each deed carried all the land which had been formed to it as accretions, though, in all, the land was designated simply as lot 4, without further description.

505 Jeffries vs. East Omaha Land Co., 134 U. S., 199.

Where land formed beside the riparian land between the date of

the official survey and the time of the grant by the government it is conveyed by the patent.

Kraut vs. Crawford, 18 Iowa, 549.

In Middleton vs. Prichard, at the time of the government survey, there was an island in the river, separated from the mainland by a wide slough through which the water ran for three months in the year. It was held that the island passed under the patent to the main shore land, the court saying: "The grant is to be taken most strongly against the grantor. Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing any intention of reservation, such as platting, or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it."

3 Scam. (Ill.), 520.

It is well settled as a principle of law that, when land to which accretions have been formed is conveyed by deed, the accretions are included, and the title passes by the same instrument, unless the accretions are expressly excluded.

Towell vs. Etter, 69 Ark., 34.

Jeffries vs. East Omaha Land Co., 134 U. S., 178.

This principle is obviously sound and well founded. Its application here would give the locus in quo to Stockley, even if the deed had not mentioned the accretions.

We again call the Court's attention to the fact that Mr. Cissna is "a mere trespasser." We wish to emphasize our proposition that defendant cannot take advantage of any matter which, it might appear from the Record, could be urged in favor of Mrs. Smith. In a suit with her the matter could be examined; it cannot be done here. It was said in Stephenson vs. Goff that a trespasser cannot enter on land granted by the government and defendant against the
506 grantee on the ground that there is a controversy likely with the government respecting the title, and that the title of the grantee is defective. (10 Rob. (La.), 99.) A trespasser has always been obnoxious to the law, and has received but scant consideration at the hands of the most eminent courts. In this case Mrs. Smith acquiesces in the claim of Stockley, but the trespassing defendant seeks to enforce an imaginary right of hers by claiming that the land in controversy is an accretion to the tracts that had caved into the river so lonf before she sold the land that she had forgotten about them, and that it is not an accretion to Stockley's. We submit that he has no right to do so.

Thus, in accordance with the theory announced by this Court in its decision, petitioner is entitled to recover to the extent of the 152 and 37-acre tracts and the accretions thereto. This, it is respectfully submitted, the Court failed to grant him, solely because of the error of fact in regard to Mrs. Smith's title, into which the Court inadvertently fell.

II.

Second. The Court erred in holding that the land in controversy *and* been formed so suddenly as to prevent it from being an accretion.

It is but fair to the Court to say that the decision on this point was only incidental, as under the view the Court took of the case—pointed out above—it was not involved. Hence the Court barely considered it. Under the correct view of Stockley's title to the riparian land on Island 37 it becomes one of the two fundamental questions of the case. Upon this point the Court in part said:

"But it is, also, a well settled rule of law that if a river should suddenly change its course and abandon its original channel the boundary line of the lands bordering on the stream and extending only to low water mark remain as they were before the desertion of the original channel. (St. Louis vs. Rutz, 138 U S., 226;
507 Nebraska vs. Iowa, 143 U. S., 359;" (Opinion, p. 24.)

"If then the fact was that the bed of the old stream was suddenly deserted, so as to constitute a case of relcition, rather than the formation of land by the slow processes of accretion, the riparian owners would not profit, for the title to the land so suddenly become dry by the stream deserting its old bed would continue in the State, in such jurisdictions as hold that the title to the submerged beds of navigable streams is in the State in trust for the public." (Opinion, p. 25.)

"The dry river bed is public property, held by the State for public purposes, but some further legislation by the State is necessary, before such a property will become open to private ownership. There was no such state of evidence as would justify the Court in instructing the jury that the premises included in the grant, below low water mark of 1824, was an addition by accretion to the lands granted prior thereto and bounded by the river, or that the change which had occur-ed had been so sudden as not to be regarded as an accretion." (Opinion, p. 30.)

Upon this holding of the Court petitioner bases this ground for a rehearing. The Court seemed to hold differently on page 22 of the Opinion. Upon this point only two witnesses testified in the Court below. Capt. O. K. Joplin stated that he commanded a steamboat which passed the locus in quo every day for a period beginning several years before the cut-off and extendinf until 1879, and has known the locality intimately ever since; that old river was navigable for one or two seasons after the cut-off, when the boats quit it, not for lack of water however, but because it had filled with snags. The first land appeared above water about the time he quit the trade, three years after the cut-off, or may be a little longer. Very little had appeared above the water when he quit the trade, but still it was fairly out. The first land to appear was along the east bank of Island 37. When the land first appeared it could only be seen in very low water.

508 It appeared as sand bars and mud bars, scattered about over the bed of the river, with ponds and sloughs intermingled. This land made until finally it began to stay out of water

long enough in the year for vegetation to grow. Then the willows and cottonwood sprouts began to grow; it increased in elevation when covered with water, until now it is only overflowed at high water, and it is now covered by a fine forest. The land was formed by the gradual deposit of the infinitely small particles of sand and earth held in solution by the water. It was formed in the usual manner in which sand bars and mud flats are formed in the Mississippi. The process of formation was so slow that it could not be seen, (Record, pp. 62, 63 and 64.)

C. A. Stockley lived in the neighborhood at the time of the cut-off and since then. He fully corroborates Capt. Joplin as to the manner and time in which the locus in quo formed. Among other things, he states that the process of formation was imperceptible; that "only after every overflow you could know that it had made a little by the mud and sand left on it." (Record, pp. 89 and 90.)

There was no other evidence than that of these witnesses on this point.

Petitioner respectfully submits that this evidence shows the locus in quo to have been formed in the slow, gradual and imperceptible manner required by the doctrine of accretions, as the principal has been clearly defined and established by the Supreme Court of the United States.

Nebraska vs. Iowa, 143 U. S., 359.
Jeffries vs. East Omaha Land Co., 134 U. S., 189.

The Supreme Court of Missouri has announced the same principle. (Benson vs. Morrow, 61 Mo., 352.) The Supreme Court of Tennessee is in accord. (Posey vs. James, 7 Lea, 98-100.)

In the cases cited above the Supreme Courts of the United States and Missouri considered this question more elaborately than any other court has ever done, and reached the conclusion that rapidity of formation could not prevent the rule of accretions from
509 applying unless there was a sudden heaping together of roods and acres of land at one interval of time, while the eye rested upon it.

In Nebraska vs. Iowa, the Supreme Court of the United States said: "There is no heaping up at an instant, and while the eye rests upon the stream, of acres, or rods, on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintergrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams in the matter of accretions is in the rapidity of the change, caused by the velocity of the current and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto." (143 U. S., 359.)

In Posey vs. James, the Supreme Court of Tennessee, quoting the

Supreme Court of the United States, laid down the rule as follows: "The test as to what is gradual and imperceptible, in the sense of the rule is, that, though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes, makes no difference." (7 Lea, 100.)

Under the law, as declared in these cases, the evidence cited above makes a clear case of a slow, gradual and imperceptible formation, as required by the doctrine of accretions. It is respectfully submitted that the decision of the Court in this case is in direct conflict with the law as announced in the cases just cited.

The formation of the land should not be confused with the cut-off. It washed away, dissolved and carried off in an opposite
510 direction over 2,000 acres of land, but did not form even a square foot. The locus in quo was not formed until several years thereafter. It was not formed by an avulsion. No land was deposited there by the cut-off. All of the land then washed away was disintergrated, dissolved and carried no one knows whither. The locus in quo was not formed by any single body of land being carried there. It is therefore an accretion. (Nebraska vs. Iowa, supra.); "Avulsion is where by the immediate and manifest power of the stream, the soil is taken suddenly from one r[illegible] estate and carried to another; and hereby a property is only [illegible]stituted by acquiescence; for it belongs to the first owner unless it shall continue on the other's land for so long a time that it cements and coalesces with the soil."

Angel on Watercourses, sec. 60.
1 Bouvier's Inst. p. 172, Sec., 433.
3 Washburn on Real Prop., (original paging 452; 4th ed., p. 60).

No land washed away by the cut-off was carried to the locus in quo. It was disintergrated, dissolved and lost its identity. There was no land formed by an avulsion in this case. The avulsion merely put one of the Tennessee civil Districts on the Arkansas side of the river. The principle of law prevented a change in the State boundary. It had no other effect.

This land was formed as an accretion rather than as a reliction because the river bed was filled up; not laid bare. This is the distinction. However, as the principles of law governing both are the same, the point is without consequence.

No question can be raised as to the law of accretions applying to any land that formed in old river after the cut-off. Indeed, the Court has made none. It is clearly established as a principle of law that, where a river changes its course and forms for itself an entirely new channel, the land which forms in the old bed belongs to the riparian proprietors, each going to the middle of the old bed.

Justinian's Institutes, Bk. 2, Tit. 1, sec. 23.
Cooper's Justinian, p. 75.
511 Sandibar's Justinian, p. 168.
Angel on Watercourses, secs. 58 and 59.

3 Washburn on Real Prop. ch. 2, sec. 4, p. 58, 4th ed., p. 452 of 1st ed.
Nattel's Law of Nations, Bk. 1, ch. 22, p. 122, sec. 270, Chitty's Ed.
Spigenor vs. Conner, 8 Rich. Law (S. C.), 301.
Acadamy vs. Dickinson, 9 Cush. (Mass.), 544.

There is no body of water to which the doctrine of accretions does not apply. It applies to lakes, ponds, creeks, rivers navigable and rivers unnavigable, and to the sea and all its indentations into the land. From the earliest history of law down to the present time, no case can be found where the law of accretions has been held not to apply to any body of water deserving the name.

It applies to the Mississippi river. (Posey vs. James, 7 Lea, 98; Nebraska vs. Iowa, 143 U. S., 359; Jeffries vs. East Omaha Land Co., 134 U. S. 189.)

To the Great Lakes. (Banks vs. Ogden, 2 Wall. (U. S.) 67; Jones vs. Johnson, 18 How. (U. S.), 150.)

To unnavigable rivers. (Lynch vs. Allen, 4 Dev. and Bab. (N. C.), 62; Trustees vs. Dickinson, 9 Cush. (Mass.), 544.)

To creeks. (Niehaus vs. Shepherd, 266 Ohio St., 45; Vaughn vs. Foster, 4[illegible] W., 333.) Though the Kentucky court held that the facts in the latter case did not constitute an accretion.

To ponds, by far more temporary in their nature than old river. (Boorman vs. Sunnuch, 42 Wis., 235.)

To small unnavigable lakes. (Warren vs. Chambers, 25 Ark., 120.)

Hence, the law applies to any land formed in the old river around, east and north of Island 37, covering the locus in quo, whether it be considered a navigable river, an unnavigable river, a lake or a pond. That was a body of water at least twenty miles long, one mile wide and, possibly, from twenty to one hundred feet deep.

No one could say for a number of years after the cut-off
512 whether it would ever fill up. There are many such old rivers around islands along the Mississippi that have never dried up, and through which the water slowly rolls in undiminished volume. There are, too, many examples of such old rivers remaining as land-locked lakes. If the law of accretions should be held not to apply to the old river here involved, this case would be an innovation in American law, and would stand out as the only authority for denying the application of the doctrine to many hundred miles of American watercourses. And that, too, without any reason. It is clear that the principle once applied to the water covering the locus in quo; then when and upon what principle did it cease to apply?

Before the cut-off, owners of riparian land along old river, then the main channel of the Mississippi, had a vested right to any land that might be formed in its bed adjacent to their banks. This was an incident to their property, an attribute of the land, and it was

as much property and their right to it as much a property right, as the land itself.

St. Clair County vs. Lovingston, 23 Wall. (U. S.), 68.
Posey vs. James, 7 Lea (Tenn.), 98.
Municipality No. 2 vs. Orleans Cotton Press, 18 La., 122.

When and how did they lose this vested right? It is impossible to have lost it. Property rights are not so precarious in the United States. The cut-off could not have produced that effect. There is not the slightest reason for it, nor can any authority for it be found in any of the cases. The reasons on which the doctrine of accretions are founded apply with greater force to this case than to any other that has been reported. This vested right to accretions is protected by the constitutions of the United States and of the State of Tennessee. It is a property right, and cannot be taken away by any judicial construction. Even the Legislature has not the power to destroy it.

513 In Nebraska vs. Iowa, 143 U. S., 359, it was held that the riparian land was not affected by the sudden cut-off, but that the owner retained his possession and property rights unimpa-red by that event. If that case means anything it means that no property right can be destroyed by a sudden cut-off. It clearly holds that such events have no effect to destroy any right of property. How, then, could the riparian land be stripped of its attending right of accretions? That case, while it does not discuss the precise point, is direct authority for our proposition that the sudden cut-off did not destroy the riparian owner's right to accretions subsequently formed in old river, because it clearly holds that such an occurrence works no change whatever in the property rights of the riparian owner.

The case of St, Louis v. Ritz, 138 U. S., 226, is almost directly in point, for in it the court asks the unanswerable question: "It may be asked, pertinently, What has become of the riparian rights of the plaintiff on the river, if his title to the land in dispute is not sustained?" In that case the court enforced the riparian owner's vested right, without regard to a rapid caving away.

To hold that the doctrine of accretions did not apply to old river after the cut-off, would be manifest error. The only question is, Did the land form slowly and imperceptibly, in the meaning of the law? That has been discussed above.

The Court has expressly held that Trigg never lost title to the land. Then, how could Trigg and the State both own it at the same time? Under the opinion of the Court, Mrs. Smith owns this land, and she has already expressly conveyed it to Stockley. For under the terms of her deed to Cæsar, she conveyed this land under the description: "This conveyance carries with it all accretions now formed or added to said above described lands." Unless this is stricken from the deed, it must be held to have carried this land. If it is given any meaning it must have this.

514 Upon these considerations, we submit that petitioner is entitled to the accretions to his Island 37 place on the east to the middle of old river, and on the south to the middle of Mc-

Kenzie's Chute, and that the Court was in error in holding the contrary.

III.

Third. The Court erred in not holding the trial court to be in error for ruling that the deed of the heirs of W. W. Trigg to H. W. Stockley was not evidence of their heirship, when it was too late for petitioner to rectify the wrong done him, after first holding that it was evidence of such heirship, when the instrument was offered in evidence. It is respectfully submitted that this court should have held the trial court to be in error on this point, even through it sustained it on the direct question. It is apparent that this question escaped the attention of the Court in the multiplicity of other matters, though the point was made on page 82 of plaintiff's brief.

When the deed of the heirs of W. W. Trigg was offered in evidence, it was objected to by defendant, because it was not evidence of their heirship. Tht Court overruled his objection. The record (pp. 163 and 151) shows the following objection and ruling as to this deed; "The defendant objected to this deed because it showed no title in the grantors; objection was overruled and the deed admitted." (Record, pp. 151 and 163.)

The deed of the Trigg heirs to Stockley is found in the Record, 161 and 162. On page 163 of the Record, at the end of the deed, is found this ruling: "Same objection and ruling as to deed marked "5." The deed marked 5 (Record pp. 148 to 151, inclusive) was objected to because it showed no ownership in the grantors; because the recitals of heirship therein were not evidence. On page 151 the objection and ruling to deed marked 5 is found. It is as follows: "The defendant objected, to this deed because it showed no title in the grantors: objection was overruled and the deed ad-
515 mitted." Hence this is the objection and ruling of the Trigg heirs' deed to Stockley.

Thus, at this time, the trial court ruled that this deed was evidence of the heirship of the grantors. After all the evidence was in, the case had been argued, and when court had convened for the jury to be charged, the motion for defendant for peremptory instructions for the jury to return a verdict in his favor was granted, and in its Opinion thereafter the Court held, among other things, that plaintiff had failed to prove a title to the Huddleston tract, because the deed of the heirs of W. W. Trigg was not evidence of their heirship.

The Record shows that when the evidence of plaintiff was completed defendant moved the court, in mere general terms, for peremptory instructions to the jury in his favor on the evidence of the plaintiff.

The Record (p. 296) is as follows:

Motion by defendant to direct a verdict, by counsel for defendant.

"Upon the completion of the testimony offered on behalf of the plaintiff the defendant moves the Court, upon the evidence of the plaintiff to direct the jury to return in favor of the defendant."

Ruling of the Court:

"The Court stated that it would not hear the motion at this time, for the reason that if it should direct a verdict for the larger tract marked A, the smaller tract marked B, would still be in controversy, and it would still be necessary to go on with the proof in reference to this smaller tract, therefore he asked counsel for defendant to withdraw the motion at this time but that it might be made at the conclusion of the defendant's proof."

The smaller tract marked B is the small tract of 131 acres described in the declaration, and the only title Stockley offered to it was under the deed of the heirs of W. W. Trigg. Hence this was tantamount to a second decision in petitioner's favor on that deed.

516 After the defendant had closed with his evidence, and all the evidence was in, and the Court had called for all special instructions either party might desire, and the same had been submitted, the defendant in general terms renewed his motion for peremptory instructions, which the Court took under advisement, and directed counsel to proceed with the argument which was done. (Record, p. 359.) The argument was completed on Wednesday, December 11, 1901, whereupon the Court adjourned until the following Friday. (Record, p. 17.) Two days after the argument was completed, Court convened, on Friday, December 13th, 1901, when the Court, in general terms, granted defendants' motion for peremptory instructions to the jury to return a verdict in his favor, and then proceeded to deliver his opinion, in which the former ruling was reversed, and, for the first time, it was held that the deed of the Trigg heirs was not evidence of their heirship. (Record, p. 360.) Thus, when the deed was introduced, the Court held it to be evidence of heirship, but, after he had directed the jury to return a verdict for defendant, he held that it was not evidence of heirship. Thus petitioner lost all opportunity to offer oral evidence of their heirship or to take a non-suit. The Record shows that petitioner and C. A. Stockley, a witness, are both near relatives of the Trigg heirs, were in Court and could have testified as to their heirship, but for this ruling of the Court.

Petitioner most respectfully submits that it is unjust and unfair for him to suffer for this change in the rulings of the trial Court. His only fault was in depending on the first ruling of the Court, and he was not only warranted in doing so, but, by force of a proper decorum of the courtroom was as much compelled to abide by the ruling in his favor as to submit to those adverse to him. The State of the law seemed to sustain the trial Judge in his first ruling. It was no manifest error.

The wrong thus done to petitioner is extremely severe. He is not responsible for it. He is merely the victim. It is a
517 wrong that no Court of justice should permit to go uncorrected. It is in conflict with the essential nature of justice and the fair administration of the law. It is but justice to the trial Judge to say that, when he announced his Opinion, he stated that he would not permit such a case to go off on such a question but

would, as a matter of favor, permit the plaintiff still to bring in witnesses and establish the heirship of the parties to the deed if, in his opinion, the claim of plaintiff did not fail on other grounds.

This matter is purely technical. It is manifest that petitioner's case is an honest one. That the persons who made the deed as the heirs of W. W. Trigg are such in reality. And the petitioner can easily prove these facts, if granted a new trial. Therefore, he respectfully submits that this Court, in common fairness, should grant him a new trial because of this error, even though it holds with the trial court, that the Trigg deed was not evidence of the heirship of the grantors. With the Trigg deed admitted, the chain of title from the State to Stockley to the 131-acre tract is perfect. It is as follows: The State to Simon Huddleston, (Record, p. 136); Simon Huddleston to John Trigg, for the east 1,500 acres (Record, p. 138); John Trigg by item 17 of his will (Record, p. 143) to his son, W. W. Trigg; the heirs of W. W. Trigg to Stockley (Record, p. 161).

IV.

Fourth. The Court erred in holding that, as a principle of law, petitioner could not recover in this action of ejectment upon proof of his prior possession and ouster of the 131-acre tract, as against the defendant, who is a mere trespasser.

This error—as it is believed to be—consists in the Court's holding the case of Hubbard vs. Godfrey, 100 Tennessee, 150-156, to be binding on it, instead of holding to the principle laid down by the Supreme Court of the United States.

518 In that case it was held that in an action of ejectment the plaintiff could not recover upon only the proof of prior possession in himself, but must show, either a deraignment of title from the State, or, seven years' adverse possession, under color of title. The other cases cited by this Court do not touch upon the question in any other way than to hold that the plaintiff must recover on the strength of his own title, and that ejectment can only be brought to enforce a legal title. Hence, they need not be further considered here, as our contention assumes those well-established principles of law.

The question is, whether this is such a matter of local law as to require this Court to follow the State Court's decision, or whether it is such a general question of law that it may ascertain the true principle for itself?

The only warrant or obligation this Court has for holding any decision of any State Court to be binding on it on any question of law, is found in the Act of Congress—September 24, 1789—contained in Section 721 of the Revised Statutes. It is as follows: "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It has been held by the Supreme Court of the United States that the word "laws," as used in the statute, does not include the decisions

of the local tribunals, for these, at the most, are only evidence of what the laws are, and are not, of themselves, laws. The laws of the State are usually understood to mean the rules and enactments promulgated by legislative authority thereof, or long-established local customs having the force of law.

Swift vs. Tyson, 16 Peters, 1.

The decisions of the State Courts on questions of a general nature, which are not based on a local statute or usage, or on any rule of law affecting the titles to land, or on any principle which has
519 become a settled rule of property, are not within this section, and therefore are not conclusive authority. They are merely persuasive in effect.

Boyce vs. Tabb, 18 Wall. (U. S.) 548;
Swift vs. Tyson, 16 Peters (U. S.), 1;
Olcott vs. Supervisors, 16 Wall. (U. S.), 678;
Hough vs. Railway Co., 100 U. S., 213;
Watson vs. Tarpley, 18 How., (U. S.) 520;
Delmas vs. Insurance Co., 14 Wall. (U. S.) 661;
Yates vs. Milwaukee, 10 Wall. (U. S.) 506.

This section was never intended to apply to questions of a more general nature, not at all dependent upon local statutes, or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts, or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as this Court; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract, or what is the just rule furnished by the principles of the law to govern the case.

Swift vs. Tyson, 1 Peters, 1.
Watson vs. Tarpley, 18 How., 520.

The Supreme Court of the United States has never acknowledged the right of the State courts to control its decisions as to the principles of common law, except, perh*spa*, in a class of cases where the State courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State.

Yates vs. Milwaukee, 10 Wall. (U. S.), 506.

The question at issue does not arise out of any enactment of the Tennessee Legislature. There is merely one decision of the Supreme Court of the State: the case of Hubbard vs. Godfrey, 100 Tennessee, 150. In the language of the cases, it is not a settled rule of any sort, nor has it long been established.

Is it an established rule of real property in Tennessee? By such is meant a principle of law which creates, or defines, the rights of individuals to realty. Or, a principle declaring the facts
520 which constitute the ownership of land. The question decided in Hubbard vs. Godfr*et* is not such a rule of property. It did not define the rights of individuals to realty. It did not

declare any facts which constitute the ownership of land. It only holds that in actions of ejectment the plaintiff cannot recover upon simply the proof of prior possession, as against a trespasser. It relates only to the quantity and quality of evidence necessary to base the action on. It decides only a question of evidence. It pertains solely to the action of ejectment, not to land titles. It is a matter of remedy, not of right. It only regulates the transaction of business before the State courts.

It is evident that the rules of property affecting land titles are only those principles of the law which provide for the deviation of titles from the State, the methods by which they may be transferred to individuals, and from person to person. In Tennessee, land titles may be derived from the State as follows: By direct entry and grant; by possession for twenty years, from which a grant is presumed; and under the law of accretions. From individuals land titles may be obtained by deeds, devise, descent and by process of law under judicial sales. And by an adverse possession of seven years, under color of title, an indefeasible title is acquired under the statute of limitations. Under the same statute seven years possession, without color of title, gives a defensible title. Conveyances are required to be made in writing; the execution, or probate, of the muniments of title and their registration are provided for, the various estates in land, as fee simple, life tenures, by dower, courtesy, or otherwise, terms for years, homestead, etc., are defined; transfers of land by inheritance are provided for by the statutes of descent; and many privileges and immunities are affixed to the ownership of land. These principles constitute a general outline of the rules of property affecting titles to land. Does the case of Hubbard vs. Godfrey fall within the scope of the
521 principles thus stated? Manifestly not. It applies only to the action of ejectment. There is nothing in it on which a land title can be based, or from which one can be defined. It pertains to the court and not to the title of land.

It is clearly beyond the power of State courts to regulate the prosecution of actions in the United States courts. The United States courts do not depend on the State courts to define their powers, or to regulate their course of business. They derive no power to try actions of ejectment from the Acts of the Tennessee Legislature. It is obtained from the Acts of Congress creating them. The act under consideration only leaves it to the State courts to declare the rules regulating the ownership of property. It was never intended to leave those Courts to say upon what *what* evidence the United States courts shall pass judgment.

This is a question of a general nature, which the United States courts must determine for themselves. It is a general question of the common law, defining upon what proof the court will render judgments in ejectment. It is a question of evidence, not of substantive law. It is clear that petitioner must prove a valid, legal title, but how shall he prove it? The question is not what is a valid, legal title, but what is satisfactory evidence of it? The Court of Tennessee has the right to define the essentials to the validity

of land title in that State, but it has not the right to lay down rules by which the United States Courts shall administer justice in the cases before them. In the United States Court it is not necessary to try the abstract right or title to the land in an action of ejectment, but, as against a mere trespasser, they will restore the plaintiff to his former possession upon proof of the fact. They presume the valid, legal title from the prior possession of the plaintiff, as against the wrongdoer. Plaintiff in not required to go to the trouble and enormous expense of deraigning title through a long line of conveyances from the State, or to put himself in peril from the defects in his unskillfully drawn instruments of title, by rea-
522 son of the wrong of a trespasser, in Federal courts. The remedy is prompt and efficacious. It is the old principle of the common law. The prior possession is sufficient.

The case of Hubbart vs. Godfrey is one of those anomalies that creep somehow into the reports of every State. It is utterly unfounded in reason and is in direct conflict with the whole volume of authorities. It is at war with the case of The Insurance Co. vs. Diggs, 8 Bax., (Tenn.), 565. That case holds to the proposition here contended for. In fact, it is in conflict with the Tennessee statutes. Section 3966, of the M. & V., Code, in regard to actions of ejectment, provides as follows:

"Upon the trial, the plaintiff need not prove an actual entry on or possession of the premises demanded, or receipt of any profits thereof, nor any lease, entry, or ouster, except as herein provided: but it is sufficient for him to show a right to the possession of the premises at the commencement of the suit." All he has to show is the right to the possession.

No change has been made in Tennessee in the old common law remedy of ejectment which restricts it, or diminishes the scope of its application. It has been extended by the Tennessee statute, but not restricted. It was formerly, under the common law, a mere possessory action—to ascertain the right of possession being its only purpose. It has been extended by the English statutes, as well as by the legislative enactment of most of the American States, to the trial of the abstract question of title. To this effect are the Tennessee statutes. They are as follows:

Section 3953, M. & V.: "Any person having a valid, subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same by an action of ejectment."

Section 3955, M. & V.: "The action is brought against the actual occupant, if any, and if no such occupant, then against any person claiming an interest therein, or exercising acts of ownership at the commencement of the suit."

523 It will be seen that these statutes do not abolish the old common law action of ejectment. Nor do they restrict it. They simply extend the remedy to the trial of the abstract title. But, clearly, the old common law remedy of the trial of the right of possession is left unimpaired. And so far as legislative enactment is concerned, that remedy is still intact and may be enforced in the action of ejectment in Tennessee.

The forcible entry laws of Tennessee do not furnish any remedy in a case like this. It requires an entry by force or strong hand or with weapons or other violent means before that remedy applies.
M. & V. Code, Sec. 4073.

If ejectment does not apply there is no remedy. These are the only remedies known to the laws of Tennessee that have any possibility of application.

The statute declares the law of the State.

The decision of the Supreme Court is of a general matter of the common law. It has no binding effect on this Court, and is entitled only to the weight which its reasoning and accordance with the principles of the common law give it.

But the decisions of the Supreme Court of the United States are binding on this Court. And that Court has announced the principle many times, that it is sufficient to entitle a plaintiff in ejectment to a recovery if he show that he was in the quiet, undisturbed possession of the land before he was ousted by the defendant.

Sabariego vs. Maverick, 124 U. S., 279-296;
Burt vs. Panyard, 99 U. S., 180;
Christy vs. Scott, 14 How., 282.

The same rule has prevailed in Tennessee.
Insurance Co. *vs.* Diggs, 8 Bax., 565.

It is the undoubted rule of the common law.
Catteris vs. Cowper, 4 Taunt, 547;
Graham vs. Peat, 1 East., 246;
Allen vs. Rivington, 2 Saunders, 111;
Jackson vs. Denn, 5 Cowen (N. Y.). 200;
Jackson vs. Walker, 7 Cowen (N. Y.), 637;
Smith vs. Lorilliard, 10 Johns. (N. Y.), 338;
524 Whitney vs. Wright, 15 Wend. (N. Y.), 172;
Jackson vs. Railroad Co., 1 Cush. (Mass.), 575.

In volume ten, at page 486, under the title of "Ejectment," in the American & English Encyclopedia of law, second edition, is found a large collection of cases in accord with those cited. Even that number would be very largely increased if all were enumerated.

This principle does not conflict with the rule that the action of ejectment can only be maintained on a valid, legal title, nor with that which requires the plaintiff to recover on the strength of his own title, and not upon the weakness of the defendant's. For the United States Supreme Court has held as strictly as the Tennessee Court the rule that the action can be supported only by a valid, legal title. (Johnson vs. Crenshaw, 128, U. S., 374; Redfield vs. Parks, 132 U. S., 239; Swaze vs. Burke, 12 Pet., 11; Oaksmith vs. Johnson, 92 U. S., 346; Fenn vs. Holmes, 21 How., 481; Hooper vs. Scheimer, 23 How., 235; Smith vs. McCann, 24 How., 398.)

So, too, the plaintiff must recover solely on the strength of his own title in the United States Courts. "It has been long and well

established as a rule of law and equity that a party must recover on the strength of his own title, and not on the weakness of his adversary's title. (Watt vs. Lendsey, 7 Wheat., 158; McNitt vs. Turner, 16 Wall., 362; Marsh vs. Brooks, 8 How., 223; Fussell vs. Gregg, 113 U. S., 550.)

That the Supreme Court holds that the plaintiff in ejectment must recover solely on the strength of his own title, that he must prove a valid legal title, and that he can recover, as against a trespasser, upon only the proof of prior possession, conclusively establishes that the latter is simply a matter of evidence, adopted for the better administration of justice, and is not a rule of property. It would be absurd to say that the Supreme Court holds that mere possession constitutes a valid, legal, paramount title.

It is submitted that this Court erred in not following the rule laid down by the Supreme Court of the United States, and in
525 holding the Tennessee case to be binding on it.

If the United States Supreme Court has laid down the true principle of law, petitioner is entitled to recover the 131-acre tract in this suit. As this Court found, the evidence shows that he is in possession of most of the east 1,500 acres of the Huddleston tract. (Opinion, pp. 15-17.)

The whole evidence shows that petitioner is now in possession of most of the tract of land described in the deed of the Trigg heirs to him. Maj. Humphreys says when he made the survey cotton was growing in Stockley's field on Centennial Island, and the hands were picking it. That his field was on the east end of Centennial Island, and the old north line of the Huddleston tract ran into it (Record, p. 40). He says that the Trigg 37 and 30-acre tracts the Chalmers 135 and the Burns 200-acre tracts, formerly on Island 37, are now inclosed inside of Stockley's field on Centennial Island. (Record, pp. 40 and 41.) He says, the island marked on his map by Stockley's name is in cultivation. (Record, p. 42.) He took his map and pointed out to the jury the land on Centennial Island which Stockley has in cultivation. (Record, pp. 42, 43 and 44.) He also says Stockley had part of his land on the towhead in cultivation, forty or fifty acres in amount. (Record, p. 49.) Capt. Joplin, also, says that Stockley has part of the towhead in cultivation. (Record, p. 66.) Maj. Humphreys' map shows Stockley's field in cultivation on Centennial Island, his dwelling house there, his field on the towhead and land there.

Stockley himself says that the Trigg place is the same as the Huddleston place, as marked on the Humphreys map, and it is the place he now owns. (Record, pp. 85 and 91 and 92.) It will be noticed that, by an error of the printer, part of his evidence was put on pages 91 and 92 of the Record instead of following on page 85. An examination of the original transcript would show this. However, the fact is patent to anyone who reads the Record.

These facts constitute possession. Fencing land, cultivating it and living on it make up as complete a possession as land is sus-
526 ceptible of. Hence, the Record shows that Stockley is now in complete possession of the east, 1,500 acres of the Huddles-

ton tract, except the smaller tract described in the declaration. This possession includes the part of the tract which has been built up since the cut-off, and is known as the tow-head (Record, pp. 49 and 66), as well as the land on the east end of Centennial Island, that was not washed away. He was as much in possession of the 131-acre tract as he would have been if he had a fence around it. All possession is constructive, as a man actually can only occupy the space of a few inches. Under the law Stockley was in possession. Cissna had neither possession nor title. He has not a foot of ground in the world so far as this record shows. He is a flagrant trespasser, and so stands in this Record. Stockley has this possession now and had it before Cissna ousted him. The first Humphreys' survey, having been made in January, 1901 (Record, p. 33), Cissna entered on May 1, 1901 (Record p. 3).

On March 1, 1897, the Triggs made a deed to petitioner, Stockley, conveying specifically the east 1,500 acres of the Huddleston tract, reciting that it was the identical tract of land conveyed by Simon Huddleston to John Trigg, giving the date of the deed and the book and page of the place of its registration, and referring to it for a fuller description, and describing it fully (Record, p. 161).

Therefore Stockley is in possession of most of this tract, holding it under the Trigg deed to him. This Trigg deed includes the 131-acre tract within the terms of its description, Maj. Humphreys testifies, from an actual survey, that it is a part of the Huddleston tract conveyed by that deed. (Record, pp. 40 and 42.) That is, the deed includes it. Joplin (Record, pp. 64 and 350), C. A. Stockley (Record, p. 96), and H. W. Stockley (Record, p. 86) all state that this 131-acres was part of the old Trigg land before the cut-off. That it is the same land conveyed to Stockley.

Therefore the 131-acre tract is a part of the tract deeded
527 to Stockley by the Triggs, which deed includes it within the lines of its metes and bounds; and Stockley was in possession of most of the land—and is now—claiming under that deed, when Cissna ousted him. Under the long and clearly established rule in Tennessee, being in possession of a part of the tract he was, in law, in possession of all of it, including the 131 acres.

Brown vs. Johnson, 1 Hump., 261;
Rutherford vs. Franklin, 1 Swan, 321;
Hebard vs. Scott, 11 Pickle, 468.

The same rule has been declared by the Supreme Court of the United States.

Clarke vs. Courtenev , Pet., 319, 354;
Carter vs. Ruddy, 166 U. S., 493.
Hunnicut vs. Peyton, 102 U. S., 368.

Where a person enters into land under a deed or title, his possession is construed to be co-extensive with his deed, or title; and although the deed or title may turn up to be defective or void, yet the

true owner will be deemed dis-seized only to the extent of the boundaries of such deed or title.

Clark vs. Courteney, 5 Pet., 319.

Even if the deed be absolutely void, or fraudulent, it is a sufficient color of title.

Blantin vs. Whitaker, 11 Hum., 313;
Clark vs. Chase, 5 Sneed, 636;
Belote vs. White, 2 Head., 705-712;
Stewart vs. Harris, 2 Swan, 656.

A chain of conveyances is not necessary; a single deed is sufficient.

Pattan vs. Haynes, Cooke, 356-359;
Hampton vs. McGinnis, 1 Tenn., 286-294;
Sawyer vs. Shannon, 1 Tenn., 474.

Therefore, petitioner was in possession of the 131-acre tract when ousted by defendant. And if the law, as laid down by the Supreme Court in the cases above cited, is to be followed, he is entitled to recover that tract in this action. This, we submit, is the true principle to govern in this action.

Petitioner is entitled to recover all accretions to the 131-acre tract, under this view of the case. For under the law, he
528 was in possession of all of the accretions to that tract, as well as the tract itself. It is well settled that one in possession of the riparian tract is also, by construction of law, in possession of all accretions that have formed to it.

Saulet vs. Shepherd, 4 Wall. (U. S.), 502;
Benne vs. Miller, 149 Mo., 228-238;
Campbell vs. Laclede Gas Co., 84 Mo., 352;
Chicago, etc., R. Co. vs. Groh, 85 Wis., 641;
Cobb vs. Lavalle, 89 Ill., 331.

This is but an application of the rule that one in possession of part of the land described in his deed is held to be in possession of all of it, to the full extent of his boundaries.

In Saulet vs. Shepherd, supra, the possession of the main shore tract was held to be such a constructive possession of the accretions as to give the possession a title to the—

*As it is in printed record.)

"An accretion becomes a part of the land to which it is built and follows whatever title covers the main land whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming, of that kind of possession which distinguishes the occupation of dry land. But it attaches to the dry land, even while it is yet under water, and belongs to the owner of the land and is in the actual possession of him who holds the actual possession of the main

(*In pencil in copy.)

land. If the mainland is in fact unoccupied, it is in the constructive possession of the owner of the true title, and with it goes the constructive possession of the forming accretion. But if the main land is held in adverse possession of the true owner, he is now in constructive possession of the accretion, and since the accretion, in its formative state, is not susceptible of actual occupancy in the sense of a pedic possesio, the indicia of the actual possession of him who holds the main land are extended over the forming accretion, and bring it within his actual possession. And it is not necessary that such possession of the accretion should be held for ten years to give the possessor title, because title to it follows title to the main land, and when the latter is held under the conditions and for the length of time required by law to vest the title in the possessor, the title to the
529 accretion follows, even though the deposit had been made but a year or a day. One who acquires title to the main land by ten years' adverse possession, acquires title to river deposits made and making on his front before and during the period in which his possessory title was forming. The accretion grows into the land and grows into the title of him who holds the land as the title itself grows, and when the title to the main land has become perfect, it extends over the accretion, however recent its formation."

Benne vs. Miller, 149 Mo., 228-239.

V.

Fifth. The Court erred in holding the grant of 1901, to petitioner, of the larger tract of land in controversy to be void because the act of the Legislature did not apply to land formed in the beds of the rivers since the passage of the act of 1874.

It is respectfully submitted that this holding is against the weight of authority. There are but three cases in point to be found, and all sustain the validity of the grant, and are against the finding of the Court. They are: Tatum vs. Sawyer, 2 Hawks (N. C.), 226; Hatfield vs. Grimstead, 7 Iredell (N. C.), 139; and Allegeny City vs. Reed, 24 Penn. St., 32-43. We believe that the reasoning of the court in Tatum vs. Sawyer escaped the attention of this Court. It is as follows: "Lands covered by navigable waters, are not subject to entry under the entry law of 1777, not by any express prohibition in that act, but, being necessary for public purposes, as common highways, for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature. But when the cause of that exemption ceased to operate, the exemption itself ceased; and they, like the other vacant lands of the State, became the subject of entry." In that case it was objected to the grant, "that the land was not subject to the entry laws, as it was not land when the act of 1777, regulating entries, was enacted."
530 Upon the strength of these cases, we submit, the grant is invalid. There are no others.

Wherefore, your petitioner respectfully prays that a rehearing of this cause be granted him; that said cause be again considered by

this Honorable Court; that the judgment of said United States Circuit Court for the Western Division of the Western District of Tennessee be set aside, reversed, and a new trial granted petitioner, and that this cause be remanded to said Circuit Court for a new trial.

T. B. TURLEY,
G. J. McSPADDEN,
Attorneys for Petitioner.

We, T. B. Turley and G. J. McSpadden, attorneys for the plaintiff in error in this suit, hereby certify that in our opinion the foregoing petition for a re-hearing is well founded in point of law, and on questions of facts, and that a re-hearing ought to be granted.

T. B. TURLEY,
G. J. McSPADDEN,
Attorneys for Petitioner.

531 And afterwards towit on February 3, 1903, an order denying said petition for rehearing was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1088.

H. W. STOCKLEY
vs.
W. A. CISSNA.

The petition to rehear in this case is hereby denied.

And afterwards towit on February 14, 1903, an opinion on said petition for rehearing was filed which reads and is as follows:

Opinion on Petition for Rehearing.

532 No. 1088.

United States Circuit Court of Appeals for the Sixth Circuit.

Decided Feb. 3, 1903.

H. W. STOCKLEY, Plaintiff in Error,
vs.
W. A. CISSNA, Defendant in Error.

On Petition to Rehear.

The petition to rehear has been carefully considered and must be denied. The question raised by it chiefly concern the correctness

of the result reached as regards that part of the land in controversy claimed as accretions formed against what was the eastern bank of Island No. 37.

Plaintiff claimed said new former land under two distinct lines of title; first, as an accretion to the tract of land on Island 37 conveyed in 1869 by Robert I. Chester, to Mrs. Martha P. Smith, and to plaintiff by sundry mense conveyances, the last being from W. J. Cæsar; second, under a grant from the State of Tennessee.

We did not support the instruction of the court below upon any theory that this new made land was not formed by the slow and gradual process called accretion, but upon the ground that whether accretions or not the plaintiff in error could not recover in an action of ejectment without showing either that he was a riparian proprietor against whose lands the locus in quo had formed or that he held a legal title derived from some other source. The conclusion we reached was that the plaintiff had not shown title to such accretions by reason of riparian ownership nor any title derived from any other source and that the instruction to find for the defendant was therefore not erroneous. This conclusion was reached
533 upon the construction of the title papers introduced by the plaintiff, including the Humphreys' survey and plots of the old grants on Island 37, and upon the undisputed physical facts necessary to the interpretation of the title papers.

Manifestly the question of title not turning upon conflicting evidence was a question of law for the Court below. If the plaintiff failed to show such a legal title as would support an action of ejectment it was the duty of the court to instruct for the defendant, for it was a matter of no concern to the plaintiff whether the locus in quo was the property of the heirs of John Trigg, Mrs. Martha P. Smith or of the defendant. If the plaintiff had failed to show title in himself his case broke down and that was an end of it. It was an inadvertence in our former opinion to say that the title to the two John Trigg grants was outstanding "in the heirs of John Trigg." It was not necessary to say more than that the title was not in the plaintiff, and that we did find as a result of the proper interpretation of the deeds under which the plaintiff holds his land on Island 37. In a later part of the same opinion we reffer-ed to the title to the Trigg grants as being in the heirs of John Trigg "or his assigns."

The original contention vigorously supported by the briefs of plaintiff's counsel was that the wasting away of the Trigg lands operated as a complete destruction of that title and that plaintiff's land thereby became riparian and entitled to all accretions thereafter formed, although made on the side of the submerged Trigg lands. It was further contended that as the accretions here involved had been made long before Mrs. Smith conveyed her Chester land, thus become riparian, to S. M. Jarvis, through whom plaintiff claims with a clause conveying all accretions to the land described, that this accretion clause operated to pass the locus in quo because it was an accretion to the land conveyed. This contention we did not accept. Upon the contrary, we held that the accretions in ques-

tion were not accretions to the Chester land conveyed by Mrs.
534 Smith, but accretions inuring to the benefit of the owners of the two Trigg grants. It is as unnecessary now as when we wrote our opinion to decide whether Mrs. Martha P. Smith had acquired the title to the two Trigg grants before she made her mortgage to S. M. Jarvis, in 1889. If she did not convey the lands covered by those grants it in no way assists the plaintiff.

The plaintiff's contention now is, that if Mrs. Martha P. Smith, in fact, owned the two Trigg tracts when she made the mortgage to Jarvis under whom the plaintiff remotely claims that effect should be given to that fact in applying that clause of her deed which recites that it is "understood and agreed that this conveyance carries with it all accretions now formed or sodded to said above described lands," and that we should hold that she intended to convey her Trigg lands and the accretions thereto under the description of "accretion now formed and sodded to said above described lands." Now the land described in her deed was a tract of land conveyed to her in 1869, by Robert I. Chester, and being for the most part the land shown on the Humphrey map as the Potter 640 acre tract. Chester described his eastern boundary as the western line of the John Trigg 152 acre grant also shown on the Humphrey map. The call of his deed was to run south with the western line of Trigg to the Tennessee river, thence with the meanders of the Tennessee river to the eastern line of the Byrne 204½ acre tract and with that line to the beginning.

The only material difference in the description of the land conveyed to Mrs. Smith by Chester in 1869 and that conveyed by her to Jarvis in 1889 is that after describing the land as described in Chester's deed she added a clause in these words:

"It is hereby understood and agreed that at the present time the Mississippi river has changed its course and does not now touch any of the above described lands, and that where said river is named as a boundary line it is understood to mean where said river once ran,
which course or bed is now dry and known as McKenzie's
535 Chute and it is further understood and agreed that this conveyance carries with it all accretions now formed or sodded to said above described lands."

Now "the above described lands" confessedly do not include by description these two Trigg tracts.

Upon the contrary she necessarily excludes these Trigg lands by her specific call for a corner in the western line of the Trigg 152 acre tract, a corner standing on a part of that tract which had never been washed away, and by making the western line of that grant the eastern line of the land conveyed.

Having thus deliberately excluded the locus in quo by this call for the western line of the Trigg 152 acre tract it is now insisted that she subsequently included the same by the description of "lands now formed or sodded to the above described lands."

The improbability that she intended any such thing is further indicated by the fact that when she made this deed to Jarvis in 1889 these Trigg lands had been for ten years or more high and dry

land and were claimed by her under a distinct deed, made long after her deed from Chester, describing them by specific metes and bounds.

The only argument advanced now in support of the construction claimed for her accretion clause is, that there is no other new made land to which the term "accretion" used in her deed can be applied and that in order to give some effect to that clause we should construe it as operating to convey the locus in quo to Jarvis, although it did not answer the description of an accretion added to the lands specifically described and conveyed.

But this is an unfounded assumption. If her deed to Jarvis be construed, as the brief for a rehearing contends, as bounding the land described and conveyed on the east and south by what is called the high bank of 1876, meaning the river bank as it was at the flood of 1876, she will exclude the whole southeastern corner of the Potter 640 acre tract, for that high bank is shown to have bent
536 westwardly from a point only thirty-two poles south of the northwest corner of the Trigg 152 acre tract. This interpretation would also exclude the land inside of the Potter grant which is occupied by the bed of what is called "old river" and shown on the Humphreys' map as well as lying south of that channel as defined and plotted by plaintiff's witness Humphreys.

Now all thus excluded was plainly included in Chester's deed to her, and if Jarvis was to get all of the land which she got from Chester he got the part restored by accretion only as an accretion to that specifically described. That the bed of the so-called "old river" had filled up so to be dry tillable land save in times of high water is the claim and contention of plaintiff. If, therefore, we are right in saying that the accretion upon the site of the Trigg grants inured to the owner of those grants, the accretion made upon the washed away parts of the land conveyed by Chester to Mrs. Smith inured to the benefit of her title and passed as accretions to her grantee being literally accretions to the lands described in her deed. But if the third call in Mrs. Smith's deed to Jarvis be extended to the old channel of McKenzie's Chute as shown on the Humphreys' map in accordance with the explanation she makes in her deed as to what she meant by calling for McKenzie's Chute the case is no better.

That chute was one of the main channels of the Mississippi river and is now dry land. Now if accretions have formed against the old shore of Island 37 as a result of the cut-off of 1876 such accretions would follow the title of the shore against which they formed. In this event the made land which shall prove to be an accretion to that described by the deed which calls to follow the meanders of the river to the eastern or upper line of the Byrne tract of 204½ acres would pass under her accretion clause to Jarvis, her grantee. There is in no event any reason for stretching the meaning of her accretion clause to cover lands otherwise plainly excluded merely for the purpose of giving some effect to that clause.

537 If it be said that in fact the new land in the bed of McKenzie's Chute is not an accretion to the shore of Island 37 but to the opposite bank, there would still be no greater reason

for applying the accretion clause to the new made land on her eastern boundary than upon her southern, and the deed should be construed as applicable only to such accretions as were in law and fact accretions to the land described if it should turn out that there was any such accretion. The case is not one where we can reform her deed. It must stand as she wrote it.

The other matters touched upon in the petition are mere reargument of questions once argued and once decided.

538 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of H. W. Stockley vs. W. A. Cissna No. 1088, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 5th day of August, A. D. 1904.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

539 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Horace H. Lurton, United States Circuit Judge in and for the Sixth Judicial Circuit, do hereby certify that Frank O. Loveland is Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In Testimony Whereof, I do hereby subscribe my name at Cincinnati, Ohio, this 29 day of Aug., 1904.

HORACE H. LURTON,
United States Circuit Judge.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that Horace H. Lurton, whose name is subscribed to the foregoing certificate, was, at the time of the subscribing the same, a Circuit Judge within and for the circuit aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Cincinnati, Ohio, this 31 day of Aug., 1904.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals, Sixth Circuit.

539a Shelby Chancery No. 1.

Chancery Court of Shelby County.

No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Chas. T. Cates, Jr., Carroll, McKellar, B. & B.
R. G. Brown, Ewing & Williamson.

Bill of Costs $166.20.

T. B. CALDWELL, *C. & M.*

Volumn Two.

Filed Apr. 1, 1905. John W. Buford, Clerk, By J. E. Springbett, D. C.

540 Chancery Court of Shelby County.

STATE OF TENNESSEE,
Shelby County:

Be it remembered, that at a term of the Chancery Court of Shelby County, State aforesaid, began and held at the Court House in the City of Memphis, in and for said county, on Monday, the 3rd day of October, 1904, the same being the first Monday in October, 1904, present and presiding the Honorable Lee Thornton, Special Chancellor of said Court, the following proceedings were had, to-wit:

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY, a Corporation Organized and Chartered under the Laws of the State of New York, and Having its Principal Situs in the City of New York in said State, and Having an Office and Mills in the State of Indiana, at the City of Muncie; W. A. Cissna, a Citizen and Resident of the State of Illinois, and Vince Beard, and Non-resident of Tennessee, but at Present in Tipton County, Tennessee.

To the Hon. John S. Cooper, Chancellor, etc., when presiding in said court:

Humbling complaining unto Your Honor, complainant represents and shows:

That prior to the — day of March, 1876, the Mississippi River flowed between Arkansas and Tennessee, and on the west boundary of Tipton County as shown on the map herein filed and made a part of this bill, marked Exhibit "A" hereto, the bend in said river as shown on the map, being known as Devil's Elbow. The course of the river, prior to March 1876, is shown by the black lines on said map.

The middle of the Mississippi River as it then flowed, consti-
541 tuted then, and now constitutes, the boundary line between the states of Arkansas and Tennessee.

On or about the — day of March 1876, a sudden change was made in the direction of the main current or channel of said river, whereby in a single night or a very short time, a new channel was formed for said river, the new channel formed being shown on said map Exhibit "A," by the blue lines traced thereon, and is shown as the Centennial Cut-off. As a result of said sudden change, the old bed of the Mississippi river in a short time became dry land, and the State of Tennessee is now, as it was then, the owner of that part of the bed of the river lying between the low water mark on the Tennessee side, and the center of said river, as it flowed prior to the cut-off in 1876.

That portion of the old bed of the river, which is now dry land, and which prior to the cut-off, or change of the channel of 1876, was between the low water mark of said river on the Tennessee side, and the middle of the said stream, *us* the property of the State of Tennessee, and is held by it for public purposes, and the timber situated thereon is the property of said state. The land above described which is now dry, and the property of the state consists of many thousands of acres of land which is valuable chiefly on account of said timber.

II.

The defendant W. A. Cissna, without right or authority, and being a trespasser upon the lands of the State of Tennessee, in Tipton County, and especially upon the land belonging to the State, described as follows:

Beginning at the northeast corner of Grant No. 21206, made by the State of Tennessee to Simon Huddleston for 2,000 acres. The east part of which is now owned by H. W. Stockley, and which grant or tract is situated in Section- 5 and 6 in Range 9 the 11th Surveyor's District in said County and State, and which said north-

east corner is 78 chains north of the south-east corner of said
542 Huddleston 2,000 acre tract and running from said north-east corner then with said Huddleston's or Stockey's north line, north 41 degrees, west 35 chains; thence with said Huddleston's or Stockley's said north line, south 82 degrees, west 34 chains; thence with said Huddleston's or Stockley's said north line 71 degrees, west 15.32 chains; thence north 8½ degrees, west 66 chains to the south-east corner of the (640) acre entry on Island Thirty-Seven, in the name of N. Potter, now owned by H. W. Stockley; thence north 55 chains to the northeast corner of the 100 acre entry on Island Thirty-seven in the name of John Trigg; thence 61 chains to the middle or thread

of the old main channel of the Mississippi River, and which channel is now dry land and which middle of said channel of the Mississippi River is the boundary line between the States of Arkansas and Tennessee; thence with said thread of said old river which is the boundary line between said states, south 18 degrees, east 71 chains; thence with said middle of said old river with said boundary line, south 31 degrees, east 62 chains; thence south 49 degrees, west 42 chains to the point of beginning, containing 1,050 acres, more or less—

The said tract above described is shown on Exhibit A hereto, and is embraced within the figures A, B, C, D, E, F, G, H; also claiming to own and exercise authority over the land of the State of Tennessee, which lies north of the tract above described and north of the northern boundary line of said tract A, B, and west of the boundary line between the State of Arkansas and Tennessee, as it goes around the Devil's Elbow; and also claiming to exercise ownership and authority over the land of the State of Tennessee, which lies to the south and east of the southern boundary C, D, of said tract above described, and which lies south of the boundary line between Arkansas and Tennessee, and which also is a part of the old bed of the Mississippi River lying between the low water mark of said river, as it formerly flowed, and the boundary line between Tennessee and Arkansas;

but without right or authority, and being a trespasser thereon,

543 on or about the — day of ——, 1903, undertook to sell and convey to the defendant Muncie Pulp Company, the timber on said land and by the terms of said deed of conveyance, he gave the defendant Muncie Pulp Company five years' time within which to cut and remove said timber. The consideration for said sale being the purported sum of Thirty-Five Thousand ($35,000.00) Dollars of which one-fifth, or Seven Thousand ($7,000.00) — was recited as paid in cash in hand, and notes were executed for the remainder of said purchase price, as set out in said deed, a copy of which will be filed as evidence on or before the hearing if necessary.

III.

The defendant, Muncie Pulp Company, although well knowing at the time of said purported sale to it, that its codefendant Cissna had no interest in or right to the said land, or the timber thereon, entered upon it with a large force of hands, and for some months it has been, and still is, cutting and removing the valuable timber from the same. To the end that said timber might be cut and removed with all expedition, it has built several miles of tramways over and across the said tract, and has a large force of hands daily employed in cutting and removing the timber as rapidly as possible, and unless enjoined and restrained, it will continue to cut and remove it and thus greatly decrease the value of said land, which is valuable chiefly for and on account of the valuable timber growing thereon. It has cut and removed valuable timber, amounting to the sum of $25,000.00 or more, the exact amount of which is unknown to complainant, but will be made to appear from the proof, but it states upon information that it amounts in value to the said sum of $25,-

000.00. It now has cut and stacked, ready for shipment, several thousand cords of valuable timber and lumber, all of which was cut from said above described land, and which will be shipped
544 in a few days, unless the same is attached in this cause, and unless the defendant, Muncie Pulp Company, its agents, servants and employees, are enjoined by the issuance of writs of injunction, from shipping and removing said timber and lumber. The value of the timber and lumber, cut, stacked, and ready for shipment, is the sum of Five Thousand ($5,000.00) Dollars.

IV.

Complainant is advised that it is entitled to have a Receiver appointed to at once take charge of said timber and lumber which has been cut from said land above described, by the defendant Muncie Pulp Company, and which is now thereon ready for shipment; that it is necessary for a receiver to be appointed at once, else by the rise of the river, the same will be carried away and thus lost or destroyed. That it is necessary for the timber which has been cut and is on the ground, and the lumber which is stacked and ready for shipment to be removed at once, or else the winter rains will render it impossible to go on said land and remove same, and the winter and spring rise will float it away.

IV*a*.

The defendant, Muncie Pulp Company, and W. A. Cissna, by reason and on account of the cutting of the timber as aforesaid, are committing irreparable injury to the land of the State of Tennessee, and both are liable for the amount of timber which has been cut and removed therefrom, by the defendant Muncie Pulp Company under its purported bill of sale from the defendant W. A. Cissna.

V.

The defendant Vince Beard, is the agent of defendant Muncie Pulp Company, who has charge of the cutting of the timber on the land of complainant, as above set out and described, and he is
545 now on said land, and in Tipton County, Tennessee, and has charge of the hands employed by the defendant Muncie Pulp Company, and has charge of the cutting and removing of said timber which is now being carried on by defendant company.

VI.

In consideration of the premises, complainant prays:

1. That the parties named in the caption as defendants, be made such by the issuance and service of copy and process as to the resident defendants, and by publication as to non-resident defendant to the end that they may be compelled to appear and answer this bill, but not under oath, the answer on oath being waived.

2. That writs of injunction issue enjoining the defendants and

each and every of them, their agents, servants and employees from further trespassing upon the lands of complainant described in this bill, exercising ownership of the same, or any other land of complainant, and cutting, destroying or removing any of the standing timber situated thereon, and from removing and shipping any of the timber which has been cut and has not yet been removed and from shipping any of the lumber cut from said timber, and from manufacturing into lumber any of the timber cut from said land, now on the mill yards of defendants.

3. That writs of attachment issue to the end that said timber and lumber cut from said land above described, as may be on hand on same, may be attached and impounded.

4. That a receiver be appointed to at once take charge of all of said timber and lumber so attached and impounded, with power and authority to sell and dispose of the same under the orders and decrees of this court, that may be made herein.

5. That on final hearing the injunction be made perpetual, and complainant recover of the defendants the value of the timber which has been so cut and removed *deom* said land, and that
546 they have such other and further *heneral* and special relief as the facts of the case may warrant, and as equity may demand. This is the first application for writs of attachment and injunction in this case, and appointment of a Receiver.

STATE OF TENNESSEE,
CHAS. T. CATES, JR.,
Attorney-General.

CARROLL, McKELLAR,
BULLINGTON & BIGGS,
Of Counsel.

To the Clerk and Master Chancery Court, Tipton County, Tennessee:

Upon this bill being presented and filed, issue writ of injunction as prayed herein by request of counsel for complainant, the application for writ of attachment and Receiver are not acted on. This the 14th day of December, 1903.

F. H. HEISKELL,
Chancellor Shelby County.

STATE OF TENNESSEE,
Shelby County:

I, Albert W. Biggs, make oath that I am agent for, and one of the solicitors of the complainant, and the statements contained in the above and foregoing bill, made as of knowledge are true, and those upon information I certainly believe to be true.

ALBERT W. BIGGS.

Subscribed and sworn to before me this December 14, 1903.

GEORGE W. GLASSCOSK,
Notary Public.

547 *Subpœna to Answer.*

Issued Dec. 15, 1903.

STATE OF TENNESSEE:

To the Sheriff of Shelby County:

Summon Muncie Pulp Compan*t* and W. A. Cissna, to appear before the Chancery Court of Tipton County, Tennessee, at the Court House in the town of Covington, in said county and state on the first Monday in January, 1903, that being one of the Rule days of said court, then and there to answer the Bill of Complaint filed against them in said Court by the State of Tennessee a true copy of which accompanies this writ.

Witness, T. Boyd, Clerk and Master of said court, at office in Covington, on this first Monday in December, 1903, and 128th year of American Independence.

T. BOYD,
Clerk and Master.

This is a conterpart of the original subpœna issued for Vince Beard to the Sheriff of Tipton County.

Service of subpœna accepted as of date Dec. 21, 1903.

MUNCIE PULP COMPANY,
VINCE BEARD,
By R. G. BROWN, *Att'y.*

Injunction.

Issued Dec. 17, 1903.

State of Tennessee to Muncie Pulp Company and W. A. Cissna and Vince Beard, and to their counsellors, attorneys, solicitors and agents, and each and every one of them, Greeting:

Whereas, in a certain suit this day instituted in our Court of Chancery, at Covington, by State of Tennessee, Complainant against the Muncie Pulp Company et al., having obtained from the Hon. F. H. Heiskell, a fiat for a writ of injunction to issue to enjoin the said defendants from trespassing upon the land of complainant.

548 We, therefore, in consideration of the premises aforesaid do structly enjoin and command you, the said Muncie Pulp Company, W. A. Cissna and Vince Beard, and all and every persons before mentioned, under the penalty prescribed by law, of you and every of your goods, lands and tenements, to be levied to our use, that you, and every one of you, do absolutely desist from trespassing upon the lands of complainant, and particularly that part of the old bed of the Mississippi River lying between low water

mark on the Tennessee side in Tipton County, and the center of said river as it flowed prior to the cut-off of 1876, from exercising ownership of it, or any other lands of compl'i't, and from cutting or removing any of the standing timber thereon, and from removing and shipping any of the timber which has been cut, and from shipping any of the lumber cut from said timber, and from manufacturing into lumber any of the timber cut from said lands now on the mill yards of defendants, until hearing of this cause in our said court of Chancery.

Witness, T. Boyd, Clerk and Master of our said Court at office, the first Monday in December, in the year of our Lord One Thousand Nine Hundred and Three, and in the 128th year of our Independence.

T. BOYD,
Clerk & Master.

Defendant is not to be found in my County, this 30th December, 1907.

T. F. KINTON, *D. S.*

Chas. T. Cates, Jr., Carroll, McKellar, Bullington & Biggs, Solicitor- for Complainant.

Filed Jan. 16, 1905. T. B. Caldwell.

549 *Subpœna to Answer.*

Issued Dec. 17, 1903.

State of Tennessee to the Sheriff of Tipton County:

Summon Vince Beard to appear before the Chancery Court of Tipton County, Tennessee, at the Court House in the town of Covington, in said county and State, on the first Monday in January, 1904, that being one of the Rule days of said Court, then and there t- answer the Bill of Complaint filed against him in said Court by the State of Tennessee, a true copy of which accompanies this writ.

Witness, T. Boyd, Clerk and Master of said Court, at office in Covington, on this first Monday in December, 1903, and 128th year of American Independence.

T. BOYD,
Clerk & Master.

A counterpart of this subpœna to answer is issued to the Sheriff of Shelby County, for Muncie Pulp Company and W. A. Cissna.

Defendant is not to be found in my County this December 30th, 1903.

T. F. KINTON, *D. S.*

Chas. T. Cates, Jr., Carroll, McKellar, Bullington & Biggs, Solicitor-.

Filed Jan. 16, 1905.

550 *Plea in Abatement.*

Filed Feb. 3, 1904.

In the Chancery Court of Tipton Coun[illegible], Tennessee.

STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY.

Plea in Abatement by W. A. Cissna.

Said defendant for plea in abatement to the bill filed against him and other- by the complainant, the State of Tennessee, says:

That the land mentioned and described in the bill is not situated nor does it lie in the County of Tipton in the State of Tennessee, except as hereinafter shown, and to such parts of said property as lies in the State of Tennessee and County of Tipton, the defendant has never asserted a right, title, or claim of possession, nor does he now assert such right, title or claim of possession; he is not in possession thereof, and never has been.

Said defendant states to the Court that Dean's Island is shown on the exemplification of that territory, filed herewith as part of this plea in abatement as Exhibit A; the land as described on the bill appears on said Exhibit A, as Tract No. 1 and Tract No. 2, and is indicated by dotted lines.

Defendant says that in the said year 1823 all of the property mentioned and described in the bill was on the Tennessee side of the middle of the Mississippi River as it then run; that from the year 1823 to 1874 continuously there were erosions into the Tennessee shore and accretions to the Arkansas shore, or to Dean's
551 Island, so that by the year 1874 Dean's Island had by gradual and imperceptible accretions become much enlarged, and by the gradual and imperceptible encroachments of the river the land on the Tennessee side had been washed away, and in the said year 1874 the land and river lines of the entire territory about and below Dean's Island appeared as shown on exemplification marked Exhibit B hereto.

Defendant says that following the description given in the bill at the said time, to-wit, 1874, and running the line as described in the bill, the result would be that the southwest corner of said land would be on the Tennessee bank of the Mississippi River, and the Northwest corner of the said land would be on the Tennessee Bank of the Mississippi River, and the said land as a body would have been either on the Arkansas shore or under the waters of the Mississippi river.

Said defendant files as Exhibit C hereto an exemplification of Dean's Island and of the Mississippi River and of the location of the land in controversy as of the year 1874; said land appearing within the dotted lines to be seen in said exemplification.

Defendant states that from the year 1874 until the year 1876 erosions were continuously, gradually and imperceptibly made into the Tennessee shore, and accretions gradually, slowly and imperceptibly formed to the Arkansas shore until what appears on Exhibit C, as the west boundary of the land in controversy had become practically the middle of the river in the year 1876, when a sudden "cut-off" took place whereby the river abandoned the course between Island 37 and the main Tennessee shore and around Devil's Elbow and Brandywine Bar and by an avulsion cut across there and about the land marked "Massey" on Exhibit "B" hereto.

Defendant says that thus the water which had prior to said "cut-off" gone around Dean's Island on the west side, and down McKenzie Chute as shown on Exhibit "C" hereto, adopted as its channel the said new channel made by the "cut-off" indicated above.

552 The result was that between Dean's Island and the Tennessee shore that was left the old river bed, and for a number of years, to-wit, about ten years, the water gradually, imperceptibly and steadily abandoned said old bed, and about the year 1883 the accretions of Dean's Island were such that no part or parcel of said land described in the bill was west of the middel of the Mississippi River and therefore in the State of Tennessee, except a small and immaterial part on the north-west of said Tract No. 2, and a small and immaterial part of the north-west of the said Tract No. 1, said portion of said land described in the bill which was taken in the year 1883 and which is now on the Tennessee side of the middle of the Mississippi River appears by the dotted lines on the west, and by a black line on the east, on exemplification filed as Exhibit D hereto.

Said defendant says that the exhibit to the complainant's bill is made as of the year 1823 in so far as it deals with the land lines and the river lines, and in so far as it undertakes to show the location of the land in controversy, and the defendant says that while the middle of the river was as shown on the said exhibit to the original bill in the year 1823 and that by gradual and imperceptible encroachments of the river into the Tennessee shore, and by gradual and imperceptible accretions to Dean's Island, the Arkansas shore, that the said middle of the Mississippi River moved westwardly, until in the year 1876, the property in controversy had become entirely on the Arkansas shore or under the waters of the Mississippi River, a navigable river, and that after said "cut-off" the water remaining for a perio of about ten years gradually departed whereby and wherefrom accretions were made to the Arkansas shore and none to the Tennessee shore, it being a high and caving bank and the property in controversy, except as stated, became and was part of the territory of the said Arkansas and Dean's Island or the said State of Arkansas, and defendant has never claimed and does not now claim any right, title, or interest in and to any proper- other

553 than that lying on the Arkansas side of the Mississippi River, and which is in the State of Arkansas, and said defendant, W. A. Cissna, disclaims any interest in or title to any of the said property, except that which lies in the state of Arkansas, and which does not lie in the State of Tennessee:

Wherefore defendants submits that the land in controversy, in so far as this defendant claims, lies in the State of Arkansas, and is not subject to the jurisdiction of this Court.

EWING & WILLIAMSON,
Solicitors for W. A. Cissna.

W. A. Cissna makes oath in due form of law and says that the statement made in the above plea in abatement are true in substance and in fact.

W. A. CISSNA.

Sworn to and subscribed to before me this the 2nd day of February, 1894.

H. H. BARKER,
Notary Public in and for Shelby County, Tennessee.

554 EXHIBITS "A", "B", "C", "D" TO PLEA IN ABATEMENT.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

Filed Feb. 3, 1904.

T. BOYD, *C. & M.*

555 In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Order at Chambers.

Entered Feb. 12, 1904.

This cause came on to be heard before the Hon. F. H. Heiskell, Chancellor of the Tenth Chancery Division of Tennessee, sitting by interchange by consent, for the Hon. John S. Cooper, Chancellor of the Ninth Chancery Division of Tennessee, and by consent of the State of Tennessee and defendants Muncie Pulp Company and Vince Beard, given *and* through their solicitors, when it appeared to the Court from the statements made, and by the consent of the parties, above named, that there is now cut in *lumber*, cord, wood, logs and lumber on the land described in the bill filed in this cause between one thousand and two thousand cords and that it is to the interest of all parties concerned for the same to be removed at once before the winter and spring rise of the Mississippi River.

And it *is* further appearing to the Court by consent, that the defendant, Muncie Pulp Company is willing to take and remove same,

and in the event that it is, in this action held liable to the complainant for the value of the same, it agrees to pay the account to the State of Tennessee, for the amount of timber, cord wood, logs, and lumber which is cut and on said land and that which has been removed therefrom since notice of the filing of the bill in this cause on the 15th day of December, 1903.

It is thereupon ordered, adjudged and decreed by the court, by consent that upon the execution by the Muncie Pulp Company of a bond with approved security, in the sum of Ten Thou-
556 sand ($10,000.00) Dollars condition for the defendant Muncie Pulp Company to account and pay to the State of Tennessee, the amount of any judgment which may be rendered in this cause against the said defendant Muncie Pulp Company for the value of the timber, cord wood, logs and lumber which is now on the lands of the State of Tennessee described in this cause and which had been removed therefrom since the 15th of December, 1903, the said injunction heretofore granted in this cause is so modified as to permit the defendant Muncie Pulp Company, its agents and servants, to enter upon the lands claimed by the State of Tennessee and described in this bill and remove the timber, cord, wood, logs and lumber above described and the injunction is dissolved in so far as it undertakes to interfere with the dealing of the Muncie Pulp Company with the timber cord, wood, logs and lumber now upon its mill yards.

It is further ordered by consent that O. K. Joplin as the agent of the complainant is to have the right to measure the cord, wood, timber, logs and lumber now cut and on the lands claimed by the State of Tennessee and described in the bill in this cause, and the Muncie Pulp Company, further agrees that the said Joplin may go upon its mill yards for the purpose of measuring and ascertaining so far as possible, the amount of such timber logs, and lumber which were cut and removed by it from the lands claimed by the State of Tennessee subsequent to notice of the filing of the bill of this cause, Dec. 15th, said inspection to be made by the said O. K. Joplin in conjunction with Vince Beard, one of the defendants in this cause.

The appearance of the Muncie Pulp Company's limited for the purpose of making and entering this consent order, and the appearance of the Muncie Pulp Company is for the purpose of obtaining this consent order, is not to prejudice any of its rights to remove the case to the United States Court if at a future date it should see fit to do so.

557 And by consent the Muncie Pulp Company and Vince Beard waive service of process and of injunction as of date December 21st 1903.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

In this cause the defendant, Muncie Pulp Company presented a bond in compliance with the order heretofore made in this cause in the sum of Ten Thousand ($10,000.00) Dollars with the American Surety Company of New York as surety, and the same is accepted and approved.

Done at Chambers in Memphis, Tennessee, July 6th, 1904.

F. H. HEISKELL,
Chancellor.

Agreement.

Filed Dec. 8, 1904.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

In this cause it is agrred by counsel representing all parties to this cause, to request the Chancellor, the Hon. John S. Cooper, to hear this cause at chambers at some place to be designated by him, on or before the first Monday, if all parties agree thereto, March 1905, and the decree, when pronounced by him, is to be entered at the next term, to-wit: the June term 1905 of the Chancery Court of Tipton County, Tennessee, nunc pro tunc as of the last day of the December term 1904, of said court. This agreement is
558 made in order *this* this cause may be heard at the April term 1905, of the Supreme Court of Tennessee, it being a case — considera-le importance to the parties, and an early adjudication of the same not only being *the* desirable, but urgent.

This December 1st, 1904.

STATE OF TENNESSEE,
By CARROLL, McKELLAR, BULLINGTON & BIGGS, *Solicitors.*
EWING & WILLIAMSON,
Solicitors for Cissna.

R. G. BROWN,
Solicitor for Muncie Pulp Company.

Agreement.

Filed July 23rd, 1904.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

In this cause it is agreed that the State of Tennessee may file more than one replication to the plea in *the* abatement of W. A. Cissna, without applying to the Court for leave to do so. This agreement is made in order to save delay, and on hearing of the cause the same rights are reserved to the defendant which it would have to object to the ruling of said plea if application was made to the Court in due form.

CARUTHERS EWING,
Attorney for W. A. Cissna.

Plea in Abatement of the Muncie Pulp Co.

Filed Jan. 15, 1905.

559 In the Chancery Court of Tipton County, Tennessee.

#—, R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP Co. et als.

Plea in Abatement of Muncie Pulp Co.

Comes the Muncie Pulp Co., a non-resident corporation by its counsel of record, R. G. Brown, and for plea to bill of complainant against it, says:—

1. That the tract of land described in the bill with the exception of a very small and insignificant portion thereof, lying in the north-west corner of said tract, is not in Tipton County, nor in the State of Tennessee; but that all of said tract with the exception of said north-west corner, lies in the State of Arkansas, being accretions to Deans Island, lying in Mississippi and Crittenden Counties, State of Arkansas. This derendant makes no claim and had never made any claim to said north-west corner of said tract, nor to any lying within the territorial limits of the State of Tennessee; nor has it ever asserted, or claimed any right, title or interest in or to any land in Tennessee, and now expressly disclaims ownership right, title or interest in any lands lying within the territorial limits of

the State of Tennessee. This defendant therefore avers that this Court has no jurisdiction over the subject matter of this suit, and pleads said want of jurisdiction in abatement of the action.

R. G. BROWN,
Sol. for Muncie Pulp Company.

R. G. Brown as agent and attorney for the Muncie Pulp Co., a non-resident corporation makes oath that the foregoing plea is true in substance and in fact.

Sworn to and subscribed before me this 2d day of March 1904.

C. D. MOORE,
Notary Public.

560 2. And for further plea this defendant says:—That at the time this suit was commenced, to-wit on the 15th day of December 1903, and at the date of the filing of this plea, this defendant had not gone upon any land lying within the territorial limits of the State of Tennessee, or in Tipton County in said State nor cut any timber from any lands lying within the boundaries of the State of Tennessee, but that all the timber which this defendant had cut at the date of the filing of the bill in this cause, and at the date of the filing of this plea, was cut off of land lying and being within the boundaries of the State of Arkansas.

This defendant avers that this court has no jurisdiction over this branch of the litigation, and pleads said want of jurisdiction in abatement of the action.

R. G. BROWN,
Sol. for Muncie Pulp Co.

R. G. Brown, as agent and attorney for the Muncie Pulp Co., a non-resident corporation makes oath that the foregoing plea is true in substance and in fact.

R. G. BROWN.

Sworn to and subscribed before me, this 2d day of March, 1904.

C. D. MOORE,
Notary Public.

Agreement.

Filed Jan. 16, 1905.

In the Chancery Court of Tipton County.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

In this cause it is agreed that the State of Tennessee may file more than one replication to the pleas in abatement of the
561 Muncie Pulp Company, without applying to the Court for leave to do so. This agreement is made in order to save

delay, and on the hearing of the cause the same rights are reserved to the defendant which it would have to object to the filing of said pleas, if application was made to the Court in due form.

MUNCIE PULP CO.
R. G. BROWN, *Attorney.*

Replication to Plea.
W. A. CISSNA..

Filed Jan. 16, 1905. F. B. Caldwell.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Replications of the Plea of W. A. Cissna.

Filed February 3d, 1904.

1.

The complainant, State of Tennessee, joins issue on the plea filed in this cause by W. A. Cissna on February 3rd, 1904.

CHAS. T. CATES, JR.,
Attorney-General;
CARROLL, McKELLAR,
BULLINGTON & BIGGS,
Solicitors.

II.

And now by leave of the Court for, further replication to the said plea, the complainant avers that *further replication to that* defendant ought not to be admitted to aver in his said plea that the land mentioned and described in the bill is not situated and does not lie in, the County of Tipton, in the State of Tennessee and that any part of the same lies in the State of Arkansas, and is not subject to the jurisdiction of this Court, but complainant avers
562 that it is a certain cause instituted by H. W. Stockley against the defendant W. A. Cissna, in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, on the 13th of May, 1901, wherein the said H. W. Stockley, a citizen and resident of Tipton County, Tennessee, sued the defendant therein and here to-wit W. A. Cissna, to recover in ejectment one certain tract of land set out and described as follows, to-wit:—

"A certain tract of land lying and being in the eleventh civil district of Tipton County, in the State of Tennessee, and described by

metes and bounds as follows: Beginning at the northeast corner of Simon Huddleston's 2,000 acre tract, which said tract was granted to the said Huddleston by the State of Tennessee, by grant No. 21,206, issued on January 22nd, 1824, and which said tract of land*f* is situated and lies in the eleventh surveyor's district in range nine (9), sections five (5) and six (6) in Tipton County, Tennessee, and which northeast corner of said Huddleston's 2,000 acre tract, thence with the north line of said tract N. 41 thirty-five (35) chains; thence with said north line of said Huddleston said tract S. 82 W. thirty-four (34) chains; thence with said Huddleston's north line N. 71 W. fifteen and thirty-two hundredths (15.32) chains thence N. 8½ W. sixty-six (66) chains to the southeast corner of N. Potter's 640 acre tract, on Island thirty-seven; thence north fifty-five chains to the north-east corner of John Trigg's 100 acre grant on said island; thence east sixty-one (61) chains to the middle of the old main bed, or channel, of the Mississippi river as the same existed prior to the Centennial cutoff in 1876, but which old river is now dry land; thence with the said middle thread of the said old river bed or channel, S. 81 E. seventy-one (71) chains; thence along the middle thread of said old main bed or channel of said Mississippi river which is now dry land; S. 31 E. sixty-two (62) chains; thence S. 49 W. forty-two (42) chains to the beginning and also for other lands and in said cause the defendant W. A. Cissna, on the 24*rd* of July, 1901, filed a plea in abatement to the jurisdiction of said court,
563 averring in his said plea in abatement, that the said lands above described and the other lands sought to be recovered in said ejectment suit, were not situated in the Western Division of the Western District of Tennessee, and were not situated within the State of Tennessee, but are and were at the time of the commencement of said suit, situated and lying in the State of Arkansas, and on the said plea, the plaintiff joined issue by replication on the 24th of July 1901, and thereafter on the hearing of the said cause before the Honorable, the district Judge of the United States —, and before a jury the defendant *of* the 13th day of December, 1901, withdrew his said plea in abatement, and submitted to the jurisdiction of the Court in said cause, and thereby sol-m-ly admitted *the* (of) record that the said land sued for in said case was within the jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee and in the State of Tennessee.

Thereupon, he moved the court to direct a verdict in his favor upon the issues joined upon the plea in bar filed in said cause when it was considered by the Court that the plea in abatement be overruled and dismissed, and the court took, assumed and adjudged that it had jurisdiction of the said land in controversy in said cause and thereupon tried and determined the said suit upon the said plea, filed by the defendant W. A. Cissna, adjudging and deciding the same in his favor, the said order — in the folllowing words and figures to-wit:

UNITED STATES OF AMERICA,
Western Division of the Western
District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Court Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1901, at the United States Court House, in the City of Memphis, in said District, on
564 to-wit, the 13th day of December, A. D. 1901, in the following cause, to-wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

Came the parties by their attorneys and the jury of good and lawful men heretofore empaneled and sworn herein, to-wit: A. M. Applewhite, G. W. Ferguson, S. H. Thomas, J. M. Crawford, W. C. Davis, W. E. Rodd, S. Heiner, W. L. Lucas, J. H. Cole, J. M. Norment, J W. Hanna and W. S. Bledsoe, when the trial was resumed, and all the evidence having been heard, the defendant withdraws his plea in abatement, and admitting that a small part of the land sued on is situated in the State of Tennessee, and that this Court for that reason has jurisdiction of a part of the subject matter of this suit, and the said defendant having also moved the Court to direct a verdict in his favor, upon the issues joined upon plea in bar, it is by the Court adjudged and ordered that said plea in abatement be overruled and dismissed, and that the said motion of the defendant for the direction of a verdict in his favor be granted, and thereupon the jury aforesaid upon their oaths do say that they find for the defendant and it is considered by the court that the defendant go hence without day and recover of the plaintiff and C. A. Stockley the surety on his bond, the costs of this suit in this behalf expended and the same is accordingly entered. To the action of the Court in so directing a verdict for the defendant the plaintiff then and there excepted and asked that said exception be entered of record which is now ordered done by the court accordingly.

And subsequently the said cause was carried after assignments of error by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, the said cause in that court being No. 1088, when and wherein the said cause was heard, and on the 10th of November 1902, the said Circuit Court of Appeals in said cause,
565 adjudged that all of the lands in dispute in said cause, were on the east side of the middle line of the channel of the old Mississippi river and within the boundary of the State of Tennessee, and the defendant in said cause, W. A. Cissna, did not except nor object

to the judgment of the Circuit Court hereinbefore set out, nor to the judgment pronounced in the United States Circuit Court of Appeals on the 10th of November 1902.

Therefore, complainant avers that the said judgment pronounced in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, as aforesaid and in the United States Circuit Court of Appeals for the Sixth Circuit as aforesaid, are res adjudicata as to the defendant W. A. Cissna, because the land in controversy in this cause is embraced in the lands in controversy in the said cause of Stockley vs. Cissna.

3.

For further replication to the said plea, the complainant avers that the defendant ought not to be admitted to aver in his said plea that the land mentioned and described in the bill in this cause is not situated and does not lie in the County of Tipton and State of Tennessee, and that any part of the same lies in the State of Arkansas, and is not subject to the jurisdiction of this court for that reason, because in a certain cause instituted by H. W. Stockley against W. A. Cissna (the defendant herein) on the 13th day of December 1901, in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein the plaintiff in said cause, a citizen and resident of Tipton County, Tennessee, and within the jurisdiction of said court sued in ejectment to recover tracts of land set out and described in the pleadings in said cause, and which tracts embrace the land sued for in this cause, and other land, and which were averred to be within the State of Tennessee. And the said Cissna in said cause on the hearing thereof, in the court afore-
566 said, did on the 13th of December, 1901, submit to, and aver that the land in controversy in this cause, was within the jurisdiction of said court, and within the State of Tennessee, and did so for the purpose of having said cause tried and determined upon his plea in bar, and his motion for the direction of a verdict in his favor, which said motion was granted, and the plaintiff's suit was dismissed.

And thereafter the said cause was carried by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, being No 1088, when and where the said cause was heard upon assignment of errors by the plaintiff below, and in which the court defendant Cissna again maintained and asserted the jurisdiction of said court, and affirmed that the lands in controversy embraced the lands in dispute in this cause were on the east side of the middle line of the channel of the Mississippi River, and within the boundary of the State of Tennessee, and the said insistence of the defendant Cissna, was maintained, and it was held and declared in the said cause in the said United States Circuit Court of Appeals for the Sixth Circuit, on the 10th of November, 1902, that the said land in controversy in said cause, and the said lands in controversy in this cause, were and are in the State of Tennessee, and within the jurisdiction of this court,

Wherefore the complainant avers that on consideration of the

premises, and because of the position taken and assumed in said cause by the defendant W. A. Cissna, he is now estopped in this cause to assert that the land in controversy here is within the State of Arkansas, and not within the State of Tennessee.

CHAS. T. CATES, JR.,
Att'y-Gen.

CARROLL, McKELLAR,
BULLINGTON & BIGGS,
Solicitors.

Order Modifying Injuncture.

Entered March 19, 1904.

(Lost and mislaid and after diligent search and inquiry cannot be found. Clerk.) (See copies of bonds and orders annexed to stipulation of May 9, 1911.)

567 Motion to dismiss replication to plea in abatement.

Filed Aug. 12, 1914. T. Boyd.
Filed Jan'y 16, 1905. Caldwell.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Motion to Strike Replication from File.

Comes W. A. Cissna and moves the Court to strike the 2nd and 3rd paragraphs of the replication herein by the complainant on the 22nd day of July, 1904, from the files, because:

1.

Said replication is unknown to the forms of law and is not in accord with the practice of the Chancery Court.

2.

The State of Tennessee was not a party to the suit of H. W. Stockley vs. W. A. Cissna nor in the privity of estate with any of the parties to said case; that the matters determined and adjudged in said action were res inter alios acta not binding upon the complainant herein nor the benefit to it and constitutes no defense to the plea in abatement filed by said Cissna.

3.

The facts alleged in the second and third paragraphs

(1)

Filed and styled as a replication do not amount in law or equity to a replication, and by the first paragraph of said writing the complainant puts in issue the facts stated in the plea, and the second and third paragraphs of said alleged replication are immaterial.

(4)

And the said W. A. Cissna moves to strike out the entire
568 paper filed in a replication because the same is unknown to the practice of the Chancery Court of the State of Tennessee.

EWING & WILLIAMSON,
Solicitors for Cissna.

Replication to plea of Muncie Pulp Co.
Filed July 22, 1904. T. Boyd.
Filed Jan. 16, 1905. T. B. Caldwell.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Replication to the Pleas of the Muncie Pulp Company Filed on March 4th, 1904.

I.

The complainant, State of Tennessee, joins issue on the first and second plea.

CHAS. T. CATES, JR.,
Attorney-General.
CARROLL, McKELLAR,
BULLINGTON & BIGGS,
Solicitor for Compl't.

II.

For replication to the said plea, the complainant avers that the defendant ought not to be admitted to aver in his said plea that the land mentioned and described in the bill is not situated and does not lie in the County of Tipton, and in the State of Tennessee, and that any part of the same lies in the State of Arkansas, and is not subject to the jurisdiction of this court, because complainant avers that in a certain cause instituted by H. W. Stockley against
569 the defendant W. A. Cissna in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, on the 13th of May, 1901, wherein the said H. W. Stockley, a citizen and resident of Tipton County, Tennessee,

sued the defendant therein and here to-wit: W. A. Cissna, to recover in ejectment, one certain tract of land set out and described as follows, to-wit:

"A certain tract of land and being in the eleventh civil district of Tipton County, in this State of Tennessee, and described by metes and bounds as follows: Beginning at the northeast corner of Simon Huddleston's 2,000 acre tract, which said tract was granted to the said Huddleston by the State of Tennessee by grant No, 21,206, issued on January 22nd, 1884, and which said tract of land is situated and lies in the eleventh surveyor's district in range nine (9), sections five (5) and six (6) in Tipton County, Tennessee, and which northeast corner is seventy-eight (78) chains north of the southeast corner of said tract; and running from said north-east corner of said Huddleston's 2,000 acre tract, thence with the north line of said tract N. 41 W. thirty-five (35) chains thence with said north line of said Huddleston's said tract S. 82 W. thirty four (34) chains; thence with said Huddleston's north line N. 71 W. fifteen and thirty-two hundredths (15.32) chains; thence N. 8½ W. sixty-six (66) chains to the southeast corner of N. Potter's 640 acre tract on Island Thirty-seven; thence north fifty-five chains to the northeast corner of the John Trigg's 100 acre grant on said island; thence east sixty-one (61) chains to the middle of the old main bed, or channel, of the Mississippi river as the same existed prior to the Centennial cut-off in 1876, but which old river is now dry; thence with the said middle thread of the said old river bed or channel, S. 18 E. seventy-one chains thence along the middle thread of said old main bed or channel of said Mississippi River which is now dry land, S. 31 E. sixty-two (62) chains; thence S. 49 W. forty-two (42) chains to the beginning and also for other lands, and is -n said cause, the defendant, W. A. Cissna on

570 the 23d of July, 1901, filed a plea in abatement to the jurisdiction of said court, averring in his said plea in abatement that the said lands above described and the other lands sought to be recovered in said ejectment suit, where not situated in the Western Division of the Western District of Tennessee, and were not situated within the State of Tennessee, but were at the time of the commencement of said suit, situated and lying in the State of Arkansas, and in the said plea the plaintiff joined issue by replication, on the second of July, 1901.

And thereafter, on the hearing of said cause before the Hon. the District Judge of the United States, and before a jury the defendant on the 13th day of December, 1901, withdrew his said plea in abatement, and submitted to the jurisdiction of the Court in said cause, and thereby solemnly admitted of record that the said land sued for in said cause, was within the jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, and in the State of Tennessee.

Thereupon, he moved the court to direct a verdict in his favor upon the issues joined upon the plea in abatement filed in said cause, when it was considered by the Court that the plea in abatement be overruled and dismissed, and the court took, assumed and adjudged

that it had jurisdiction of the said land in controversy in said cause, and thereupon tried the said suit upon the said plea in bar, filed by the defendant W. A. Cissna adjudging and deciding the same in his favir the said order being in the following words and figures to-wit:

UNITED STATES OF AMERICA,
Division of the Western District of Tennessee:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November Term, A. D. 1901, at the United
571 State Court House in the City of Memphis, in said district on to-wit, the 13th day of December, A. D. 1901, in the following cause, to-wit:

No. 3601.

H. W. STOCKLEY, Plaintiff,
vs.
W. A. CISSNA, Defendant.

"Came the parties by their attorneys and the jury of good and lawful men heretofore empaneled and sworn herein to-wit, A. M. Applewhite, G. M. Ferguson, S. H. Thomas, J. M. Crawford, W. C. Davis, W. E. Todd, S. Heiner, W. T. Lucas, J. H. Cole, J. M. Norment, J. W. Hanna and W. S. Bledsoe, when the trial was resumed, and all the evidence having been heard, the defendant withdraws his plea in abatement, and admitting that a small part of the land sued on is situated in the State of Tennessee, and that this Court for that reason has jurisdiction of a part of the subject matter of this suit, and the said defendant having also moved the court to direct a verdict in his favor upon issues joined upon plea in abatement be overruled and dismissed, and that the said motion of the defendant for the direction of a verdict is his favor be granted, and thereupon the jury aforesaid upon their oaths do say that they find for the defendant and it is considered by the court that the defendant go hence without day and recover of the plaintiff and C. A. Stockley, the surety on his bond, the costs of this suit and this behalf expended and the same is accordingly entered.

The action of the Court in so directing a verdict for the defendant, the plaintiff then and there excepted and asked that said exception be entered of record which is now ordered done by the court accordingly."

And subsequently the said cause was carried after assignment of error, by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, the said cause in that court being No.
572 1088, when and wherein the said cause was heard, and on the 10th day of November, 1902, the said Circuit Court of Ap-

peals in said cause, adjudged that all of the lands in dispute in said cause, were on the east side of the middle line of the channel of the old Mississippi River, and within the boundary of the State of Tennessee, and the defendant in said cause, W. A. Cissna, did not except nor object to the judgment pronounced in the United States Circuit Court of Appeals on the 10th of November, 1902.

Therefore complainant avers that the said judgment pronounced in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, as aforesaid, and in the United States Circuit Court of Appeals for the Sixth Circuit as aforesaid, are res adjudicata as to the defendant Muncie Pulp Company, because the land in controversy in this cause is embraced in the lands in controversy in the said cause of Stockley vs. Cissna and the Muncie Pulp Company claims its right under and by virtue of a certain deed or conveyance from the defendant W. A. Cissna, and makes no other claim whatever to said real estate.

CHAS. T. CATES, JR.,
Attorney-Gen.
CARROLL, McKELLAR,
BULLINGTON & BIGGS,
Solicitors.

573 *Petition for Removal.*

Filed Jan'y 11, 1905. T. Boyd, C. & M.

Filed Jan'y 16, 1905. T. B. Caldwell, C. M.

THE STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY et al.

To the Honorable John S. Cooper, Chancellor, Presiding in said Court:

Your petitioners, the State of Tennessee, the Complainants in the above styled cause, the Muncie Pulp Company, Leo Oppenheimer, Receiver in Bankruptcy for the Muncie Pulp Company, and W. A. Cissna, the defendants in the above styled cause respectfully represent and show:

1. This cause involves a controversy as to a large body of land situated in what was formerly the bed of the Mississippi River, it being alleged and claimed by the State of Tennessee that it is the owner of the land described in the bill filed in this cause, holding the same in trust for all the citizens of the state, and that said land is not subj*ce* to grant by the State, reference being here made and had to the bill and its exhibits, for their full and exact contents. The said land is valuable, largely on account of the timber growing thereon, which timber and the land upon which it is grown, is claimed by the defendant, W. A. Cissna, and the Muncie Pulp Company, Leo Oppenheimer, Receiver in Bankruptcy, for the Muncie Pulp Company, who dispute the claims of the State of Tennessee to the ownership of said lands and timber, and claim the- own the same, and in their pleas filed in this cause, have averred the said

land is not in the State of Tennessee, but is within the State of Arkansas; reference being had to the pleadings in said cause for the full and exact contents of same.

2. When the bill was filed by the State of Tennessee, an
574 injunction was issued restraining the defendants from cutting timber on said land, and this injunction was first modified upon the execution, by The Muncie Pulp Company of a bond of Ten Thousand Dollars, on which bond the American Surety Company of New York was surety, and later the injunction was dissolved upon the execution of a bond for Fifteen Thousand Dollars, upon which bond the said American Surety Company became surety; said injunction, orders and bonds, being referred to for their exact contents and effect.

3. Since the execution of said bonds, a large amount of timber has been cut and removed from the lands in controversy, and the said timber is now being cut and removed by and under an agreement entered into and between the defendants, W. A. Cissna, The Muncie Pulp Company, and Leo Oppenheimer, Receiver *Receiver* in Bankruptcy for the Muncie Pulp Company, and since the execution of said bonds an involuntary petition in bankruptcy has been filed in the United States District Court for the Southern District of New York, against the said Muncie Pulp Company, and in said cause the said Leo Oppenheimer has been appointed and is now acting as Receiver of the said Muncie Pulp Company.

Besides the land involved in this controversy, the State of Tennessee claims ma-y thousands of acres of land which it claims are not subject to grant by the State, the said lands being in the old bed of the Mississippi River (abandoned by the Centennial cut-off) and on which land valuable timber is now situated, and which timber, in many instances, is now being cut by other parties. In this cause the boundary lines between the States of Arkansas and Tennessee will necessarily have to be adjudicated, and when that is done in this cause, the State will then know the exact boundary of the other lands which it claims, and steps may be taken to preserve and protect, for the benefit of all citizens of said State, the lands which belong to it.

575 Whereas, by reason, and in consideration of the facts hereinbefore set out, the importance of the decision of the bankruptcy proceedings now pending against the Puncie Pulp Company, it is desired by all parties that this cause may be determined as soon as possible; and

Whereas, the said cause is not now ready for trial, and it is thought by all parties that the same can be made ready for trial in time to appeal the case if desired, to the Supreme Court of Tennessee, at the April Term, 1905; and

Whereas, there is no regular term of this Court before the month of June, 1905—from which term it will be too late to pray and perfect an appeal to the Supreme Court of Tennessee, at Jackson, for the April Term, 1905, and consequently, this cause cannot be determined until the April Term, 1906, of the Supreme Court at Jackson, Tennessee,

Therefore, in consideration of the Premises, the petitioners herein unite in the request to Your Honor, under Sec. 4308 of the Code of Tennessee, to transfer this cause to the Chancery Court of Shelby County, Tennessee, to the end that this cause may be prepared for trial, and heard in said Court as aforesaid.

However, the petitioners, the Muncie Pulp Company, Leo Oppenheimer, Receiver in Bankruptcy of the Muncie Pulp Company and W. A. Cissna, by uniting in this petition, do not waive the plea to the jurisdiction of this Court, which they have filed in this cause, and the State of Tennessee by its counsel, hereby agreed and consents that the appearance herein of the said defendants, as petitioners, shall in no wise be held, or be construed to be a waiver of said plea in abatement, and that no advantage of the same shall be taken in any manner whatever, but that their appearance is limited to the purposes herein stated, and to none other; it being understood and agreed that said pleas to the jurisdiction and any amendment thereof may be prosecuted with the same effect as if the cause remained in said Tipton Chancery Court. The petitioners agree to be
576 bound by and abide the judgment of the Chancery Court of Shelby County, Tenn., or the judgment of the Supreme Court of Tennessee, on appeal therefrom, in the same manner, and to the same extent as though the said cause be heard and the decree pronounced in this court, and the transfer of this cause shall in no wise affect the liability of the American Surety Company on the aforesaid bonds.

It is further agreed that, in the event this cause is transferred to the Chancery Court of Shelby County, Tenn., that the final judgment passed in this cause may be entered of record in the Chancery Court of Tipton County, Tenn., by proper proceedings had therein, should it be desired by either party, the said party so desiring to pay the costs of the same. It is further agreed that a copy of the final judgment and decree may, when properly authenticated, be recorded in the Register's Office of Tipton County, Tennessee, as a muniment of title.

The American Surety Company of New York signs this petition for the purpose of signifying its consent to the prayer thereof. It agrees that all orders and judgments rendered in this cause in the Shelby Chancery Court shall have, as to it, the same, and no other, force and effect as if rendered in the Chancery Court of Tipton County, provided however that it shall have the same right to question or appeal therefrom and all other rights respecting same as is such orders and judgments were rendered in said Chancery Court of Tipton County.

AMERICAN SURETY COMPANY OF NEW YORK,
By THOMAS W. BULLITT, *Att'y.*
STATE OF TENNESSEE,
By CARROLL, McKELLAR, BULLINGTON & BIGGS, *Sols.*
R. G. BROWN,
Sol. for Muncie Pulp Co. and Leo Oppenheimer, Receiver.

(Statements as to cutting timber, etc. not to alter written contract under and by which the same is being cut. The statements above not being full and accurate.

W. A. CISSNA,
By EWING & WILLIAMSON, *Att'ys.*

577 *Petition.*

Filed Jan. 11, 1905. T. Boyd, Com.

Filed Jan. 16, 1905. T. B. Caldwell, C. M.

STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY et al.

Before the Honorable John S. Cooper, Chancellor, at Chambers.

The undersigned agree and request Your Honor to act, upon the attached petition, at Chambers, believing that an order made herein, at Chambers, is such a one as is authorized under Chapter 248 of the Acts of 1903, and they consent for the said order of removal to be made at Chambers, and further consent for the same to be acted upon immediately upon the receipt of these papers.

Dec. 17th, 1904.

STATE OF TENNESSEE.
CAROLL, McKELLAR, BULLINGTON & BIGGS.
MUNCIE PULP COMPANY AND LEO OPPENHEIMER, *Recv.,*
By R. G. BROWN, *Sol.*
W. A. CISSNA,
By EWING & WILLIAMSON, *Att'ys.*

578 *Transcript from Tipton County.*

Filed January 16, 1905. T. B. Caldwell, C. M.

Be it remembered that at a regular term of the Chancery Court of Tipton County, Tennessee, begun and held in the court house at Covington, Tenn., on the first Monday in June, 1904, it being the 6th day of June and the regular time fixed by law for opening and holding said Court:

Present: T. Boyd, Clerk & Master, and J. L. Johnson, Sheriff of Tipton County, and no Chancellor appearing by 4 o'clock P. M., the Court is adjourned until tomorrow morning at 8:30 o'clock.

T. BOYD, *C. & M.*

TUESDAY MORNING, June 7, 1904.

Court met pursuant to adjournment, Hon. John S. Cooper, Chancellor, presiding, present also T. Boyd, C. & M., and J. L. Johnson, Sheriff of Tipton County, when the following proceedings were had and entered of record, to-wit:

WEDNESDAY MORNING, June 8th, 1904.

Court met pursuant to adjournment, Hon. John S. Cooper, Chancellor, presiding, Present also T. Boyd, C. & M., and J. L. Johnson, Sheriff, when the following proceedings were had and entered of -ecord to-wit:

#50.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

This cause is continued on account of the absence of solicitors for both parties.

And at the December Term, 1904, of said Chancery Court of Tipton County, the following order was entered in said cause on Thursday, December 8th.

579 #43.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

This cause is continued by consent.

And on the 11th day of January, 1905, the following order was received from Chancellor Jno. S. Cooper, sitting in Chambers at Trenton, Tenn., and duly recorded in Minute Book *j*, page 484 of said court:

Orders at Chambers.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Pending in the Chancery Court at Covington.

Be it remembered that this cause came on to be heard before me at Chambers at Trenton, on the 9th day of Jan'y, 1905, upon the petition and motion of the parties to this suit to have the suit transferred from the chancery court at Covington to the Chancery Court

of Shelby County at Memphis. And it appearing that all of the parties to this suit consent to such transfer and desire that it be made, and that the American Surety Company also agrees and consents to such transfer, said company being surety upon certain bonds executed upon the injunction herein being modified and being dissolved; and all of the parties to the suit asking that said transfer be made, and that an order to this end be made by me at Chambers, at this time. It is therefore ordered and decreed that said suit and cause be transferred from the Chancery Court of Tipton County at Covington to the Chancery Court of Shelby County at Memphis, and that the Clerk & Master of the Chancery Court at Covington transmit the original file of papers in the cause to the Clerk & Master of said Chancery Court at Memphis, together with a certified copy of all orders and decrees that may have been entered in the cause
580 upon the minutes of the court and upon the rule docket or order book, and a statement of the bill of costs accrued in the cause in the Chancery Court at Covington.

The C. & M. will file the petition for such transfer, which petition is sent to him with this order, and which will then become a part of the record.

The said record &c. in the cause may be delivered in person or sent by express by the C. & M. at Covington to the C. & M. of said court at Memphis.

The Clerk & Master of the Chancery Court at Covington will enter this order upon the minute book of his court, as provided by the acts of 1903, ch. 248 of said acts under an appropriate heading as provided by said Act.

Done at Chambers at Trenton on the date above written.

JNO. S. COOPER,

Chancellor of the 9th Chancery Division of Tennessee.

Received by registered mail at 9:30 o'clock A. M. January 11, 1905.

T. BOYD, *T. & M.*

Rules from the Rule Docket.

(Rule Docket F, Page 18.)

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Bill filed December 5, 1903.

Sworn to.

Fiat of Judge F. H. Heiskell received by mail Dec. 15, 1903.

Copy of bill and subpœna to answer issued to Sheriff at Shelby County for Muncie Pulp Company and W. A. Cissna, Dec. 15, 1903.

Injunction issued Dec. 15, 1903.

581 Exhibit A to bill filed with bill Dec. 15, 1903.

Copy of bill and subpœna to answer issued for Vince Beard to Shff. of Tipton County, Dec. 17, 1903.

Injunction issued to Vince Beard Dec. 17, 1903.
Telephone message to Compl'ts att'ys (25 cts.) paid by C. & M., Dec. 17, 1903.
Injunction and subpœna to answer for Vince Beard returned "not found" Dec. 30, 1903, T. F. Kinton, D. S.
Plea in abatement by W. A. Cissna filed Feb. 3, 1904.
Notice give-.
Exhibits A, B, C & D to same filed Feb. 13, 1904. Notice given.
Forthcoming bond of Muncie Pulp Company filed Feb. 6, 1904.
American Bonding Co. security on forthcoming bond.
Copy order of Judge F. H. Heiskell, by interchange with Judge Jno. S. Cooper, allowing said bond to be made, received by mail and filed Feb. 12, 1904. Order dated Jan'y 6th, 1904.
Copy of above order and bond made for compl'ts solicitors Feb. 26, 1904. Fee $1.25.
Plea in abatement of Muncie Pulp Company filed M'ch 4, 1904. Notice given.
Forthcoming bond of Muncie Pulp Company for $15,000.00 with American Bonding Co. as surety received and filed M'ch 18, 1904.
Order of Judge F. H. Heis-ell, sitting by interchange with Judge Cooper, allowing said bond, filed M'ch 19, 1904.
June 1904. Continued on account of the absence of solicitors of both parties.
Replication to plea of Muncie Pulp Co., filed July 22, 1904.
Notice given.
Replication to plea of W. A. Cissna, filed July 22, 1904.
Notice given.
2 agreements filed July 23, 1904.
Motion to strike replication to plea in abatement W. A. Cissna filed Aug. 12, 1904. Notice given.
Agreement of counsel filed Dec. 8, 1904.
582 Dec. 1904, Continued by consent.
Petition to transfer to Chancery Court at Memphis filed January 11, 1904.
Petition to hear petition for transfer to Memphis filed Jan. 11, 1904.
Order for removal of cause to Chancery Court at Memphis received from Chancellor Jno. S. Cooper, Jan. 11, 1905 and filed.
Entire record from minutes, with rules and cost bill copies Jan'y 13 1905.
Entire record submitted by express to C. & M., of Memphis, Jan'y 14, 1905.

583 *Cost Bill.*

C. & M. filing bill and exhibit	.50
2 copies of bill and 2 subpœnas to answer	8.50
Issuing two injunctions	2.00
Filing 2 pleas in abatement and notices	1.00
Filing 4 exhibits to pleas in abatement	1.00

Filing 2 forthcoming bonds	.50
Filing 3 agreements	.75
Filing 2 petitions	.50
Entering security of record on 2 bonds	.50
3 judicial orders from Judge Heiskell	.75
Copy of bond and order and telephone message to complainant's attorneys	1.50
Docket and 2 continuances	1.10
Filing 2 replications and notices	1.00
Motion to dismiss replication and notice	.50
Order for removal	.25
Entering orders and decrees on minutes	.50
Costs bill and 29 rules	3.40
Copy of record and court seal	2.50
D. S., T. F. Kinton returning one subpœna to answer and one injunction not found	.50
	$27.20

I, T. Boyd, Clerk & Master of the Chancery Court at Covington, Tenn., do certify that the above and foregoing is a true and perfect copy of all the orders and decreed on the minute books, and of all the rules on the rule docket and the full amount of costs remaining in my office in the cause of the State of Tennessee vs. Muncie Pulp Company, et al.

Given under my hand and seal of office this January 14, 1905.

[SEAL.] T. BOYD, *C. & M.*

584 In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

The Deposition of Charles Le Vasseur, Taken by Consent and Agreement of R. G. Brown, Esq., and Thos. W. Bullitt, Esq., Solicitors for the Muncie Pulp Company and Oppenheimer, Receiver; Caruthers Ewing, Esq., Solicitor for W. A. Cissna; and Albert W. Biggs, Esq., Solicitor for the State of Tennessee, at the Office of Carroll, McKellar, Bullington & Biggs, on Saturday, Jan. 14th, 1905, to Be Read as Evidence on Behalf of the State of Tennessee in the Above Styled Cause, Caption, and Certificate, and All Formalities of Notice, etc., Waived.

Filed March 29, 1905.

Said witness being duly sworn, deposed as follows:

Q. 1. What is your name, and where do you reside?
A. Chas. Le Vasseur, Memphis, Tenn.
Q. 2. How long have you lived in the United States of America?

A. Since 1890.

Q. 3. Where were you born, and where educated?

A. I was born at Paris, France, educated in the University of Paris, where I took the degree of Bachelor of Arts and Bachelor of Science, and admitted to the French Military School Ecole Polytechnique, where I graduated First Lieutenant of Engineers in 1878.

Q. 4. How long did you serve in the Engineering Corps in the French Army?

A. From 1878 to 1886.

Q. 5. In what capacity did you serve?

A. As first Lieutenant of Engineers in charge of Forts and Fortifications.

585 Q. 6. What became of your business after 1886, when you resigned from the French Army?

A. I did not resign from the French Army in 1886.

Q. 7. When did you resign from the French Army?

A. In 1894, when I was already in the United States. I was compelled to resign by the passing of the Civil Service Law.

Q. 8. From 1886, how were you occupied, and where were you located?

A. I was on a furlough from 1886 to the time I resigned, authorized by the Minister of War of the French Army, and served as Chief Division Engineer of the Panama Canal from 1886 to 1889.

Q. 9. How are you now employed, Captain? In what service?

A. In the United States Corps of Engineers under the Mississippi River Commission.

Q. 10. Where are you located, and in what district?

A. I am located in Memphis, as headquarters, and what is called the First and Second District-, Mississippi River Commission extending from Cairo, Ill., to the mouth of White River.

Q. 11. How long have you been in the Districts extending from Cairo, Ill., to the mouth of White River?

A. Since 1892.

Q. 12. Are you familiar with the Mississippi River from Cairo, Ill., to the mouth of White River?

A. I am.

Q. 13. How have you acquired that familiarity with the river, which you say you have?

A. I have been in charge of the surveys, examination and compilation of scientific data from Cairo to White River. In the performance of my duties. I am obliged to cover on foot, for instrumental observations, both banks of the Mississippi River from Cairo to White River. I have also, in the performance of my duties, located all the levee lines in existence from Cairo to White River, together with the channel improvements.

586 Q. 14. Capt. Le Vasseur is that portion of the Mississippi River between Pecan Point on the Arkansas shore and Brandywine Island, embraced in the district which you have mentioned?

A. It is.

Q. 15. Are you acquainted with the present location of Dean's

Island, what is known as Centennial Island, 37, Brandywine Island and the territory which lies between the point which I have mentioned?

A. I am.

Q. 16. Before going any further with your personal experience and observation, I ask you to state in whose custody,—what Commission,—are the maps and surveys which have from time ti time been made under the direction of the United States Army, and of the Mississippi River Commission between Cairo and White River?

A. In the custody of the Mississippi River Commission.

Q. 17. Are those maps, or copies of the same in your possession, as one of the Engineers employed by the Mississippi River Commission?

A. Yes sir.

Q. 18. Do you know when the Mississippi River Commission was established?

A. In 1879.

Q. 19. Prior to the establishment of the Mississippi River Commission, under what Department of the Government was the Mississippi River?

A. United States War Department.

Q. 20. Under what department is it now?

A. War Department. The same.

Q. 21. Prior to the establishment of the Mississippi River Commission, as I understand you then, the maps and surveys of the Mississippi River were made by the Chief Engineer of the U. S. Army?

A. Made under the direction of the Chief Engineer of
587 the U. S. Army, by some special officer detailed for the purpose.

Q. When was the first survey and map, which you have in your possession, of the Mississippi River, between the points you have mentioned, made?

A. By Humphrey and Abbott in 185- before the Civil War.

Q. 23. Was there a map of this section made in 1821 or 1823?

A. Yes, sir, but not by the War Department.

Q. 24. Do you know by whom that map was made?

A. By the Land Office of the U. S. Government.

Q. 25. Can you, and will you, furnish a copy of the map of 1823, made by the U. S. Land Office, and mark it as Exhibit No. 1 to your deposition?

A. I do.

Q. 26. Have you a copy of the map made under the direction of the War Department in 1850?

A. I have a copy of the report of Humphrey & Abbott, but I cannot file them.

Q. 23. You say you cannot file the map of 1850. Why is that?

A. That map was not, or is not, published separatelt, and the volume or reports of Generals Humphrey & Abbott, is out of print?

Q. 28. Can you make a copy of that map and file it?

A. I can have a copy of that map made.

Q. 29. And will you make it Exhibit 2 to your deposition?

A. I will.

Q. 30. When was the next survey and map made, under the direction of the War Department of this territory?

A. In 1874.

Q. 31. By whom was the map made?

A. Col. Chas. Suter, then Captain of Engineers U. S. A.

Q. 32. Was that map printed by the U. S. Government?

A. Yes sir.

Q. 33. Have you one of the printed copies of that map, and if not; can one be obtained?

588 A. There is a printed copy of the map of Chas. Suter in the U. S. Office in this town; but these maps are out of print, and can not be obtained.

Q. 34. Have you had prepared under your direction, a copy of that map, upon a larger scale than the one made by the U. S. Government?

A. I have.

Q. 35. Will you file that map as Exhibit No. 3 to your deposition?

A. I do.

Q. 36. On the map which you have filed as Exhibit No. 3, if there appear any words, lines or figures which did not appear upon the map of Col. Chas. Suter, will you please so state, and explain the lines and figures that appear upon this map, and also explain — what sources you obtained them?

A. The meridian lines, the red lines, the words "Centennial Island," "Centennial Cut-off," the dotted lines representing sand bar after Cut-off, the title in the upper left hand corner of the map, the legend in the upper right hand corner, are not on Col. Suter's map. The legent is the same that appears on the first chart of Col. Suter's map of this entire division.

Q. 37. After the map made by Cap. Chas. Suter, when was the next map made by the U. S. Government, under the direction of the Mississippi River Commission?

A. 1879 and 1880.

Q. 38. Is the map of 1879 and 80 out of print?

A. Yes sir.

Q. 39. Have you made a copy of that map?

A. Yes sir.

Q. 40. Will you please file it as Exhibit No. 4 to your deposition?

A. I will. It is on the same scale as Exhibit No. 3.

Q. 41. Please examine map Exhibit No. 4 and state whether any lines, words or figures appear upon that map which do not appear upon the original, and state what they are?

A. The title on the upper left hand corner does not appear.

589 Q. 42. When was the next map made under the direction of the Mississippi River Commission of this territory?

A. In 1883 and 1884, map of Mississippi River Commission being Chart No. 18 and 19.

Q. 43. Will you file these charts 18 and 19 as printed by the River Commission, as Exhibits Nos. 4 and 5 to your deposition?

A. I do.

Q. 44. I direct your attention to charts 18 and 19 filed as Exhibits 5 and 6 with your deposition,—In the bed of the river, columns of figures appear, Please explain what these figures represent.

A. The figures represent the depth of the river at the time of the survey.

Q. 46. I also call your attention to certain contour lines which appear on the map, and especially to those which appear along and adjacent to Dean's Island. They are marked, some of them 220, others 230 and others 235, etc. Now will you explain what these contour lines represent?

A. They are the elevation above the zero of Memphis gauge or above what we call the Memphis datum.

Q. 47. What was the Memphis datum at that time?

A. 190.84.

Q. 48. You say the Memphis datum is 190.84 feet. Does that mean that where 235 appears, it is 235 feet above 190.84 feet or that the elevation marked 235, is as much higher than the elevation at Memphis as is the difference between 190.84 and the figures given on the contout lines?

A. Memphis datum 190.84 is elevation, referring to the mense gauge at Biloxi on the Gulf. In other words, the zero of the Memphis gauge is 190.84 feet above Gulf level. The figures on maps 18 and 19 are the elevation 200 or 230, or whatever it is marked, above the Gulf.

Q. 49. When was the next map of which you have any
590 knowledge, printed by the Mississippi River Commission?

A. In 1891.

Q. 50. Will you file one of said maps as Exhibit No. 7 to your deposition?

A. I do.

Q. 51. Does that map represent the river and bank in 1891?

A. No sir.

Q. 52. From what surveys was the map printed?

A. Parts of 1878 and 1879.

Q. 53. This map is not a map similar to chart 18 and 19 which shows all the river depths and contout elevations?

A. This map, published in 1891, was for the general purpose of people connected with the river, such as pilots and others, and the bank lines of the river are taken from surveys made from 1878 up to 1890. It does not intend to represent accurately the bank lines in 1891, but was simply designated to guide those persons who wanted to know the deep channel of the river. A general information map. The purpose of the map was to show the deed water channel of the river and the landings for the use of pilots.

Q. 54. Have you recently made, or had made, under your direction, a map of the Mississippi River, and the surrounding territory from Pecan Point to Brandywine Island, and if so, when did you have the surveys made and the map made?

A. I had a map showing the bank line between 1884 and 1904. I had a survey made under my direction, of this territory from Pecan Point to Fogelman's Chute, in 1904, October, November and

December. In addition to that, I had a survey made of the same territory, showing the bank line January 6th to 13th, 1905. The party occupies on this last survey, just returned yesterday, evening, and the map will not be printed before the 16th evening.

Q. 55. Will you file as Exhibit No. 8 to your deposition, the map which you have prepared, showing the conditions from 1884 to 1904?

591 A. I do.

Q. 56. In making this map which you file as Exhibit No. 8 to your deposition, and from which you show the conditions existing from 1884 to 1904, what besides the survey made in October and November of 1904, is the authority upon which you base this map?

A. The original triangulation surveys made by the Engineering Corps, U. S. A., under the Mississippi River Commission, of which records and notes are in the office, and maps projected on the District Office book.

Q. 57. If I understand you correctly, Cap. Le Vasseur, you were personally on the ground when this survey of October and November 1904 was made?

A. I was.

Q. 58. Have you prepared a map showing the Mississippi River from Pecan Point to Brandywine Island, giving the conditions of the river at various times from 1823 to 1847?

A. I did.

Q. 59. Will you file that map and mark it Exhibit No. 9 to your deposition?

A. I do.

Q. 60. From what source did you get the information from which to project this map?

A. 1823 from the U. S. Land Office records, 1874, from Cap. Chas. Suter's maps and notes.

Q. 61. Have you also prepared a map of the Mississippi River from Pecan Point to Brandywine Island, showing the existing conditions from 1874 to 1878?

A. I did.

Q. 62. Will you file that map as Exhibit No. 10 to your deposition?

A. I do.

592 Q. 63. State the authorities from which you derived the information for the making of this map Exhibit No. 10?

A. 1874, Capt. Suter's map; 1878 survey done by the U. S. Engineers, Mississippi River Commission.

Q. 64. Do you know at what period of the year of 1874 the reconnoissance was made by Capt. Chas. Suter?

A. In the fall of 1874.

Q. 65. Are maps Exhibits 8, 9, and 10 made on the same scale?

A. They are.

Q. 66. I ask you to state what change had taken place on the Tennessee bank, opposite the west of Dean's Island, and on the bank of Island 37 between the years 1823 and 1847?

A. Tennessee bank line opposite and west of Dean's Island had

receded from 1823 bank a distance of about 2,300 feet southwest. Island 36 disappeared on the down stream point. The towhead of Dean's Island was formed and a flat sand bar extending from the southeast corner of original Dean's Island towards the river had also been formed.

Q. 67. What change had taken place along the east bank of Island 37?

A. Between 1823 and 1874 the chute of Island 37, or what is called McKenzie Chute, has been changed as to its direction. The result of the cutting off of the Tennessee main bank west and opposite Dean's Island, forced along the original McKenzie chute bank in 1823, the deposit which up to 1874 created a point, forced the current of said chute north. The changes also brought changes on Island 37 east bank. The east bank of 37 caved in to a distance of maximum 1,500 feet and the flow of the river went through the newly made 37 chute, old river east and north of 37 having been gradually filling up by deposit.

Q. 68. Does your map show the deposit made north of Island 37 and east of it, and is it a line which is dotted with ink and shaded with brown on Exhibit No. 9?

593 A. It is.

Q. 69. You show on your map, and you say there was formed to the south and west of Dean's Island, a tow-head? Where on your map does that tow-head appear? Give between what parallels of latitude and longitude?

A. The head of the tow head commenced about 2,200 feet east of 90 degrees 2 minutes, extending west 2,000 feet beyond 90 degrees and 3 minutes, and situated between 35 degrees 25 minutes and 35 degrees and 26 minutes of latitude.

Q. 70. You speak of the sand bar which had formed also to the south and west of Dean's Island. Have you marked this sand bar so as to show how much of it was a barren sand bar, not covered by vegetation?

A. I did.

Q. 71. Of what date did you so mark this sand bar?

A. In 1874.

Q. 72. At the time of the survey of Capt. Chas. Suter?

A. Yes sir.

Q. 73. How is that sand bar bounded?

A. By a dotted line backed by a brown streak.

Q. 74. How have you marked the line which separates the barren said bar from that part of the bar which was covered by the small growth of willows?

A. By a black line backed by a brown streak, over which is written "line of willows subject to inundation."

Q. 75. How have you designated that part of the bar which was covered with heavier timber?

A. By a black line, also backed by a brown color, over which the regular topographical sign is shown.

Q. 76. What is that regular topographical sign?

A. The sign of trees.

Q. 77. Then the little flourishes represents the heavy timbers on this map?

A. They do.

594 Q. 78. And the black line backed by brown immediately adjoining that, marks the line of the heavy timber?

A. It does.

Q. 79. What words have you written within the territory or area so covered by willows and heavy timber?

A. "Willows" and "Heavy timber."

Q. 80. Now this tow head which you speak of as being south of Dean's Island. What was it covered with?

A. Willows, subject to inundation.

Q. 81. In giving the answers to the foregoing question, as to the *grough* of timber upon this bar, to refer to what date?

A. Map of Col. Chas. Suter, 1874.

Q. 82. According to that map in anything under a medium stage of the river, what part or parts, if any, of this sand bar would be covered with water?

A. In a medium stage of the river, all the sand bar and part of the territory covered with willows subject to inundation, would be covered by the water.

Q. 83. At high water, and I do not mean overflow stage, what part would be covered with water?

A. If you understand by high water, bankful stage——

Q. 84. That is what I mean,—at bank full stage, what part of it will be covered by water?

A. All the said bar accretions the willow accretions to the original line of 1823 of Dean's Island.

Q. 85. You mean by your last answer, this was the condition in 1874?

A. I do.

Q. 86. Was any of that bar suitable for cultivation for agricultural purposes?

A. It was not.

Q. 87. Capt. Le Vassuer, around what was known as Devil's Elbow, and at the head of Brandywine Island, what change had taken place in the Mississippi river from the time the map of 1823 was made until the map was made by Capt. Chas. Suter in 1874?

595 A. The point of what was called Abel's Point, which is the extreme south end of Devil's Elbow, increased southward. The river changed its course on the head of Brandywine Island, and the Tennessee bank receded between 1823 and 1874 over 7000 feet northward, leaving between the two banks of the old river a space of about 4500 feet at the point that I will mark A, followed by the figures 4500, on the map.

Q. 88. According to this map, as I understand you, at bank full of water, the old boundaries around the south and west of Dean's Island were the boundaries in 1874? Is that correct?

A. It was and has been so until 1897.

Q. 89. Now Capt. LeVasseur, according to this map, in 1874 what was the distance between the Tennessee Bank and the Dean's

Island bank or Arkansas shore at the apex of the bend south of Dean's Island?

A. Along 90 degrees 2 minutes about 7500 feet.

Q. 90. Then as I understand you the river at that point was about 7500 feet wide?

A. Yes sir.

Q. 91. I ask you whether or not there was any report made of the width of the river at that place in 1874, and if so, will you give the book, volume and page where the same can be found?

A. The record of the width of the river from 1821 to 1874 showing the comparative width of the bend of the river will be found in the report of the Chief Engineer U. S. A. appendix w., page 848 et seq. in volume 2 part of the Message and Documents of the War Department 187801879, published by the authority of the U. S. Government, and being communicated to the two Houses of Congress.

Q. 92. Will you please refer from page 848 and read from said book, the width of said river as given in said report at the apex of the bend, Dean's Island in 1874?

A. According to this report, the width of the Mississippi river at the apex of Dean's Island in 1874 was 7600 feet.

596 Q. 93. What was the width at that place in 1821 according to said report?

A. 5,000 feet.

Q. 94. What is the measurement which you have just given as being along the meridianal line of 90 degrees and 2 minutes at the apex of the bend of Dean's Island, and is it taken at the same place as the measurement given in the report of the Chief Engineer U. S. A., from which you have just read?

A. The measurement just given on bend 90 degrees 2 minutes is that I consider the apex of the bend and my measurement on the map seems to check with the measurement indicated in the report quoted above.

Q. 95. Referring again to the tow-head south of Dean's Island, I will ask you what, in 1874, according to the map of Capt. Chas. Suter, separated this tow-head from the sand bar covered with willows, subject to inundation, which adjoined Dean's Island?

A. A pond of water.

Q. 96. Which in your judgment, was formed first—the tow-head *of* the sand bar connecting the tow-head with Dean's Island?

A. The tow-head, of course.

Q. 97. Why of course?

A. Because the sand bar, as formed first, formed south face of the tow-head, the tow-head being separated prior to 1874 by the chute which remains as shown by Capt. Chas. Suter's survey, in the pond north of the tow-head. Gradually the sand bar south of the tow-head having increased, filled up said chute and joined the main bank of Dean's Island and making a small sand bar which may have formed south of this Island along the chute which was at the time running between the tow-head and Dean's Island.

Q. 98. Is there any map extant, made by the War Department,

showing the exact condition of the Mississippi River after the map of Capt. Chas. Suter, and before the Centennial cut-off?

A. No sir.

597 Q. 99. In Exhibit No. 10, which you have filed to your deposition, you show the Centennial Cut-off do you?

A. I do.

Q. 100. From what source did you get your information for making this map Exhibit No. 10?

A. The 1874 line as previously stated, was taken from the notes and maps of Capt. Suter's survey. The blue line, or 1878 line, was taken from the triangulation survey and notes made by the U. S. Engineering Corps, U. S. Army, and of which, the original- are among the records of the Mississippi River Commission.

Q. 101. After the cut-off, the maon body of water and the main channel of the water, went through what place?

A. Whent through the cut-off.

Q. 102. What has become of the river around Island 37?

A. The river around Island 37, previous to 1874, had undergone a process of drilling. Precious to the cut-off, the main body of the flow of the river was through McKenzie Chute.

Q. 103. After the cut-off, was this work of filling accelerated or retarded?

A. After the cut-off, the work of filling was accelerated, not only in the old river proper, but also in Island 37 Chute, or McKenzie Chute.

Q. 104. What effect did the cut-off have in so far as the sand bar which you have previously spoken of as being south and west of Dean's Island, was concerned?

A. The main body of the river having abandoned its flow through McKenzie Chute, and running through the Centennial cut-off all the water which passes through the McKenzie chute only passed with a very slow velocity, and the deposit or sediment contained in this water, increased the extension of the sand bar south of the tow-head — Dean's Island, in 1874.

Q. 105. Have you marked the extent of this sand bar, as it was in 1878 or 1879, at the time of the triangulation survey?

A. I did. It is marked by the dotted black line, backed by a blue streak.

598 Q. 106. Now at this time, 1878 or 1879, to what place had the Arkansas or Dean's Island bank line extended, if it had extended at all?

A. I don't understand your question.

Q. 107. Well, after the cut-off, had the willows and heavy timber which had been growing on this sand bar, extended further west and south?

A. It did.

Q. 108. Have you a line run around Dean's Island, showing the line of the willows and heavy timber at that time?

A. I have.

Q. 109. I mean in 1878 and '9?

A. Yes.

Q. 110. How is that line marked?

A. Black line, backed by blue color.

Q. 111. And west and south of this line, willows were growing were they, at that time, 1878 and '9?

A. Yes, bunches of willows, like it happens on all sand bars.

Q. 112. Have you made a small map showing the section lines upon Dean's Island, and showing the original sectional lines as surveyed by the United States land office in 1823?

A. I did.

Q. 113. If you should take a common corner between sections 4 and 5, 32 and run a line 98 chains west from that point, along the township line, about what would you reach?

A. The line of the growth of willows and heavy timber in 1878.

Q. 114. Was that, in your judgment, the bank line in 1876 or subsequent thereto?

A. No.

Q. 115. Why not?

A. Because that line of willows was not marked as the bluff bank at that time, the sand bar or accretion from the original 1823 Dean's Island, sloping easily towards the river. If you take a map
599 of the Mississippi River, showing topography and hydrology of 1882 and 1884, being chart 18, you will see that on the territory in question, that is 98 chains from the common corner, contour lines above the Memphis datum are very far apart, and indicated that a difference of five feet lower than the adjacent country was existing 98 chains from said point in 1883 and 1884.

Q. 117. What difference in topography do the contour lines represent? In other words, how much rise or fall must there be in the ground for each contour line?

A. Five feet.

Q. 118. Will you please file as Exhibit No. 11 to your deposition a map on which the section lines are shown?

A. I will do so.

Q. 119. I ask you if the map Exhibit No. 11, is upon the same scale as Chart No. 18?

A. Yes sir.

Q. 120. Will you please mark on chart 18 about the common corner between sections 4 and 5, 32 and 33 and letter it "B"?

A. I do.

Q. 121. Will you indicate on this map, chart 18, about the place which would be 98 chains west from point "B," and mark it "C"?

A. I do so, as requested.

Mr. Biggs: I asked this question at the request of Col. Bullitt.

Q. 122. From the point marked "C" to the extreme edge of the sand bar going west, according to the map of 1884, what was the difference in the elevation of the land?

A. Five feet in 4000 feet.

Q. 123. And from the point "B" to the point "C," there was what difference in the elevation of the land according to the map of 1883 and 1884?

A. It was nearly level. Just as nearly level as it can be.

Q. 124. Was there, at the place marked "C" in 1883 and 1884, at the time this map was made, a difference in the elevation of the land east of a line drawn from that point, or from 10 to 20 feet more than the land west of it?

600 A. No sir. The difference in the elevation of the land east from the point "C," from the elevation of the land at "C," would be unnoticable to the eye, and could only be detected by instrumental observation.

Q. 125. Is that true of the land west of "C"?

A. It is true also of the land west of "C," for that land only drops 5 feet in 4000 feet.

Q. 126. Then in your judgment, as borne out by the map of the Mississippi River Commission, there was no bank line there, marking the difference between the land east and west of the point "C," from 10 to 20 feet, which was visible to the naked eye in 1883 and 1884?

A. No sir. I answer only from the official documents and accurate surveys shown on chart 18, which is an exhibit.

Q. 127. Capt. Le Vasseur, in Exhibit No. 8 you show a place marked "Middle Pond." Is that the present depression in the land?

A. It is.

Q. 128. Does that present depression and pond, about correspond to the place 98 chains east of the common corner, which you have been asked about?

A. That is about 400 feet east.

Q. 129. Has this middle pond been formed since the survey of 1883 and 1884?

A. Yes sir.

Q. 130. At the present time, is there any water in McKenzie Chute?

A. Some pools here and there.

Q. 131. The old river bed around Island 37 is about all filled up, is it not, except that part next to Arkansas shore, where Barney chute is?

A. Old river, from the mouth of McKenzie Chute up to the mouth of Barney chute, is only a succession of pools and shoals.

601 Q. 132. Is there any water in the place you have marked "Pool," on your Exhibit No. 8? I mean the place marked pond immediately south of the word "Dean's"?

A. Yes sir. Some pools of water.

Q. 133. On map Exhibit No. 10 the area you have embraced with the marked lines which indicate property boundaries, and beginning at the point "B" and extending thence east, and thence northwestward, and thence in a southeasterly direction, marks the boundary of what tract of land?

A. I don't know.

Q. 134. Where did you get these lines from?

A. From the original survey. The map made by J. W. Humphrey and filed in the case of Stockley vs. Cissna.

Q. 135. I here hand you a map copied from an original map made

by J. W. Humphreys in November 1901, and ask you if it is from this map that you got these boundaries?

A. I get the boundaries from the notes indicated on this map, which is here shown to me and I platted those notes to the scale on Exhibits 8-9 and 10.

Q. 136. Well you mark on Exhibit No. 9 the line showing in your judgment, the middle of the Mississippi River, as near as you could ascertain it before the cut-off?

A. I do, and mark the line in red ink, and over the line the words, "middle of channel prior to cut-off."

Cross-examination by R. G. Brown, counsel for the Muncie Pulp Company, and Leo Oppenheimer, receiver.

Q. 1. Capt. Le Vasseur, can you tell me, from what chart 18, what was the depth of the river when these surveys were made, at the most easterly point of Centennial Island?

A. December 28, 1883, a sounding of 14 feet reduced to a plane corresponding t- the mense state of the water, is indicated just east of the eastern point of Centennial Island.

Q. 2. I notice on this map that there is an open channel
602 between the sand bar south of Dean's Island and the eastern Bank of Centennial Island. Can you tell me what was the depth of the water indicated in this open channel?

A. There is depth of water indicated on this open channel, because the water at the time the survey, was so shallow that soundings could not then be taken above the 14 feet sounding just referred to. You will notice that the word "mud," is written, and it appears that also on the opposite side of what you call an open channel, a mud deposit was formed, so that the channel having a northerly course east of Centennial Island, must have been closed at its mouth by what we call a mud shoal, making the flow of the water through that chute, very slow and rendering the depth of the chute very small.

Q. 3. How wide is that channel as platted on the map numbered as chart 18?

A. At the entrance, an average of 450 feet from its mouth to a point about 3600 feet north. There the channel width of the chute increased to about 1000 feet around the north point of Centennial Island.

Q. 4. Then at the time that this map, chart 18, was made in 1883-1884, there was an open channel between Dean's Island and Centennial Island of 450 feet up to a width of say 700 or 800 feet?

A. At the time of the survey, shown on chart 18, it was a stream of water which may have been partly dry, but was not what I would call a regular channel.

Q. 5. Can you state from this map, how deep the water was in this channel?

A. I have already answered that the channel must have been so shallow that the Engineer who made the survey did not deem necessary to take soundings of it, considering that the old river was practically filled up.

Q. 6. Was this map of 1883 and 1884, made at a low stage of water or at a medium stage of water, or at a high stage of water?

603 A. This map was made at 12 foot stage, Fulton gauge.

Q. 7. Is that high, low or medium stage of water?

A. It is neither now nor medium. It is between the low water and the medium stage.

Q. 8. What is considered low water stage?

A. The low water stage os 2.01. The high water at the time of the survey of course is 36.07. The mense stage would be 14.04.

Q. 9. Then this sounding was made at practically a medium stage of the water?

A. Practically so; mense stage.

Q. 10. I notice on the map that just south of the extreme east point of Centennial Island, above the sounding of 14 feet, appears the word "mud," and on the south side of Deans Island sand bar, also appears the word "mud," heretofore referred to by you; but between these two words "mud," one of which is on shaded ground and the other on white, there appears a large black space, the same as appears to be used for the channel of the river. I will ask you is there is anything upon this map which indicates to you that this mud deposit extended between these two words "mud," or whether this was open water, the same as the river channel between Deans Island and Centennial Island?

A. On the west side of the accretion south of Deans Island is found a big deposit of mud. By personal experience in similar cases, on chutes similarly placed, this deposit of mud extends from the original formation of the sand bar, to the first bank opposite. There is nothing on this map to indicate the depths of the water, but I infer from my experience, that this mud deposit at the time of the survey extended across the small depression left by the original river, along the east side of Centennial Island. If this depression had been a channel, navigable at the time of the survey, the Engineer would have taken soundings in it to show that the escape of the water from the Mississippi River was going through the old chute. You will see also that in Barney chute no

604 soundings were taken, which shows that Barney chute was not a channel. Also in the long pond existing south of the original Deans Island, so soundings were taken. These bodies of water were at the time of the sur-y, considered so small and unimportant that soundings were not taken.

Q. 11. Will you please state from this chart 18, what was the difference between the elevation of the land on the Tennessee side of this open channel and the land on the Deans Island?

A. What do you understand by Deans Island?

Q. 12. I mean the sand bar immediately opposite the southeastern point of Centennial Island.

A. 35 feet.

Q. 13. Then the Tennessee bank at the southeast point of Centennial Island, when this map was made, was 35 feet above the water, was it?

A. Yes sir.

Q. 14. And the land on the sand bar was at the water level?

A. Yes sir.

Q. 15. When you made this survey shown in maps 8, 9 and 10, what did you find was the heighth of the Tennessee bank, above the depression immediatelt to the east of it?

A. About 12 or 13 feet.

Q. 16. That would indicate, would it not, that the bed of the river was filled up between 1883 and 1904, some 22 or 23 feet?

A. Yes sir.

Q. 17. Then, if that is the case, is it not a fact that the bank line of the river in 1876, in any stage of water, on the Arkansas shore, there was a bank of about 25 feet?

A. Not necessarily.

Q. 18. Why not?

A. First, I would ask you what you call the bank of 1876?

Q. 19. I mean the part of Deans Island where the water came to at low water mark?

605 A. That would not be the bank of Deans Island. It would be simply the water's edge at low water, on the sand bar.

Q. 21. At that time, the water's edge on the Tennessee side would be 35 feet lower than the top of the bank, would it not?

A. It would.

Q. 21. And on the Arkansas side it would simply come up on the sand bar, and there would be no bank whatever?

A. Yes, up to the Arkansas shore.

Q. 22. What is the difference in elevation between the Tennessee Bank on Centennial Island, which you have stated was 35 feet higher than the water at low water mark, and the land on Deans Island, which you have marked "B" on chart 18?

A. 15 feet.

Q. 23. Then, before the water would go over the Tennessee bank, it would have to be 15 feet deep all over Deans Island would it not?

A. It would.

Q. 24. I believe you have stated that the difference between low water mark and medium stage was about 16 feet?

A. At mense stage, it is 14.4 on Fulton's guage. At low water mark it is 2.01.

Q. 25. This, then, makes a difference between low water at this point and medium stage about 12 feet?

A. Yes.

Q. 26. Then all of Deans Island went under water when the river went one foot above medium stage?

A. No sir. You are entirely wrong in your calculations. The Fulton guage 2.01 is extreme low water, above zero guage of Fulton, and what is shown as the water's edge on the map of 1883 and 1884 is 14.4 contour, on the said Fulton guage, and not the zero.

Q. 27. As I have understood you, the bank of the eastern edge of Centennial Island is 35 feet high; that the water is at that

point when there is what is known as low water? Am I correct in this.

606 A. No sir.

Q. 28. Then will you please state how high the bank at the eastern margin of Centennial Island is, above the water at low water mark at that point?

A. 31.1 feet.

Q. 29. How high above the same stage of water is the land at the point which you have marked "B" on Deans Island, being the common corner between sections 32 and 33,—'4 and '5?

A. 15.1 feet.

Q. 30. Then there is a difference of exactly 16 feet in the elevation of the land on Deans Island and the land on the Tennessee shore, is there not?

A. Yes sir.

Q. 31. Then, Captain, is it not a fact that while the bank of the Tennessee shore would be 16 feet out of the water the whole of Deans Island would be overflowed?

A. According to this map.

Q. 32. You have stated that medium stage of water then is 16 feet higher than low water. Then is it not a fact that all of Deans Island would go under water at a medium stage of water?

A. Practically all of it.

Q. 33. If that is the case, where would be the bank of the Mississippi River on the Arkansas side, at this point, at high water when the water went over the Tennessee bank?

A. I could not tell where it goes when it goes out of its banks.

Q. 34. Is the land on the Tennessee shore immediately south of Deans Island, of the same elevation as the land on the eastern end of Centennial Island?

A. Lower*m* according to this map.

Q. 35. How much lower?

A. About an average of 5 feet lower than Centennial Island.

Q. 36. On Exhibit No. 9 to your deposition, you have marked in red ink what you estimate to have been the middle line of the river, prior to the cut-off in 1876. At what stage of water

607 did you estimate that to be the middle line?

A. I estimated that to be the middle line at the medium stage of water.

Q. 37. That is, it is estimated to be the middle of the entire body of water, when Deans Island was only one foot out of water?

A. No.

Q. 38. How high was the point "B," on Deans Island out of water when you estimated that to be the middle o*d* the channel?

A. That middle line of the channel is not to be taken into consideration with the map of 1883 and 1884. This line shows what was, or what was expected to have been, the middle of the channel of the river prior to the cut-off. Between '76 and '83, some deposit had settled on the sand bar south *if* Deans Island. Prior to that cut-off, the sand bar was flat, and at m*asse* stage, was occupyin*h* the channel or bed of the river, extending between original Deans

Island and the Tennessee shore, what would apply as the middle of the stream in 1876, or prior to the cut-off, will not apply to the stream after the cut-off, or the changes took place on the elevation of Deans Island being minus or plus.

Q. 39. Is not point B that you have marked on this chart No. 18 the highest point on Deans Island?

A. When?

Q. 40. When this chart was made?

A. In 1883? No sir, it is not on the highest point of Deans Island.

Q. 41. What point of Deans Island is higher than the point you have marked "B," and how much higher is it?

A. The highest part of Deans Island seems to be situated at the head of the Island, where an elevation of 242 is recorded on this map.

Q. 42. There is a difference then of two feet between the point "B" and the highest point on the Island?

608 A. No sir, it is not that, because "B" is inside of the 240 feet contour, and is lower than the 240 feet.

Q. 43. How much lower is "B" than 240 feet?

A. Exactly, I could not tell, only it is situated between the 235 and 240 contour.

Q. 44. Referring to your Exhibit No. 9, on which you have marked what you state was the middle of the channel prior to the cut-off, I will ask you what was the low water mark of the river on the Arkansas shore at the time that this middle line is fixed by you, viz., prior to the cut-off?

A. It is shown on the map by the dotted black line shaded with green.

Q. 45. Then the medium line as you have marked it on this Exhibit 9, lies partly to the east of the low water mark, and partly to the west of it?

A. It does.

Q. 46. Now will you please mark on this map, what would be the middle of the channel at low water mark at the time that you have marked the middle of the channel at the middle stage of the river?

A. It will be a line eq-idistant between the sand bar west and south of Deans Island and the Tennessee shore, as outlines on the Arkansas side by the dotted black lines shaded in brown, and on the Tennessee line by the solid black line shaded with brown. I mark this middle line of the channel at low water mark by a blue line upon Exhibit No. 9, hereafter. This will give you the center of the filiment of the water at medium low water, but not the middle of the bed or channel of the river.

Q. 47. Then, Captain, if I understand you correctly at the medium stage of water you say that prior to the cut-off (of) the Arkansas bank of the river was the line of survey of Deans Island made in 1823?

A. Yes sir.

Q. 48. According to the map that you have made Exhibit

609 No. 9 to your deposition, in 1823 the Tennessee bank was about a mile east of the Arkansas bank. Is that a fact?

A. Yes sir.

Q. 49. And at the time of the survey of Capt. Suter, the Tennessee shore had receded west and south of a distance of about three quarters of a mile, had it not?

A. Not quite a half mile.

Q. 50. At that time, that is, at the time of the survey by Capt. Suter in 1874, the Tennessee bank had gone west and south from the bank of 1823, by about a half mile?

A. Yes sir.

Q. 51. Had not the Arkansas bank followed the recession of the river?

A. No sir. As is shown on the map, a pond was existing on a very low depression, immediately south of Dean's Island. The accretion south and east of Dean's Island was commenced as a very low flat sand bar, which, as it is in many places along the river, stands only on all of the area, a couple of feet above low water. At two or three feet on the gauge, it would be covered with water.

Q. 52. I notice that on the survey made by Capt. Suter in 1874, that there is a flat or a part of this flat which appears to be covered with willows and heavy timber. How accurately are these bodies of land marked in these surveys? Do they run the line of the timber, or just guess at what they come to?

A. They generally run the line of the timber.

Q. 53. Now on this Exhibit 9 to your deposition, the sand bar appears to the south and to the west of the tow-head. All of that area on this map between the low water marked the south end of this pond, was a sand bar, which appeared at low water?

A. Yes sir.

Q. 54. And that sand bar connected the tow-head with Deans Island, did it not?

610 A. Yes sir, except where the pond north of the tow-head was existing.

Q. 55. Now after 1874, Captain, did not the Mississippi River continue to go west and to still further encroach upon the Tennessee shore?

A. Yes sir.

Q. 56. How much further did it go west and how much further did it encroach upon the Tennessee shore before the cut-off took place?

A. I could not tell you sir.

Q. 57. You have no date then, except the next survey which was made between '79 and '80, to find how much further west the river had gone after Capt. Suter's survey?

A. Yes sir.

Q. 58. How much further west had it gone between 1874 and 1879?

A. About 1,800 feet.

Q. 59. That is something over a third of a mile is it not?

A. Yes sir.

Q. 60. Then from 1823 to 1879 the river had gone three-quarters of a mile or more further west, had it not, on the Tennessee side?

A. Yes sir.

Q. 61. And in all that time there had been no following of the receding Tennessee shore, by the Arkansas shore?

A. The Arkansas shore had not increased, but as I stated previously, between 1823 and 1874 the original Dean's Island must have been separated by a chute running along the south bank of the original Dean's Island, and the north bank of the formation shown as tow-head on the Suter map. Following the recession of the Tennessee side, the sand bar formation occur-ed, and further on, the encroachment of the river on the Tennessee side, so in fact, the sand bar had increased in length in direct ratio with the recession of the Tennessee bank. The increase was in length and area of the sand bar south of Dean's Island, corresponding to decrease in length and height of the Tennessee bank.

611 Q. 62. On Exhibit 11 to your deposition, you have stated that a solid black line shaded with blue on Dean's Island, represents the grouth of willows and heavy timber in 1878. How did you arrive at that conclusion?

A. By notes and data filed in the U. S. Engineer's Occice.

Q. 63. Do you consider, Captain, that land occupied by willows and heavy timber is a part of the bed of a stream?

A. I have been in many places, the bed of this river covered by willows and heavy timber, which was overflowed by 20 feet deep at high water.

Q. 64. As a matter of fact, all of Dean's Island would be overflowed 15 feet deep at high water, would it not?

A. Not now sir.

Q. 65. Why not?

A. Because since 1821, changes occur-ed by flood which at certain places reduced the height of the original land; in other places increased said height.

Q. 66. But you have stated that in 1883 Dean's Island was only two feet above medium line of water, and high water as I understand it, is 22 feet above medium water. Then at high water Dean's Island would be covered 20 feet deep under water?

A. That is a mistake. If the statement was made that way, it was made by mistake of figures. The *guage* at Fulton has a variation from low water to high water from 2.1 to 36.7. A *mense guage* rating of 14.4. The plane used in the survey of 1883 and 1884 was equal to 231.5 *mense* stage, the average elevation of Dean's Island being 230 and 240, would stand from 1.5 to 8.5 above the mense elevation, and during overflow times, when Dean's Island would be under water by 13.8 feet, Centennial Island at Corona would be out of water by 2.8 feet.

Q. 67. As I understand you now, Captain, from your revised figures Dean's Island proper, as embraced in the survey of 1823, was an average elevation of 235, which would place this body of land about 3 feet above the medium stage of water. Is that correct?

612 A. No, 6.5.

Q. 68. 6.5 feet above the medium stage of water?

A. Yes.

Q. 69. And the island would be overflowed at high water an average of 14 feet would it?

A. Yes sir.

Q. 70. Well then, at high water what would be the Arkansas bank of the Mississippi River, opposite Centennial Island?

A. Whatever the contour of 235.8 would be reached.

Q. 71. Then as a matter of fact Captain, the only bank that you can find on the Arkansas shore, is at the medium stage of water? When it goes above the medium stage of water, the Arkansas bank disappears, does it not?

A. If you mean to say in time of overflow, all banks disappear.

Q. 72. What do you consider an overflow to mean? Is it not high water?

A. No sir.

Q. 73. Then, please state what you do consider an overflow?

A. I consider an overflow when the water has attained its maximum guage record, when the water spilling over the bank, inundated the country. In the high water in this present case, taken at 36.7 on the Fulton guage, was the maximum high water in 1882. Soon after 36.7 the whole country was overflowed, excedp a few places here and there, which were above that stage.

Q. 74. You have said that the line of growth of willows and heavy timber in 1878 was at the point marked in Exhibit 11 by a black line shaded with blue. How large timber is required to be classified by the rules of the Engineer's Department, to constitute heavy timber?

A. We classify it as heavy timber when the trunk of the tree is above six inches.

Q. 75. Did you ever know any cottonwood or willow to grow six inches in two years?

A. I could not tell you anything about the growth of timber. My line is not a timber expert.

613 Q. 76. In your experience as a surveyor and an engineer, upon the Mississippi River, in the District between Cairo and White River, have you ever known any brakes of timber six inches and over to be found in two years?

A. I never pay attention to the growth of timber.

Q. 77. Captain, if you should find along the line which you have designated as the heavy timber line in 1878, that cottonwood trees grew which measure from 8 to 16 inches larger on an average than the timber immediately to the west of this heavy timber, what would you say was the difference in formation of the two bodies of land, so far as age was concerned?

A. All that depends on what place the timber would be situated.

Q. 78. How does it depend upon the place where it is situated?

A. When the river has been under sudden changes, some timber may have been cut down by the flow of water, and previous timber left on ridges, and near by, the timber of the same age have been swept away and replaced by younger growth.

Q. 79. Still, judging the formation of that land, where the young growth comes up, to be a new formation of land, what would

you say was the difference in age of the two formations as judged by the growth?

A. I could not tell the difference of age of timber.

Q. 80. You have stated that the middle pond was formed since 1883. How do you know this?

A. By the map of the Mississippi River Commission in 1883 and 1884, and the present survey in 1904. On the map of 1883 and 1884, no such depression as middle pond, Campbell Lake, Long Lake, is shown. On the survey of 1904, these depressions are existing, and the country west of Barney Chute is cut up by ridges, due to the plowing effect of water during flood time.

Q. 81. You were with the survey party who made this survey from which your maps are taken?

A. I was.

614 Q. 82. How high is the east bank of Middle Pond above the land to the west of Middle Pond?

A. The banks of Middle Pond are about similar.

Q. 83. Then there is no bank there but merely a scooped out place filled with water?

A. A scooped out place, and the banks may be higher than the previous elevation of the adjacent land, as it is generall*t* the case that the banks of a formed bayou or depression receive more deposit in flood time than the depression itself.

Q. 84. If that is the case, would not the land that bordered the river prior to 1876, have received more deposit than the old bed of the river, left by Centennial Cut-off?

A. That portion of the sand bar formation immediately south and west of Dean's Island, had received more sediment after 1874 than the whole bed of the river proper.

Q. 85. If that is the case then, ought not the old sand bar existing prior to the cut-off of 1876, to be higher relatively than the old bed of the river?

A. Not necessarily.

Q. 86. Please state how it would receive more deposit than the old bed of the river, and not be higher than the old bed?

A. In 1874, the depression was existing west and south of Dean's Island. This depression necessitated a great many more deposits, during the flood which occur-ed after 1874, the river may have formed some channel through those depressions and washed away some of the deposit which was to be replaced again by subsequent over-flow.

Q. 97. You know nothing about how long it took for this channel which we will call old bed of the river, after the cut-off, to fill up, do you, of your own personal knowledge?

A. No, I only know it from the maps and records.

Q. 88. Do you know, or have you any records in the Engineer's Office, that show what was the depth of the river to the south and west of Dean's Island in 1874?

615 A. The records that we have are the maps of Cap. Suter, which show that the steamboat channel was flowing south and west of the sandbar formation on Dean's Island, around McKenzie Chute.

Q. 89. Do the soundings show how deep the water was there?

A. No, sir.

Q. 90. There is no record then, in the office, to show any soundings along that part of the river until this map of 1883 and 1884 was made?

A. No, sir, but in 1874 the river through McKenzie Chute was the only channel during low water. The old river proper, at mouth of Island 37, had already undergone a stage of filling.

Q. 91. But you have no means of knowing how deep the river was through McKenzie Chute?

A. Not only I, but nobody else.

Q. 92. What is the average depth of the Mississippi River in a channel a mile wide?

A. You cannot ascertain that, because there are no two reaches the same.

Cross-examination by Col. T. W. Bullitt for Muncie Pulp Company and the Receiver Leo. Oppenheimer:

Q. 1. In your observations on Island 37 did you observe a road which crosses that Island 37, coming up from Corona Landing? Where does that road run, compared with the lines shown on any one of the maps filed as exhibits to your deposition?

A. It appears on the map of J. H. Humphreys, and is there marked "Road to Island 37 and Arkansas."

Q. 2. Does, or does not that road lie on the bank of the Mississippi river as shown by the Suter survey of 1874?

A. That road lay about 200 or 300 feet west of the 1874 bank line of Suter's map, coming towards the head of the Island.

Q. 3. On the copy of the Suter map of 1874, filed with your deposition as Exhibit No. 3, appear the meridian lines. How have
616 you been able to place those meridian lines on that map? You stated that they did not appear on Capt. Suter's original map.

A. On the original of Capt. Suter's map, the old Dr. McGavock place and also the E. W. McGavock residences are shown. These residences are still existing. From those residences, instrumental lines were run to establish the triangulation stones fixed by the Mississippi River Commission. Having those stones ascertained, it was an easy matter to find by which degree of longitude and latitude those houses and old residences were situated. From these I projected upon the copy of Capt. Suter's map, the meridian as instrumentally found.

Q. 4. Do I understand you to say that the Mississippi River Commission at some time previous, had fixed the location of the McGavock residence according to the meridian lines?

A. Yes, sir.

Q. 5. When and by whom was that done, if you know?

A. Bench marks were established by me on the Dr. McGavock place in 1892, ties the triangulation lines to what we called the McGavock place, known in the record as B. M. 55/4. and this stone appears upon the map of 1883 and 1884.

Q. 6. Is the McGavock house to which you refer, that which on the Suter map appears located on the Arkansas side, on Barney chute?

A. Yes, sir.

Q. 7. Have you compared that location with the location of the township line as established by the Government of the United States on Dean's Island?

A. I did.

Q. 8. And did you find that to compare correctly with the location of the point, common corner of sections 4 and 5—32, and 33, on Dean's Island, or have you made that comparison?

A. To re-trace the section lines, we found the corners of 20 and 19, which line we followed down to Dean's Island, on the section line between 33 and 4. We re-traced all the section lines on Dean's Island, and this survey was also not only tied to 55/4, but
617 also to other stones below Point Abel, so both surveys of the section land and of the Mississippi River Commission, was made and attached. When we were making the survey on Dean's Island, re-tracing township lines, we came across two monuments which were indicated as the original corners. We tried those monuments instrumentally, and found them 5 degrees wrong, from the original Land Office notes. *And* inquiries, the Engineer, under my direction, ascertained that these corners were recently set up by people interested on property lines on Dean's Island. As my operations were not hunting up property lines, but to re-trace the original survey of 1823, further attention to inquiry was not made to the wrong monuments so found.

Q. 9. So you disregarded in your survey, the monuments as you found them actually placed?

A. No, sir We disregarded some monuments which were placed not on the line shown by the maps of 1823, or other monuments found to be the correct 1823 monuments.

Q. 10. Have you, at the request of counsel for the State of Tennessee, Mr. Biggs, compared the location of the corner common to sections 4 and 5, 32 and 33 on Dean's Island, with the location of that same corner as fixed by Mr. Martin on the map filed by him in this cause?

A. Yes, sir. I did make the comparison of the map made by Mr. Martin, about the township line between section- 4 and 5. From said comparison, it appears that Mr. Martin, without going into an extensive survey, to retrace the original 1823 monuments, was content to take the monuments as shown on Dean's Island, which were found incorrect by my party.

Q. 11. How far does the location of that point common to those four sections, as made by Mr. Martin, differ from that same point as made by you?

A. Upon the location of that corner adopted by Mr. Martin, the original 1823 monument of Dean's Island would be thrown about 415 feet eastward.

618 Q. 12. The question I asked you was not in reference to property lines, but as to what was the difference in the location of that particular point common to those four sections. Do you

place that point further north or south, or east or west from the point as located by Mr. Martin?

A. That point would be further north and further east.

Q. 13. How much further north and how much further east?

A. I haven't my notes here. Martin locates that point 415 ft. further east than I locate it. I don't remember exactly how much further north.

Q. 14. When you spoke of the monuments of 1823, by whose authority were those monuments placed according to your understanding?

A. By the land office of the United States.

Q. 15. You mean in laying off those sections?

A. I do.

Q. 16. What was the information upon which you acted, by which to find and to satisfy yourself as to the correctness of the monuments which you adopted?

A. Upon the notes of the land office we hunted up the corner of 19,-20. From the said notes of the land office, corner- were indicated to be established at some other sections, those corners to be on a certain given azimuth. We made astronomical observations to find the true variation of the needle at the time of the survey, upon which we corrected, according to the variation of the needle at the time of the 1823 survey. We re-run or re-traced the original notes as shown by the land office. In several instances we found monuments as described and we proceeded with the survey on the same notes as the 1823 survey, until we would meet some 1823 monuments which would correspond to the description of the 1823 survey, notes. In that manner, not only the corner of section- 5 and 4 were located, but all the corners of the sections from Pecan Point to Point Abel were re-surveyed and re-located. Three months operation with two Engineers and necessary party, was required to make these surveys.

619 Q. 17. Was this survey made at the request of the counsel for the State of Tennessee?

A. It was.

Q. 18. The survey was not made by you in your capacity as Government Engineer, but under private employment?

A. I was requested by Mr. Biggs to be employed for the State and in behalf of the State of Tennessee to make this survey. Authorization was granted me to be used as a consulting Engineer in this matter by the War Department. The survey expenses were paid entirely outside of whatever compensation I may ever get, directly to the men in the field.

Q. 19. Were these assistants that you had, Government employes, or were they employes outside?

A. The Chief of the party, Mr. George de Bergen, had been Government Engineer in charge of the survey for the last four years, in the second and first district M. R. C. under my orders. I selected him to make this survey, as he was entirely familiar with that part of hhe country, and with accuracy required for all government work

This gentleman having severed his connection with my office, went into the civil practice.

Q. 20. Did you personally attend the survey by which the location of these various monuments were determined and fixed, or did you rely upon your assistant for fixing these points, and especially this point common to the four sections above mentioned?

A. I attended myself and checked instrumentally all the survey from time to time, and especially when the monuments of the survey of 1823 were in question.

Q. 21. Whence did you obtain the original notes — the survey of 1823, which guided your present survey?

A. From the land office of the United States, at Washington, D. C.

Q. 22. They sent you a copy of those, did they?

A. They did.

Q. 23. You have them still?

620 A. Yes sir.

Q. 24. In your deposition you have been asked to state, and have stated a point 98 chains west of the corner common to the four sections above named. Mr. Martin, in his deposition, also makes a monument 98 chains west of that corner. If I understand you correctly, the measurement of 98 chains projected by you extends about 415 feet — west than the same measurement as made by Mr. Martin?

A. It does.

Q. 25. In speaking of the river and its boundaries, Deans Island and Island 37 and their boundaries, as of date prior to the recent survey made by yourself, you speak entirely from what is shown by the maps you have referred to, and not from personal knowledge or observation?

A. All my answers as to those boundaries, prior to survey made by me for the United States, are based only on the maps in my possession, records and date of the office, and not upon personal observation.

Q. 26. What was the date of the survey that you made for the United States?

A. 1892.

Q. 27. When did you personally make your first observations of the river and its surroundings at the point between Island 37 and Deans Island?

A. In 1892.

Q. 28. All of your statements then relating to the period of 1876 and prior, are simply interpretations of what is found upon the maps to which you have referred?

A. Yes sir.

Q. 29. And the maps which you have yourself filed, purport simply to be copies of the camparisons between the different maps of the government, or of the Mississippi River Commission, which are also filed with your deposition?

A. Yes sir.

Q. 30. Exhibit No. 9 filed with your deposition, is a com-

621 bination as I understand you, or the maps of 1823 and 1874, which are separately filed as other exhibits?

A. Yes sir.

Q. 31. From what date have you been enabled to plat down on No. 9, the exact relation between the original maps of 1823 and 1874, a comparison of which is represented by No. 9, especially with reference to the meridianal lines?

A. I stated before, in one of my answers, the original survey of 1823 was entirely re-made by me in 1904. This survey, as I have stated, was tied to triangulation point giving me a reference to the corner lines of the meridians. This survey was platted off and compared with the plat furnished to me by the U. S. Land Office for the same survey in 1823. As to the survey of Capt. Suter, I answered a while ago how the meridians were arrived at. This survey was then projected on the same scale of the 1823 survey, with the result of map shown as Exhibit No. 9 to my deposition.

Q. 32. On the Government map of 1823, to which you have referred, are the meridianal lines shown at all?

A. No sir.

Q. 33. How are you able then to place the meridianal lines on the map of 1823?

A. I stated previously, that we have some astronomical observations showing the exact location of the face of the earth where the original corners of 1823 were formed to bisect. Those astronomical observations by themselves, enabled me to state exactly between which meridians said point is situated. Not content with these observations, the line of the corners and of the meridians were located instrumentally on permanent stone bench marks, establishing different meridians, and situated about three miles apart, established by the U. S. Engineering Corps.

Q. 34. The meridianal lines you fixed, as I understand, with reference to the surveys made by the United States, of the
622 sections in Arkansas. Am I correct in that?

A. Yes sir.

Q. 35. Did that survey of the United States Government, made for the purpose of sectionalizing the lands, deal with the location of the Mississippi River, and if so, at what point or points?

A. I don't understand the meaning of your question.

Q. 36. You have filed with your deposition as Exhibit No. 1, a tracing showing sectional lines including sections 4 and 5, 32 and 33 in Arkansas. Now is there anything on there which enables you to locate the Mississippi River as shown by the survey of 1823, the bends and shores?

A. I understand you now. From the sectionalized map of 1823 after having checked some corners original to that survey, tied those corners to known triangulation points, and also by astronomical observations found the regular meridians which were corresponding to the corners, the sectional lines as they were described in the notes of 1823, were re-run, and also the boundary of the Mississippi River, as shown on the 1823 map, were established, so that the map of 1823 was entirely re-run, excepting the places where the river now is existing, which land in 1823 was shown.

From the sectional corners, the notes and plat which were furnished to me by the U. S. Land Office, were shown the distances of the river. Those distances, where possible, were re-traced on the ground.

Q. 37. What map did you use as the basis for platting down upon Exhibit No. 9, the river as it existed in 1823?

A. I used the map and notes of the U. S. Land office.

Q. 38. Did you have any other map than the one which you have filed as Exhibit No. 1 from the land office?

A. Yes sir. I had all the map of Arkansas, covering the territory from Pecan Point to Gogleman's chute.

Q. 39. What map of Tennessee did you have, as of that date, showing the Tennessee side of the boundaries of the river?

A. A map of Tennessee from the land office of the United States.

623 Q. 40. Will you kindly file with your deposition, the map furnished by the United States to you, of Tennessee, showing the location of the western boundary of the river through the territory of which *toy* have been speaking?

A. I will.

Q. 41. Am I correct now in the understanding that this map, Exhibit No. 9, purports to represent comparatively the river as shown in 1823 and 1874?

A. It does.

Q. 42. Now was the map of 1823, from which you platted so much of Exhibit No. 9, as shows the river in 1823, copied from any map of the river made under the authority of the U. S. Government, and if so, what map was it?

A The map that I had to retrace the survey and make this comparative map, was from 1823, the maps and notes furnished by the U. S. Land Office, and from 1874 the maps and notes of Col Chas. Suter's Survey.

Q. 43. I am dealing not only with the map of 1823. My question is, did you retrace that as a copy, from any other map in your possession?

A. No sir.

Q. 44. Now give us the precise data upon which you have undertaken to put down on No. 9, the location boundaries of the Mississippi River as of 1823, on your Exhibit No. 9?

A. From a map furnished to me, and in my possession, which I will file as an exhibit, the boundary of the Mississippi River *as* described. This boundary was re-platted on the map Exhibit No. 9, and shown as indicated on said map.

Q. 45. Do you refer to Exhibit No. 1 already filed by you?

A. No, I refer to maps furnished me by the land office.

Q. 46. Will you file the maps or copies thereof?

A. I will, as have already stated, file the maps furnished to me by the Land Office which I used in making map Exhibit No. 9.

624 Cross-examination by Mr. Bullett—continued on Monday, Jan. 16th, 1905:

Q. Captain Le Vasseur, how do you call your name?

A. Le Vasseur.

Q. On No. 11 filed by you, you platted in the brown lines, the Suter map 1874, as I understand it?

A I did.

Q. Now, the Suter map thus filed shows—the explanations on the map show—that the black line shaded with brown represents the bank line of 1874; that is correct, is it not?

A. Yes sir.

Q. I observe that, on Exhibit 11, upon which you have platted down the Suter map, you have two of those lines black lines, shaded in brown—one of those lines having above it "Heavy timber, 1974." The other having above it "Willow Subject to Inundation, 1874." Is there anything by which you are able to tell which of those two lines, Captain Suter indicated to represent the bank lines, how are you able to tell it and which line was it?

A. This map marked "Exhibit No. 11" was made on the request of Mr. Biggs, to show the different lines of the river as a memorandum for his own use. On the map of 1874, from which Exhibit No. 11 was taken, the line shown on Exhibit 9—the line appearing on Exhibit 11, as Heavy Timber in 1874; and also in the legend as bank line of 1874 he has indicated the line of "Willows and Heavy Timber." Second line, as line of "Willows Subject to Inundation," under the original of Capt. Suter's map, these two lines are demarked by regular typographical signs, from which the map, Exhibit 9, was made. The bank lines, as you asked me, on Exhibit 11, could not be intended as the second line as "Willows Subject to Inundation," and this part of the accretion must have been according to the map of Capt. Suter of recent formation, and forming a gradual slope towards the western boundary of the sand bar in 1874.

625 Q On Capt. Suter's map, from which you made the tracing on No. 9, and on No. 11, do either the w-rds appear, or the signs appear, indicating that the inside of those lines are "Willow and Heavy Timber" in the one instance, and "Willow subject to Inundation" in the other?

A. On the original lithographic sheets of the survey of Capt. Charles Suter, that I have got in the Engineer's Office, the word "Willows" words "Heavy Timber," is not written, but at the first page of the book of charts of Suter survey is the general legent, indicates the meaning of different typographical signs indicated on his maps. From these original notes, in files of the War Department, it will be found that the direction of that timber, or, I should say, Heavy Timber and Willows, is indicated by instrumental course.

Q. Then, you obtained this location of heavy timber and willow subject to inundation not by what is written on the map but by *which* is written on the signs in the book, is that it?

A. Yes sir. If you want, I can file the original maps of Capt. Suter, subject to return to my office when through with them.

Mr. Biggs: I will not have it filed, but will have it subject to use of counsel.

Mr. Bullitt: So it can be used in Court?

Mr. Biggs: Yes sir.

Q. Is there any writing on Capt. Suter's map which indicates the difference between the two lines those (thus) marked, the one "Willows and Heavy Timber" and the other "Willows subject to Inundation"?

A. No sir.

Q. You don't know the difference of elevation between those lines?

A. There is nothing on Capt. Suter's map showing the difference of elevation between those two lines.

Q. Then, as of 1874, or '78, you have no knowledge as to whether there was any difference in the elevation of those two lines?

A. I have no personal knowledge of the difference of those two lines in 1874, but——

626 Q. Or of '78?

A. Or 1878, but from my personal knowledge of the river, knowing the locality and the general law of accretion of the Mississippi River, I would infer that the formation west of Dean's Island, or the different lines indicating such accretion, the ground, as I have already stated, would be gently sloping from the bank of Dean's Island, 1823, towards the low-water edge of the Mississippi River.

Q. Now, on Exhibit No 10, you have represented the same two lines, I believe, that are shown as on Suter's line, both with black line and brown shading, and crossing a blue line, at the northerly edge thereof?

A. I did.

Q. On that same map, No. 10, you have a blue line; rather*m* you have a black line shaded in blue, commencing on the tow of Barney chute, and coming down in a southern and southeasterly direction, and on the explanation of that map it is said that the black line shaded in blue is the bank line of '78, is that correct?

A. Yes, sir, that is correct.

Q. Is that shown—where do you get that black line shaded in blue from the Government Map?

A. From a Government Survey made by the United States, in 1878.

Q. Now, above that, to the east of that, I find the words "Willows and Heavy Timber." Then, that Government map to which you refer shows that east of that blue line marked as the bank line of '78, was then growing up in "Willows and Heavy Timber," is that correct?

A. Yes sir.

Q. To the west of that line, I see it states "Willows Subject to Inundation" in 1878, then the Government map shows that west

of that line the earth was covered with willows still subject to inundation?

A. Not entirely all of it.

Q. I said west of that line?

627 A. The strip of territory west of that line was covered with willows subject to inundation. I understand you meant east?

Q. West?

A. West, yes sir.

Q. To make no mistake, I mean to say that the Government Map of '78, shows that on the east of that line were then Willows and Heavy Timber, while on the west of that line were Willows Subject to Inundation, that is correct?

A. Yes sir.

Q. That blue line as platted on No. 10 lies inside, to a large extent, inside—that is west of the boundary claimed by the State of Tennessee in this case, as platted on that map, by you, does it not?

A. I don't know exactly about the lands claimed by the State.

Q. What you platted down is the boundary line claimed by the State? It does lay west of the property boundary line platted on the map?

A. These property lines as I have stated already in some of my answers were not surveyed by me were formerly projected on the map according to data furnished me.

Q. Furnished you by Counsel for the State in this case?

A. Yes sir.

Q. Now, do you know that in '78, was the difference of elevation between the blue line which we have just mentioned and the black line shaded in brown, of Capt. Suter, mentioned just a few moments ago, or do you know whether there was any difference in the elevation?

A. In 1878, the difference of elevation between that blue line and the brown line of Capt. Suter, as no elevation- were given in Charles Suter's map, the only difference that I could state, is that, from my knowledge of the river, as aforesaid, the map of 1874 and '78, the depression which seems to have existed in Col. Suter's survey of '74 must have been filled by deposit—to that extent I could not accurately state, and as the map of '74 does not

628 carry any elevation of ground.

Q. The map of '78—The Government map to which you have referred—does show that the bank of the Mississippi River at that time corresponded, on the east and on the west, with the blue lines, or, rather, with the black lines, shaded in blue, as laid down on Map No. 10?

A. It does not.

Q. Does not the explanation on that map, on Exhibit No. 10, show that the black lines shaded in blue are the bank lines of '78, I will ask you to look at the explanantion on the face of the map, and see is that is not true?

A. It indicates that this line was about mean stage of the bank line of the Mississippi River, at about mean stage.

Q. I will ask you what there is on the map of 1878, which has upon it, in its explanation, just what I have stated, the black lines represented in its explanantion to bank lines in 1878. Where is there upon that map which influences you to qualify the statement made itself, namely: the black lines shaded in blue, represent the bank lines as they then existed? I will ask you to make that statement from anything outlines on this map of the Government of 1878 from which you made this tracing? I ask if the map does not show that is the bank line of '78?

A. No sir.

Q. Have you in this tracing, correctly traced, the explanantions on the map of '78, as well as the lines?

A. I did.

A. Now, I ask you Captain?

A. Let me explain. The bank line as we understand it does not refer to any specific elevation. At the time of the survey, when the survey is made by low water, the mean stage bank ascertained by the level is generally taken as one of the bank lines. We have low water banks, high water banks, and an ordinary bank.

Q. Now, what is there on the face of the map of '78 from which made this tracing, to show that the stage of the water was at
629 the time that those blue lines were marked as representing the banks of the Mississippi?

A. The stage is indicated in the maps, which, if you desire, I will file under disposition of counsel of both sides of this case, which map will have to be returned to my office.

Q. Then, this tracing that you have made is not a complete tracing of the map of '78, from which you obtained your data?

A. It is a complete tracing so far as the lines are concerned.

Q. Do you remember definitely the fact that the map shows that the stage of water at the time that the survey was made is shown to have been the medium stage?

A. No, sir. It was a low water stage.

Q. You remember that definitely, do you?

A. Yes sir.

Q. Were those—do you mean to say that those blue lines then represented on the Government map—not what the Government calls ordinarily the banks of the river, but represented the bank at low water?

A. You will notice in this map that this solid black line shaded in blue is far apart—say about four thousand feet from the water's edge—dotted black line shaded in blue. This only will show you that the survey was made during low water, and not banked, in solid black shaded blue, was only represented the edges of the Willows and Heavy Timber, covered, as I explained above, by mean stage.

Q. On the Tennessee side, along Centennial Island, that blue line came immediately to the foot of the bluff or high ground of which you spoke the other day?

A. On the Centennial Island the bank is nearly perpendicular, and changes on the gauge of the stage of the water is not shown in length, but shown in height.

Q. The blue line thereon, according to your understanding of the map made in 1878 was intended to indicate what it states the bank line, but simply to indicate what then was grown up in willows and heavy timber, is that correct?

630 A. That blue line that you refer to is intended to indicate one of the bank lines, as we understand it, along the Mississippi River, and showing the demarcation of the line of Willows and Heavy Timber.

Q. Now, you say it was intended to indicate one of the banks? How many banks are intended to be represented—or how many banks do you speak of in the survey work?

A. There is, as I have stated before, the bank of the river at low water, the bank at mean stage, and the bank at high stage, or at bank full.

Q. Then the blue line indicates the bank of the river at medium stage in 1878 on Exhibit No. 10?

A. It does.

Q. In 1878, as shown by this map of Exhibit No. 10, west of the blue line, where Willows Subject to Inundation, and still further west of that was a sand bar not grown up in vegitation at all, is that correct?

A. It is correct, sir. Immediately west of the blue line referred to in Willow Subject to Inundation were stated to be growing, and further west, sandbar, without any sign of vegetation, to extent to the water's edge of the river, or to the extreme low water bank of the river at the time of this survey.

Q. Is there anything on that map of 1878, as plated down on Exhibit 10, which indicates the banks of the river at low water stage in 1878?

A. It does.

Q. What lines now indicate the eastern bank and the western bank at low water stage of 1878?

A. The dotted black line shaded in blue, south and west of Deans Island, the solid black line shaded in blue and the dotted black line shaded in blue on the Tennessee side.

631 Q. Now Captain, is there anything upon the map, or have you any knowledge to indicate the difference of elevation between the black line shaded in blue dividing the heavy timber from the willows subject to inundation, the difference between the elevation of that line, and the Suter lines that we have spoken of, lying to the east thereof?

A. The difference of elevation between those two lines?

Q. Yes, sir, the difference between this line and that?

A. I have no data, as I have said before showing any elevation on the sand bar shown in the Suter map.

Q. I will ask you to look at—this is a copy of what you had the other day; it will be m-re convenient—I will ask you to look at Chart No. 18, which you have filed with your deposition,

And if you want this, Mr. Biggs, I will take pleasure in giving it to you.

Mr. Biggs: I will put the cloth back on it, and you can let me use the other one, so we won't tear this.

Mr. Bullitt: This little won't do any harm.

Q. I will ask you to state, and, indeed, I lay down upon this map, the black line shaded in blue, that we have just explained, show how it corresponds with line of 235 feet elevation shown upon Chart 18.

Mr. Biggs: Do you want that shown at some future time?
Mr. Bullitt: Yes, sir.
Witness: I will do so.

Q. While upon that, I will just ask you now to lay down upon that chart No. 18, the following information, the point B referred to the other day as the common corner of Sections 4, 5, 32
632 and 33, on Dean's Island. Second, the point C, being the terminus of the line of 98 chains in length drawn west from point B. Third, the bank of 1823, as indicated by you on one of your plats. Fourth, the bank of 1874, as shown upon the Suter map of that date. Fifth, the bank of the black line shaded in blue mentioned on No. 10—and I believe also on No. 9,—as the bank line of '78, on the Arkansas side. Sixth, the line of willows and heavy timber on the map of '78, I will also ask of you, Captain, in order that it may be a little more plainly read, to mark, in red ink, and in somewhat larger figures, the elevations as shown on the contour lines upon this c-art 18 on Dean's Island, also along the bluff of Centennial Island.

A. Yes sir.

Q. As I understood you the other day you have made a comparison between your map and that of Mr. Martin, ascertaining that this location of the corner B varied about 415 feet from your location. I will ask you whether what Mr. Martin has recorded on his map as the bank of '76, does, or does not, coincide with or very closely with, the black line, shaded in blue, dividing Willows and Heavy Timber, and Willows Subject to Inundation, as shown on your Exhibit No. 10?

A. It does.

Q. They are coincident, or very closely so?

A. Very closely so.

Q. Now, Captain, did I understand that you supervised personally that particular survey, that particular portion of the survey, fixing that blue line, or the location of the blue line?

A. I did not specially and practically sup-rntend the survey of this location that you are referring to, but I personally and practically sup-rentended all of the survey operations from Pecan Point to Fogleman's Chute.

633 Q. Captain, did you run a survey along the line that you have platted down, taken from Mr. Humphrey's map, or did you simply project that on your map?

A. I simply projected it on the map. As I have answered before, my survey operation, and the commission from the State into which I was working, had no reference whatever to property lines.

Q. Did you personally go through the tract of ground from which the Muncie Pulp Company, or its lessees, have cut timber within the bounds of that property line, when projected upon the map?

A. I went personally over part of the ground, situated along the blue line of '78, where timber was cut.

Q. Did you find according to your observation thus personally made, that on the east side of that line there was the willow and heavy timber, while upon the west side of the line there was timber much lighter, and therefore, of a later date.

A. I didn't pay much attention to the timber. I wasen't sent there as a timber expert.

Q. You are therefore not able to state whether any point of that heavy timber lies on the east side of that blue line or on the west s of that blue line?

A. I did not attach any special importance ti the size of the timber during mu operations.

Q. You are therefore unable to state to us, give us any particular information, as to the size ot eht timber on that tract of ground?

A. I am.

Q. What was your starting point in projecting upon the map the lines which in the explanation are designated as property boundaries, and from whom did you obtain the starting point for the making of that projection?

634 A. I started the projection of that property as the south corner of what is indicated on Mr. Humphrey's map as the 152 acres—southeast corner of 152.

Q. From that point you simply followed Mr. Humphrey's line?

A. That is all I did?

Q. I say you followed Humphrey's line?

A. Yes sir.

Q. How are you able, on your map, to determine just where the Humphrey survey would fall?

A. About the distance from the Fifth and Fourth corner township projected as far as the perpendicular line, reaching the corner of Mr. Humphrey's map.

Q. Have you any knowledge of the location made by Mr. Humphreys of that point B common to Sections 4 and 5?

A. I have not.

Q. Then, if he started—if his location of point B was different from yours, the location of his lines of your map might be incorrect?

A. I don't claim any correctness for property lines shown on the map, as that property lines was not surveyed on the ground, but my platting only placed there as a general indication of the property.

Q. I wish you to describe the monument which you placed at the Point B, so that we may have it verified in connection with Mr. Humphreys and Mr. Martin's surveys?

A. I will give a copy (as far as the copy) of the original *of the original*, as field notes, showing the description of that monument, so it can be traced.

Q. Do you understand, as I understand you, how the line of cutting responds with the same line as you have fixed it?

635 A. I had nothing to do with the cutting of the timber on that, directly; neither did I have anything to do with it on my part of the survey.

Q. Are you able, Captain, to state anuthing about what was the character of soil on either side of the blue line between the heavy timber and the willows subject to inundation?

A. Yes sir.

Q. Is there any difference between the character of the soil?

A. Borings were made all along a- different place- of my survey which borings are indicated in my field notes, which will, if you desire, be filed in this case.

Q. I am not only asking about borings. I am asking of your knowledge about it, and whteher, so far as the character of the soil is concerned—I mean, fertility, growth of vegetation whether there is in your knowledge any differences in the soil on the west of the blue line?

A. I would rather give you the result of the boring which will show the exact quality of the soil.

Q. In fixing your center line, as I understand you, you have treated the Tennessee line as being at the fott of the high ground, and entirely without reference to the property lines as indicated by the grants or conveyances heretofore made by the State of Tennessee on Centennial Island and Island 37?

A. I have indicated on the map the probable State line, disregarding entirely all grants made by either the State of Tennessee or Arkansas. I took for the base of my location of the State line which I believed to be the middle of the channel, or bed of the river, prior to the cut off.

Q. On some of these maps I notice a chute called "Barney
636 Chute," and on others "McGavock Chute." Are they the same?

A. Yes sir.

Q. You, I believe, state you would file the Suter map?

A. I will. That must be returned to the Office.

Q. Captain, in making your surveys, 1904, did you take any elevations?

A. I did.

Q. Have you ma-ked them on the map there?

A. No sir.

Q. Would you object to marking those elevations?

A. I will.

Q. Suppose you mark them with those on Chart 18, so as to see how your elevations correspond with the elevations on Chart 18?

A. Yes sir.

Cross-examination of Capt. Le Vasseur, by Mr. Caruthers Ewing, resumed on this the 9th day of February, 1905, at 2 o'clock p. m.:

Q. 29. When, do I understand, it is your opinion that McKenzie chute became known as, and became the regular channel of the Mississippi River?

A. To answer that question, I will ask you first, what you understand by being the regular channel, of the Mississippi River? What do you understand by the word "Channel?"

Q. 30. I mean where the largest volume of water passed. The deepest part, and where steamboats would naturally run.

A. I understanf you to take the word "channel" as the course followed bv steamboats. In that case, the steamboats must have followed McKenzie Chute as the channel between 1823 and 1874.

637 Q. 31. If McKenzie chute became, as early as 1835, the main channel of the river, would or not that have had any effect on your opinion as to where the center of the river which runs north and around Island 37, was in 1876?

A. No.

Q. 32. Please refer to map No. 4 and state, if you can, the point of intersection between 90 and '03 and 35-26?

A. Yes sir.

Q. 33. That point is within the line of heavy timber on Dean's Island, is it?

A. Yes sir, according to the topographical signs.

Q. 34. If the map is correct as to what was intended to be shown by the signs there, that point is within the heavy timber, is it not?

A. According to that map, yes sir.

Q. 35. How far is that point east of the Centennial Island bank in a direct line with 35-26?

A. 7620 feet about.

Q. 36. Would you say that the intersection of 90-03 and 35-26 on map No. 4 which is the map of 1879 and 1880, was at the point which was or was not of the original Dean's Island in 1823?

A. The intersection of 90-03 and 35-26 was not part of Dean's Island in 1823.

Q. 37. Please state how far it was in 1879, from that point to the heavy or main bank of the Arkansas shore, towards the west?

A. On 35-26 of the line between topographical signs showing heavy timber and another one showing willows subject to inundation, the distance is about 2100 feet.

Q. 38. Please measure the same distance and the same direction on map No. 9, and designate with your pencil the point that would be on the map?

638 A. I do so.

Q. 39. I will ask you if the point you have designated as being the distance indicated about, does not strike the red line you marked on No. 9 as the center of the river in 1876?

A. It strikes the red line shown as the middle of the channel prior to the Cut-off.

Q. 40. Did this red line which you have marked on No. 9, as the center of the river intend to indicate what you understand to be the center of the river in 1876 when the cut-off took place?

A. This red line, as indicated on map Exhibit No. 9, is intended to indicate the center of the bed of the river prior to the cut-off, and I could ascertain by documents and maps in my possession.

Q. 41. How long prior to the Cut-off?

A. From the surveys of 1874 and 1878.

Q. 42. You intended the red lines which you have marked as the

center of the channel prior to the cut-off, to represent the period just anterior to the Cut-off?

A. I do.

Q. 43. Now I will ask you to explain how, on Map No. 4, from a fixed point, the intersection of latitudinal and logitudional lines to the heavy bank as shown on the map of 1879, would, when measured on the map No. 9, not *to* be the bank, but be the center of the river?

A. From the map of 1879, what you designate as the line of heavy bank, is only a line showing the demarkation of topographical signs showing heavy timber, and the willows subject to inundation, which does not mean that the heavy timber ceased to exist all at once on any point along that line, and then just past the line that young willows are beginning to grow, but generally indicates about an average between the two kinds of timber. In 1874, the point just measured falls on the sand bar which, between 1874 and 1879-'80, may have been covered by willows, the elevation also increased by successive deposits.

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Q. 44. The point you place at the middle of the channel just prior to the Cut-off, is shown by the map of 1879 to have been at the line of demarcation between heavy timber and willows subject to overflow?

A. It will just fall on the line of demarcation between topographical signs referring to heavy timber and willows subject to inundation. If you could procure the original map or the printed map of 1879-'80, showing the different contour lines, you may just ascertain what difference of elevation was existing on the place where the point just measured falls.

Q. 45. In order for the red line which you have drawn, to be the center of the river to be such, it must be true that between 1876 and 1879, that which had at the first date been covered with water to the extent of one-half of the river, became at the latter date, a point drawn by surveyors who were on the ground, as between heavy timber and willows subject to overflow?

A. In 1876, the point, just marked as the middle of the channel, was covered by water at different stages. The point re-produced on the map of 1879-'80 may also be covered by water at different stages. Of course between 1874 when such a point was on the sand bar, subject to inundation of every rise of the river above low water, between 74 and 79 the territory north of the cut-off has been increased in elevation, and the same point may, alone, nevertheless, as being situated demarkating different growth of timber, be subject to inundation at variation of stages which may be only very small compared to that of 1874.

Q. 46. Captain, in order to make the middle of the channel, I suppose you would have to know the width of the channel. Therefore, I will ask you to tell me what was the width of the river as you calculated at the point where it is crossed by latitude 35-27?

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A. Generally the width of the channel of the river or the width of its bed is taken normally to the general direction of the stream

at any given point on either bank. The width of the river on 35-26, as you just asked me, which is about 9000 feet, does not give the regular width of the river.

Q. 47. The question I asked is to give the width of the river at that point, 35-26, that when you fixed the red line as the center of the channel?

A. Taking that point as the middle of the channel as indicated on Map 9, the width of the river at this particular point would have been, trying to get as near as possible the line normal to the current, about 7000 some odd feet.

Q. 48. Now, please measure from the center of the river, according to the red lines, location, as on map No. 4, and point out where that would place the Arkansas bank?

A. I do roughly, and mark the point No. 1.

Q. 49. The point No. 1 would, in your judgment, be the Arkansas bank of 1876?

A. It would.

Q. 50. Now I will ask you how far that point is within Dean's Island, from the line that marks the line of descriptopn between heavy timber and willows subject to overflow?

A. Over 3000 feet.

Q. 51. The map No. 4 plainly shows that there are 3000 feet or approximately that, of heavy timber between the Arkansas bank of 1876 and the general outline of the center of the river as you mark it?

A. Yes.

Q. 52. Will you please trace on No. 4, with ink, a point
641 corresponding with the red line that you mark on Exhibit No. 9, as the center of the river?

A. I do it roughly. It will not vary 200 feet either way.

Q. 53. We will identify that line by putting at one end a 3 and at the other end a 4.

A. All right.

Q. 54. The State, in this case, described the property claimed as commencing at the northeast corner of the Simon Huddleston grant. Can you, on map No. 4, locate from the Humphreys map, the northeast corner of the Huddleston grant, assuming that the Huddleston grant is that which is marked on Humphreys map as such?

A. I will mark it, and designate it as No. 5.

Q. 55. The northeast corner of the Huddleston grant would be how close to the corner of the river as marked on Exhibit No. 4?

A. About 1700 feet southwest.

Q. 56. How far is it from the intersection of 90-01 and 35-27, north to the Mississippi River?

A. About 4500 feet.

Q. 57. How far is it on No. 11, to the bank from exactly the same spot?

A. About 1400 feet.

Q. 58. Please follow on map No. 11 latitude line 35-26 from bank to bank and measure the distance as of 1874?

A. About 9000 feet.

Q. 59. Take that point on the map No. 4, and measure 9000 feet east?

A. I do roughly.

Q. 60. Will you mark a round thing like a naught, at that point?

A. I do.

642 Q. 61. On map No. 3, do the signs indicate that above 35-27 and east of 90-01 there was heavy timber in 1874?

A. It does.

Q. 62. How far is it on the map of 1874, No. 3 east from the intersection of 90-01 and 35-27 to the main river bank?

A. About 2100 or 2200 feet.

Q. 63. How far from the same point to the bank of 1874, is it on map No. 9?

A. About 1000 feet. But some changes occur.

Q. 64. No change could occur from 1874 to *1874*, and the question is now, from the same point on No. 9 to the bank of 1874, as you have marked on that, is how far?

A. You are working on the wrong basis. The maps made and shown here, all of them were made, not to take into consideration as I said above, any point on Barney Chute or any point nirth of 35-26 on the east bank of Dean's Island. Those lines are unfinished, and the points on those maps which are intended to be covered by study, were south of 35-26, around the river to Brandywine Island to 35-23. The only line north of 35-26 on the east side of Dean's Island, which is platted accurately, is the 1823 map. All the lines from 1823 to date do not take any accuracy, but south of 35-26 as it was intended to study only the portion of the river between 90-01 to 90-12.

Q. Please tell me now, what parts of these maps drawn by you, are to be disregarded as inaccurate?

A. None are inaccurate, but those lines from 35-26 on the east side of Dean's Island are unfinished lines, as it was unnecessary for the case for which I was appointed, to go further than really the apex of Dean's Island on section 4.

Q. 66. The bank line of 1874, as marked on map No. 9, running from 35-27 to 35-26, on the east side of Dean's Island, is not at the right place, is it? If so, why is it that the distances from

643 the fixed point, the intersection of 90-01 and 35-27 to the bank of 1874, do not correspond?

A. The line of '74 and successive years north of 26 may not be accurately platted as they were not to be referred to in the matter for which I was appointed.

Q. 67. Can you look at map No. 11, and give me the Arkansas low water contour lines measured from the bank of 1823?

A. No, sir, I can't give you the low water contour of 1823 as it is not indicated on the map and I have no record in my possession to show the low water in 1823, such a map not being in existence.

Q. 68. No. 11 shows the low water contour line of 1878 does it?

A. It does.

Q. 69. Please point out the Arkansas low water contour line in 1878?

A. I will point you the low water contour south and west of Dean's Island in 1873 which was sand bar attached to said Island and it appears on the map as a black dotted line backed in blue.

Q. 70. Towards the property in controversy, or where that property goes towards the Dean's Island side from the eastern beginning how far is it from this low water contour of 1878, or Arkansas low water contour to the bank of 1823?

A. I mark the two points A and B in pencil on the map, and the distance *os* 7500 feet about.

Q. 71. Now take the same point on Maj. Humphreys' map which you have marked No. 11 as point B, and measure the same distance in the same direction?

A. I can only give it to you about.

A. 72. You mean that you cannot give the thing with absolute accuracy on account of the difference in the angle which may occur in measuring only with the naked eye?

A. I could give it to you with proper instruments and more time.

644 Q. 73. Please give the best measurement you can?

A. I will give it to you as near as I can. This point would come in the middle of what is marked Sandy Chute on the map of Mr. Humphreys, where about the word "Sandy" appears.

Q. 74. To make this clear, the Arkansas low water contour line of 1878, which is two years after the Cut-off, would be on the Humphreys map approximately running through the word "Sandy," which described the chute that is marked on his map as Sandy Chute?

A. It will. That would give you only the addition to the sand bar south and west of Dean's Island between 1874 and 1878, sue to the fact of the Cut-off, of about 1500 feet, which is far from being after the change of the river after the Cut-off.

Q. 75. I will ask you if the red line which you designate as the middle of the channel prior to the Cut-off, would not, on Maj. Humphreys' map, be over on the Trigg 152 acres?

A. It would.

Q. 76. Please measure from the intersection of 35-27 and 90-03 to the center of the river as marked by you on map No. 9, and state the distance along 35-27?

A. The distance along 35-27 from the intersection of 35-27 and 90-03, is about 5000 feet.

Q. 77. Please measure from the same point about 5000 feet west on the Humphreys map, and designate the end?

A. I can't do it, because Mr. Humphreys' map shown me, has no longitudinal and latitudinal lines, but if you want to measure it from the section corner line on those maps, I could give it to you.

Q. 78. Well, do so.

A. Taking for granted that the section corner on both maps are identical, which I found in many cases far from being the dis-

tance from the common corner of 29-28-32 and 33 to the center of the river as I marked it on No. 9, is 8600 feet about.

645 Q. 79. From the same common corner on the Humphreys map, measure westward along the same lines 8600 feet and see where it will come to?

A. I do so.

Q. 80. Please designate by the letter A, this point, with ink?

A. I do so roughly.

Q. 81. I will ask you to please run in red lines on map No. 4 the property in controversy, from the bill, which is filed in this cause, and which I give you for that purpose?

A. I will do so.

Reexamination by Albert W. Biggs, for complainant:

Q. 1. Captain Le Vasseur, you are asked by Mr. Ewing certain questions relative to the lines of latitude and longitude, and the situation of Dean's Island and Barney Chute in relation thereto, as appears on map Exhibit No. 4. Now I ask you to state if you have, since that examination, made a careful examination of map No. 4 and if so, state whether that map is a correct reproduction of the original map made by the Mississippi River Commission?

A. Since the examination by Mr. Caruthers Ewing, I have carefully examined the map, Exhibit No. 4, and I find it to be an inaccurate reproduction of the map made by the Mississippi River Commission.

Q. 2. Did you personally make this map, Exhibit No. 4?

646 A. I did not.

Q. 3. Who made it?

A. A young man named E. W. Arledge, who was at the time employed by the U. S. Office as assistant draftsman. In making said Exhibit No. 4, which was an enlargement of the original map, he made certain mistakes in his measurements. However, relying upon the accuracy of his work, I had not gone carefully over it until my attention was called to certain points thereon, during the examination of Mr. Ewing, and since that time, I have compared the map and find that it is inaccurate. I did not go over this map, because it was never used by me in preparing the maps of the different years which are filed as Exhibit 8, 9 and 10 to my deposition, and which maps are correct and made from the original printed chart of the Mississippi River Commission.

Q. 4. You have a printed map from which this exhibit No. 4 was enlarged?

A. I have.

Q. 5. Will you please file it as exhibit to your deposition?

A. I have already filed that map as Exhibit No. 7. At the time map Exhibit No. 4 was made, it was given to Mr. Biggs in order to show the difference between the river before and after the Cut-off, and as I said to my answer in my original deposition, this map though published in 1891, was not intended to show the river bank at that time, but the bank lines of the river were taken from the

surveys made from 1879 and 1879, the topographical signs from the survey of 1883 and 1884. It was not intended to represent accurately the bank lines of 1891 at the time it was prepared, but designated simply as a general information map for the use of pilots. This map is done to the scale of one inch to the mile. It was the one used, or intended to be used by Mr. Arledge when some months ago he made the enlargement shown as Exhibit No. 4.

When Mr. Arledge made Exhibit No. 4, I was not con-
647 nected in any way, shape or form with the subject or cause for which it was made, but Mr. Biggs called at my office to inspect the Government maps, and asked if that map could be enlarged to the same size as the map of Col. Suter, and I told him it would, and I would have a copy of the Suter map, and of that map made on the same scale by the young men, in the office, as I did not have the time to do it myself. Mr. Biggs was introduced to me on that day by Mr. Harry N. Pharr, the Chief Engineer of the St. Francis Levee Board, and that was the first time we met.

Q. 6. Then as I understand you, the map exhibit No. 7, was compiled from Chart 18?

A. Yes sir, Exhibit No. 7 was practically compiled from information obtained from the map shown on Chart 18, with modification from place to place which was obtainable between the map, chart 18, and the publication of map No. 7.

Q. 7. Now Captain, when on your maps exhibits 8, 9 and 10, and 11 and you refer to the survey of 1878, what survey do you mean?

A. I mean that the latitude and longitude was determined by the survey made in 1877 and 1878, the secondary triangulation and precise level in 1879 and 1880. By this secondary triangulation, I mean the establishment of triangulation points from two to five miles apart on each side of the river, which were established by triangulation tied or referred to geometrical positions and which are a reference for all subsequent surveys. They are called U. S. bench marks. The hydrography and topography of the river which show the river bank, islands, bars and growth of timber were determined and established by what we call a stadea survey, tied and referred to the triangulation points already established. This survey collected all information and data for the topography and

hydropography shown on chart 18, as well as that shown on
648 Exhibit No. 7, published in 1891, and this was made in 1883 to 1884. Therefore the lines of demarcation between the various kinds of timber which appear upon the map Exhibit 7, which is called the map of 1878 at times in my deposition, was in fact not determined until 1883 and 1884.

Q. 8. Captain, you have stated in your disposition that you were not a timber expert, and were not able to tell the age of timber at places where you survey. Have you had any observation as to the growth of willows along the sand bar of the Mississippi River, and if so, will you state how the same grew? I mean how fast?

A. Theree years ago on a sand bar at places willows would grow

large enough to use in mattresses construction, which means at least three inches to the butt for 30 to 45 feet in length.

Q. 9. Captain, will you explain upon map Exhibit No. 9, where you have marked the middle of the bed of the Mississippi River as it flowed prior to the cut-off; also indicate by a dotted line between the letters X and Z the middle of the channel of the river as it flowed in 1823?

A. I will do so.

Q. 10. Col. Bullitt asked you quite a number of questions as to how you were able to determine the Tennessee shore in 1823. I now ask you if the Land Office surveys made in Arkansas at that time, in 1823, showed the width of the river at various points?

A. It does, and from those I was able to determine, with the help of the original map of the State of Tennessee, the river bank in 1823.

Q. 11. When your original deposition was taken, you stated that you had not made the survey of the timber which had been cut, and could not show the line of the same on your map?

649 Will you please show on Exhibit No. 8 the line of the timber by a dotted blue line and the middle of the stream by a dotted red line?

A. I will do so, the survey having been made since my original examination was taken.

Q. 12. Is Island 37 within the State of Tennessee of the State of Arkansas?

A. The State of Tennessee.

Q. 13. Why do you make this statement?

A. First, because the boundary line between the State of Arkansas and the State of Tennessee was, according to the Act of Congress admitting the State of Arkansas into the Union, approved June 16th- 1836, to be the middle of the main channel of the Mississippi River. Second, because Island 37 has never been sectionized by the State of Arkansas, the original map of 1823 showing the sections of the State of Arkansas, ending at what was then the Arkansas Mississippi River bank. Third, on the map of 185- of Humphrey & Abbott, Island 37 is included in Tennessee. Fourth, Island 37 is covered by a grant issued by the State of Tennessee and none, to my knowledge, by the State of Arkansas. Fifth, by the information that I obtained from the people living in Arkansas, and the people living on Island 37, that Island 37 was part of the State of Tennessee, and not a part of the State of Arkansas, and the State of Tennessee exercises jurisdiction over said Island, and to the best of my information has always done so.

Q. 14. You have designated on the map the middle of the main channel of the Mississippi River, as it flowed prior to the Cut-off in 1876. Will you now give a description of that line so that it may be run upon the ground?

A. Starting from a point on longitude 90-0313495 feet south of latitude 35-26, North 32-45 West 4160 feet to a point on

650 latitude 35-26, 2225 feet west of longitude 90-03; thence north 23-45 west, 6140 feet to a point on latitude 35-27, 95 feet East of Longitude 90-04; thence north 10-30 west.

Q. 15. I here hand you a certified copy of the Grant from the State of Tennessee to John Trigg, being Grant No. 3271 for 100 acres in Tipton County, Tennessee, on Island 37, the same appearing extensic at page 168 of the transcript of the record of the case of H. W. Stockley vs. W. A. Cissna, filed in this cause; also grant No. 3270, for 30 acres on Island 37 in the Mississippi River, the same dated Nov. 10, 1837, the same appearing in full on page 170 and 171 on the transcript of the record of Stockley vs. Cissna; also grant No. 3292, for 37 acres, dated the 13th of November, 1837; also Grant No. 3269 for 151½ acres granted by the State of Tennessee to John Trigg by grant dated Nov. 10, 1837, the same being on page 173 and 174 of the record of Stockley v. Cissna; also grant No. 3283, for 152 acres, dated the 12th of November, 1837, and appearing in said record at page 202; and I ask you where the said tracts of land are situated?

A. They are all situated by the description, upon Island 37 on the Mississippi River, and the same appear platted upon the map of Maj. Humphreys, and are grants from the State of Tennessee.

Q. 16. Do any of said grants refer in terms to McKenzie Chute and the Mississippi River?

A. Grant No. 3270 refers to McKenzie Chute in terms, it stating in the description, "containing 30 acres situated and lying and being in the County of Tipton and State of Tennessee, in Range 9 section 6 an Island 37 in the Mississippi River, beginning at the southeast corner of an occupant entry of. I. Barney, assigned to Zephannah Doan, on two small cotton-woods marked "I. B." standing on the bank of McKenzie Chute, etc." In Grant 3292, the description is as follows:—"By virtue of an entry in Tipton County, etc., there is granted by the State of Tennessee, unto John Trigg, assignee
651 of W. W. Woodfork, containing 37 acres by survey, bearing date of 14th of October, 1857, lying in said county, in Range 9 and Section 6 on Island 37 in the Mississippi River, beginning at the head of said Island, about 400 poles north 50 degrees west from L. Duddleston's northeast corner, running thence down the main or north chute, north 10 degrees west to a sycamore marked "J. T.," thence west 90 poles to a hackberry marked "J. T.," thence south 80 poles to a hackberry on McKenzie Chute, marked "J. T.," thence up said chute east 20 degrees north 95 poles to the beginning." What is here referred to as the main river, or north chute is the river which flows around island 37 to the north, and is contradistinguished from McKenzie Chute by being called the main chute. Also in the grant No. 3269 this is referred to as the main chute, and also as *rhw* Mississippi River.

Cross-examination of Capt. Le Vasseur by Mr. Caruthers Ewing, January 7th, 1905:

Q. 1. Captain the McKenzie Chute in 1823, was the main channel of, and known by the people, as the Mississippi River was it not?

A. No sir.

Q. 2. Why do you say that?

A. In 1823 the main crossing of the water going between the north bank of Island 37 and the Arkansas shore.

Q. 3. You have before you, the Humphreys map, which shows the northeast corner of the Simon Huddleston grant, have you?

A. I take it for granted.

652 Q. 4. You have Maj. Humphreys' map before you, have you not?

A. Yes a copy.

Q. 5. Who made the map?

A. I don't know.

Mr. Biggs agrees that this is a copy of the Humphreys map.

Q. 6. Please state if on the map you see a tract marked "Huddeston's 2000 acres"?

A. I do.

Q. 7. I will ask you to examine Grant No. 21206 to Simon Huddleston for 2000 acres, based upon certificate No. 1364, dated March 31st, 1820, and assuming that the point on the Humphreys map treated as the northeast corner of this map, is in fact such? Please trace the calls of that grant and see whether according to the calls as written in the original grant, based on the certificate dated 1820, McKenzie Chute was or was not referred to and designated as the river?

A. No, it calls it as the Mississippi River, but does not say it is the main channel of the Mississippi River.

Q. 8. The Mississippi River referred to in the description based on the Certificate of 1820, would, and necessarily does, refer to that which is marked on the Humphreys map as McKenzie Chute, does it not?

A. What is called in that deed as the Mississippi River, is called on the map of Mr. Humphrey, McKenzie Chute.

Q. 9. I will as*k* you to refer to Exhibit No. 9 to your deposition, and tell me what the figures 19-02, 90-03, etc., with a red line drawn directly under each of these on the map, means? To what do these red lines drawn under the figures 90-02, and 90-03, etc., refer?

653 A To longitude.

Q. 10. I notice across the map a similar map drawn, on which line are the figures 35-27 and 35-26, etc. What are these lines?

A. Latitude.

Q 11. The intersection of those lines are fixed points are they not?

A. Yes sir.

Q. 12. They would vary with the variations of the land lines or river lines?

A. No sir.

A. 13. Deans Island is made by a chute between the land and Arkansas main bank on some of the maps Barney Chute, some call it McGavock's chute and some Deans Island Chute.

—. Please explain so that I may understand the maps, why it is that the intersection of 90-03 longitude and 35-27 latitude is north

of this same intersection, while on No. 3 the same intersection is south of the chute?

A. On the map Exhibit No. 9, the bank of Barney Chute is indicated as it was in 1823. Between 1823 and 1874 some changes of Barney Chute may have taken place. This map, Exhibit No. 9 the changes which may have occurred on shore line of McGavock's or Barney chute, are not indicated, as the work done on this map was not pertaining to Barney Chute or the river proper. The intersection of 90-03 and 35-27 map to the north or south of that chute, according to the years, which may be due to changes in that chute during such period, changes which are not retraced by me as the work I was in charge of did not require me to re-trace the different shore line of the chute.

Q. 14. P-ease look at Exhibit No. 9, and state what distance it is from the northwest corner of the property line to the Tennessee bank?

654 A. About 2350 feet; something near that.

Q. 15. Will you state on Exhibit No. 3, what the same number of feet would indicate from the same point, was the property line?

A. There is no scale on map Exhibit No. 3.

Q. 16. It is marked on map Exhibit No. 3 "Scale one inch to the half mile." Can you not, with that scale, figure approximately the distance?

A. I cannot. One *os* on tenths and the other in inches.

A. 17. Do I understand that you cannot tell distances on the map as such as No. 37?

A. Oh yes, I can tell distances on any map if you furnish me scales.

Q. 18. I will furnish you the scale of one-half mile to the inch, on map No. 3, according as is marked on the map, and now ask that you give me the distance?

A. I will when such a scale will be furnished to me.

The further cross-examination as to matters dealing with other maps than those scales so the witness can answer, is deferred until he has gotten the necessary instruments to make the measurements asked.

A. 19. On maps 10 and 11, there appears a scale which enables you to tell the distances, does it not?

A. Yes sir.

Q. 20. Please state what is the distance on map No. 10 from the intersection of 90-02 and 35-26 to the property corner?

A. About 6100 feet in a straight line.

Q. 21 Please look at map No. 11 and state what is the distance between the same points on that map?

A. 6100 feet.

655 Q. 22. So that the two maps will correspond as to the distance from a fixed point to the property line?

A. Yes sir.

Q. 23. You can tell from map No. 3 whether the point I have indicated was on Dean's Island and in heavy timber in 1874?

A. The intersection of 90-02 and 35-26 on map Exhibit No. 3 seems to be located in timber subject to inundation.

Q. 24. You have carefully compared No. 3 and No. 11 with a view to locating on No. 3 the intersection of 90-02 and 35-26?

A. Yes sir.

Q. 25. And locating that point on No. 3, you would fix it on Dean's Island at the point which was timbered, but subject to inundation?

A. I do.

Q. 26. And the location of that fixed point on No. 3 gives your idea of what on that map, represents timber subject to inundation?

A. It does.

Q. 27. At what gauge of the river would you say that timber was subject to inundation?

A. The water would be hardly bank full, Willows subject to inundation, does not mean that they will be inundated only at a very high stage.

Q. 28. Look at the timbered property south of Dean's Island, around which a black line appears, and say whether you mean to indicate that heavy timber was on that point?

A. No sir. They were willows.

Adjourned until 2 O'clock Thursday, February 9, 1905.

656 Recross-examination by counsel for Muncie Pulp Company, on March 16th, 1905:

Q. 1. Captain LeVasseur, when you were cross-examined in this cause by counsel for the Muncie Pulp Company, you introduced a certain number of maps as Exhibits to your deposition, ma-king them from Exhibit 1 to Exhibit 11. How many of these maps were accurately made by you?

A. Exhibits 8, 9, 10 and 11.

Q. 2. By whom were Exhibits 3 and 4 made?

A. They were made by a young man who used to be employed temporarily as draftsman in the U. S. Engineer's office, named Arlage.

Q. 3. You introduced both of these maps as having been prepared under your direction, did you not?

A. I don't think I did. I had nothing to do with those at the time.

Q. 4. I call your attention to question 34 in your direct examination by Mr. Biggs, which is as follows: "Q. Have you had prepared under your direction, a copy of that map upon a larger scale than the one made by the U. S. Government? A. I have. Q. 35. Will you file that map as Exhibit 3 to your deposition? A. I do." I will ask you whether that statement on your deposition, which I now show you, was correct or not?

A. That answer is a mistake. The young man who made those maps for Mr. Biggs was at the time under my direction in the

office, but I had nothing to do, in so far as the maps were concerned. When Mr. Biggs came to the office at the time, he asked me if I could have a copy made of those maps, for him. I told him I could not do it myself, of course, but I would recommend some one to do it for him. Mr. Arlage was the man who made the maps. At the time the maps were done, I did not know for what purpose they were made or to what scale they were to be enlarged.

657 Q. 5. Have you subsequent to giving your deposition, examined these maps 3 and 4?

A. I examined those maps, but not closely, taking it for granted that Mr. Arlage would have enlarged accurately the maps asked to be enlarged by Mr. Biggs.

Q. 6. Since giving your deposition, then, you have found that Exhibits 3 and 4 to your deposition, are totally incorrect?

A. I would not say totally, but incorrect at some points.

Q. 7. Have you examined these maps in order to find at what points they are incorrect?

A. A month ago I made such examinations.

Mr. Biggs, counsel for the State of Tennessee states that after it was ascertained that maps Exhibits 3 and 4 were not correct copies and enlargement on the maps, in every particular, that they will not be relied upon by the State of Tennessee on the hearing of this cause, for any purpose whatsoever.

Q. 8. Did you personally make maps Nos. 8, 9 and 10?

A. I did.

Q. 9. I see that map No. 8 is stated to be made on the authority of 1881, from the triangulation survey of 1884, and 1904, from the original triangulation survey made by George De Beughem under the direction of Charles LeVasseur. I will ask what personal work you did in connection with fixing the distances and the lines shown on that map? Original work I mean.

A. Platted the surveys of 1884 and 1904, from the respective data and notes of those dates. The original map where those lines were platted is in my possession and it is from such a map that the tracing here, as Exhibit is made.

658 Q. 10. Regarding the original map of 1884, which you say you platted on Exhibit 8, I will ask you if that is not the map attached as a part of your exhibit to your deposition as map No. 5?

A. Map No. 5 may be the same map, but this identical sheet was not in my possession, but my data and information was taken from maps and records in existence in the U. S. Engineer's office for the First and Second Districts and inclosed in a big atlas, showing the modification of the river according to surveys made from year to year.

Q. 11. The data for the bank lines of 1904 and the low water contour of 1904, you took from surveys made, not by yourself, but by George de Beugham. Is that a fact?

A. The survey made by Mr. de Beughem in 1904, was made un-

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der my direction by Mr. de Beughem in charge of the field party and other instrument men. I superintended on the ground, made report of that survey, and the lines shown on Exhibit 8 are platted from the field notes obtained during the survey by Mr. de Beughem and his assistants.

Q. 12. You, however, made none of these field notes yourself, did you?

A. No sir.

Q. 13. Then all that you are testifying here to, is what you have received from the survey of Mr. de Beughem?

A. And my personal observation.

Q. 14. Then I want to know exactly how far your personal observation went? To what extent, and what parts of this territory did your personal observation cover?

A. My personal observation covered all this territory, but I was not the man behind the instrument to read the asimuth and distance. I *d-d in* to carry the chain, but was there, when they checked their work on different bench marks. I computed their work to see if it was correct.

Q. 15. You have been asked to show on this map 8, the
659 line of timber cut on Dean's Island, as related to the line to which you have fixed as the middle of the channel prior to the cut-off, of 1876. I notice that this has not been made. Did you personally have anything to do with the survey fixing the line of this cut timber?

A. I had nothing personal to do with it when Mr. Brown and Mr. Bullitt requested me to have that line surveyed. I transmitted the request to Mr. de Beughem. Since then Mr. de Beughem having been busy on some other work, and the weather having been, during this winter, very unfavorable for field work, Mr. de Beughem has had, I believe, this work done lately. Personally I had nothing to do with it.

Q. 16. Will you please look on Map 8, the common corner of sections 5 and 4-32 and 33?

A. I do, indicating the same by a black dot surrounded by a circle.

Q. 17. How far is that common corner from the east line of the tract claimed by the State of Tennessee, shown on this map by shaded black lines?

A. 5000 feet.

Q. 18. Please indicate on this map the location of the heavy timber subject to inundation, as located on Capt. Suter's map of 1874?

A. They appear on map 9 with appropriate legends and this map is drawn to the same scale as map 9 and the location of this heavy timber can be found by superimposing map 8 over map 9.

Q. 19. At what stage of water were your bank lines of 1904 calculated on map 8?

A. The stage depended entirely upon what point is taken. The bank line has not the same level all the way through the reach. This would be ascertained by the reading of the field notes of this survey which if you want will be deposited as an exhibit. For the

present it would be really ha-d for me to tell exactly the elevation of the bank line at one particular point without referring as
660 I say, to the survey notes.

Q. 20. I don't think you exactly comprehend my question. You have shown on this map, Exhibit No. 8, two lines shaded with red, a solid black line and a dotted black line, and the legend at the head of your map stated that the solid black line shaded with red is the bank line of 1904 and the dotted black line shaded with red is the low water contour of 1904. What I want to know is what was the stage of water when you located the bank line? Low water, medium water, or high water?

A. That is just what my answer referred to. This survey was not made in a day. It was made during the different stages of water which are found in the field book. The bank line which is represented on this map by heavy line, backed with red, represents the high bank, the elevation- of which are also recorded at different points, on the field books. This high bank has not, as you know the same elevation everywhere, so as to answer you which, elevation of the bank or low water contour, I must have the notes of the survey.

Q. 21. How long did it take to make this survey of 1904?

A. More than three months.

Q. 22. During that three months did you have such a change in the water in the river that it went from high water to low water?

A. No sir, not during the survey.

A. 23. Then, if you did not have it during the survey, how did you fix the high bank and the low water contour?

A. We call low water contour the elevation of the sand bar during low water stage, equivalent to pretty nearly the extreme low water. We call high bank, which is generall- a bluff bank, and which at first sight shows that said bank is above the medium stage of water.

Q. 24. Do I understand you then to mean by this map that in the *d*all of 1904 when this survey was made, you found an
661 open water chennel between the Tennessee shore to the east end of Centennial Island, and the west side of Dean's Island and the accretions thereto?

A. I do not, sir. The map does not show it?

Q. 25. I call your attention here to a black line shaded with red, running to the north of Centennial Island and down the east side of the Island to the point which I will mark on the map between those two letters is not indicated by your map to be the bank line of 1904 from the east end of Centennial Island?

A. Yes sir.

Q. 26. I now call your attention to the black line shaded with red between the point *w*hat I will mark with the letter C down to the point where I will mark with the letter D, and I will ask if that does not indicate the bank line of Dean's Island and its accretion in 1904?

A. It shows the bank line of the accretion, west of Dean's Island, but it does not intend to show that an open channe*k* was during the survey of 1904, found between the points A, B, C and D.

Q. 27. What was the space marked on your map between those points and the left bank and the unfilled in on the map?

A. It was the ond bed of McKenzie Chute.

Q. 28. Are you not mistaken in saying it was the old bed of McKenzie Chute. Is it not a fact that McKenzie Chute began approximately on the line between the letter A and C. and the balance of this trace from A to B. and from C. to D. was the old bed of the Mississippi River prior to the cut-off?

662 A. Prior to the cut-off, McKenzie Chute begun near by letters A and C. The old river flowing there, the old river bed between Island 37 and Arkansas and the main steamboat channel being diverted near by the point A and C to McKenzie chute. After the cut-off occurred, old river filled up and was closed around 37 and from A to B, known now also as McKenzie Chute, the bank may be that of Centennial Island, after the cut-off, when some of the water of the river was flowing between the southwest accretion of Dean's Island and the eastern boundary of Centennial Island.

Q. 29. Was the line between the letters C. and D. at the time your survey of 1904 was made, a bluff bank or not?

A. It was a bluff bank but not comparatively to that of Centennial Island.

Q. 30. In other words, the bank line between A and B was much higher than the bank line between C and D?

A. It was.

Q. 31. How much higher was it?

A. The field not- book which will be exhibited will show that exact difference in the elevation.

Q. 32. It was, however, a very distinct bluff bank on both sides was it not?

A. Especially so on Centennial Island. A half bluff on the other side. In other words, the bank showing several ledges.

Q. 33. That would indicate, would it not, that for quite a while there was an open channel between these two bluff banks?

A. Not necessarily.

A. 34. Why not.

A. The channel may have been at the time filled up entirely to the bluff bank of Centennial Island but during high water the flow of the river may have cut off or washed out part of the deposit or accretion and made therefrom the bluff bank. The same

663 kind of bank is found in existence along both sides of the Middle Pond.

Q. 35. How wide is the space between the two lines A to B and C to D on an average?

A. About 400 feet.

Q. 36. The land back of the line C to D, progressing eastwardly towards the original Deans Island, is it of the same elevation as that line, or a greater elevation?

A. No sir. All that territory between the line C and D, and Middle Pond, is what we generally call corrugated country, which shows that during high water the ground has been gouged so by the flow of water towards McKenzie Chute or towards Old River.

Q. 37. Did you notice *which* you were making this survey, anything about the character of the timber between the lines C, D and the original Deans Island?

A. No sir.

Q. 38. Is Barney Chute correctly located and meandered on this map?

A. It is.

Q. 39. Does it correspond with the location of McGavock's chute as set out on Exhibit 3, the Suter map of 1874?

A. The McGavock Chute od 1874 shown on map of Co. Suter is plotted by guesswork. The operations of Col. Suter never intended to make a survey of McGavock's chute, therefore on his map that chute has been sketched in without any instrumental observations, and is, as may be anticipated, wrong.

Q. 40. Please locate on map 8, the middle of the low water channel prior to the cut-off?

A. I do so, on maps 8 and 9 and will write above the line "Middle of the low water channel of 1874."

Q. 41. What is the distance from the common corner of 5—4, 32—33 to the middle line of the low water channel, measuring due west on the projection of the section line?

664 A. 500 feet from the common corner to the middle of the low water channel of 1874.

Q. 42. The legends on map 9, "willows and heavy timber" and "willows subject to inundation," are identical, are they not, with the same legends on the Suter map of 1874?

A. On the map of Suter, which we have at the office the words, "Willows and heavy timber" and "willows subject to inundation" is not written, but is *is* shown on the first page of the atlas by the topographical signs, which, in order to make more plain, I have written out on the map.

Q. 43. What is the distance from the head of Island 37 at the point marked "gravel" to the red line given by you as the middle of the channel, prior to the cut-off?

A. 2500 feet.

Q. 44. What is the distance from this line to the line marked willows subject to inundation on the Arkansas shore?

A. On the same due east projection, the distance is 3900 feet. That is, it is 3900 feet from the head of Island 37 to willows subject to inundation?

Q. 45. I did not ask you for this measuremen-, You misunderstood me. The distance that I wished now measured is from the line which you have marked as the middle of the chennel to the line indicating willows subject to inundation?

A. 1400 feet.

Q. 46. Why do you not locate the chennel line exactly half way between these points?

A. Because that is not the channel.

Q. 47. Is not land covered with willows considered by all surveyors and Civil Engineers, as the bank, and not part of the bed of the stream?

A. The territory covered by willows is in many instances along the Mississippi a River, a part of the bed of the river.

665 They are showing up dry only at extremely low water, and at medium stage are thoroughly covered by water. The channel or bed of the river as it is understood by all surveyors and Civil Engineers, is the territory on which the river flows at full stage.

Q. 48. Do you, or do you not, know, Cap. LeVasseur, that the rule of property on the State of Arkansas is that land coveted with vegetation of any character is part of, and belongs to the reparian owner, and that only land not covered with vegetation is a part of the bank of the river?

A. I don't know the laws of Arkansas, but I know that the channel of the river may be covered by vegetation, and norwithstanding whatever statute or law of Arkansas exists, it is the channel of the river.

Q. 49. I notice on map 10, the east line of the tract claimed by the State of Tennessee runs through land marked with the legend "willows and heavy timber" on the parallel 35 degrees 26 minutes, while on map 9, the same point is marked. Is it, or not a fact that the timber marks on mao 9 were taken from observations and notes made in 1874, while those on map 10 were taken from observations and notes made in 1878?

A. The word "sand" and all, topographical signs or words shown on Exhibit 9, are to answer to the survey of Co. Suter in 1874. Those on Exhibit 10, outside of the words, "willows subject to inundation," 1874, are referring to topographical features after 1874, after the cut-off.

Q. 50. I notice on the legend inscribed at the head of Exhibit 10 that you say your authorities are the original reconnois-ance of 1874, and original triangulation survey of 1878. Therefore, all of these words and topographical signs show the existence of the territory and the appearance thereof, not later than 1878. Is that a fact?

666 A. No sir, the map of 1878 was begun in 1878 and 1879 and of records of different surveys as existing in 1884. In other words, the 1878 survey was completed in 1884.

Q. 51. Can you tell when the survey of this particular part of the river was made, so far as the topographical signs indicating vegetation are concerned?

A. I will furnish the exact date from the maps in the U. S. Engineer's Office. My recollection is that those lines apply to the date 1878 and 1879.

Q. 52. How long does it take, for sand to grow willows and heavy timber?

A. I could not tell you.

Q. 53. You have stated in your deposition that you have known willows three inch in butt, to grow in three years?

A. Yes sir, I have known that, but I never made a special study of the growth of willows. That particular branch is not one of my profession.

Q. 54. Did you ever know willows and heavy timber to grow

from sand in space of four to four and a half years, you having already defined willows and heavy timber to be from six inches up?

A. I would rather not say anything about the growth of timber as I am thoroughly incompetent on that question.

Re-examination:

Q. 1. The map and survey which you speak of as the map of 1878 and 1879, was the first map made under the authority of the Mississippi River Commission, was it not?

A. Yes sir.

Q. 2. I here hand you an executive document No. 58 of the second session of the 46th Congress of the United States, and being the report of the Mississippi River Commission transmitted to
667 Congress by a letter from the Secretary of War, and ask you to file the same as Exhibit A to your deposition?

A. I do so.

Q. 3. Did not that report accompany the survey and map which is filed as Exhibit No. D to the deposition of Col. Suter, which I here show you?

A. I will have to examine it.

Q. 4. Does the triangulation survey undertake to give the timber?

A. No.

Q. 5. In measuring the width of the channel at any place, you measure perpendicularly to the way the stream is flowing at that place?

A. We measure in the direction normal to the current.

Q. 6. You mean by that, perpendicular to the current?

A. I do.

Q. 7. I here hand you the report of the Mississippi River Commission prepared in 1893, showing the stages of the Misisssippi River from Cairo, Ill., to Carrollton, La., and ask you to examine page 163 and see if on there is a report of the stages of the Mississippi River at the City of Memphis, for the year 1874?

A. There is.

Q. 8. Will you have a copy of said stage made, and filed as Exhibit B to your deposition?

A. I will.

Q. 9. On Exhibit No. 1 there appears certain directions and distances from the Arkansas shore and Dean's Island to the Tennessee shore. Will you please state what these distances are, the points from which the measurements were made, the calls or directions, and state whether the- check on your map *map* Exhibit No. 9.
668 A. These directions and distances shown on Exhibit No. 1 from established points on the Arkansas side towards the Tennessee shore, are indicating direction of certain points adopted by the survey at that time, situated on the Tennessee shore, and some also indicating the distance along said direction. One of those are, starting from a point, sections 19-20, 30-29 south 54 degrees west 54.44 chains. This distance and direction on the map Exhibit No. 9 checked exactly with the point situated on the extreme

northeast side of Island 37, which is distant from the same initial point 3593.04 feet.

From another point starting from the conjunction of the middle line between sections 4-5-32 and 33, and the bank of Deans Island, shows that with the direction of south 89 degrees west, the instrument ought to strike the head of an Island on the Tennessee side. There are no distances given on the original map. Said direction platted on map Exhibit 9, from the same initial point will strike the southeast point of Island 37. The other measurements given in the notes of the Land Office, also check on Map No. 9.

669 Re-examination by A. W. Biggs, for the State:

Q. 1. Capt. Le Vasseur, I noticed on your map Exhibit No. — and also on Exhibit No. 2 to deBeughem's deposition, a chute marked south of Deans Island stops before it reaches meridian of 80-03 of west longitude. I notice on the map filed by Col. Suter, which was printed in 1882, that this chute extended beyond 90-03 west longitude, and I call your attention to this, and ask you if you have looked to the original chart in the office of the Second and Third District to see the chute, as you represent it, is correct to the map from which you made it?

A. The lines as shown on the atlas in the U. S. Engineer's Office, indicate the line of 1879*00*1880 for a chute not reaching 90-03. On the printed map, made between 1880 and 1884 the chute extends past 90-03.

Q. 2. Will you indicate it as it extends on the printed map, by a dash and perpendicular dot?

A. I do.

Cross-examination by Col. Bullitt, for Oppenheimer, Trustee:

Q. 1. On the map, Exhibit No. 2 to de Beughem's deposition, which accords with one of the maps filed by you, for 1874-1878, you have marked along a broken line the words, "Middle of bed prior to cut-off." In estimating that as the middle of the bed of that river at that time, you assumed that the bank of the river on the Arkansas side was the same as the bank marked "Bank line of 1834." Am I correct in that?

A. For a part, you are. I mean for the part of 90-03 southeast. For part 90-03 northwest, I took the 1874 bank line of willows and heavy timber, as indicated on the map of Co. Suter.

670 Q. 2. In marking this middle bed prior to cut-off in 1876, you assumed as the eastern or Arkansas bank, the solid line marked "bank line 1823" as continued towards the northwest by the scalloped line marked "Willows and heavy timber".

A. I do.

Q. 3. Now that line marked "middle bed prior to cut-off" is on the west edge of the territory marked "Willows and heavy timber" on the map of 1878, that is correct?

A. Yes sir.

Q. 4. Is there anything upon any of the maps shown, or have you any personal knowledge that in 1876 there was *nay* stream or flowing water be*y*ween that line marked "middle bed prior to cut-off" and the bank line in 1823, continued by the line marked "willows and heavy timber"?

A. I have no personal knowledge of it, and there is no map between 1874 and 1878. I have therefore, no information from maps that there was a stream flowing between the lines indicated.

Q. 5. Have you knowledge derived from any maps or any data or from other source of information, are you able to state that in 1876, or at any time prior thereto, within say, ten, fifteen or twenty years prior to 1876 there was a stream of flowing water lying between the lines indicated, to-wit:—the line marked "Middle bed prior to cut-off", and the line marked "bank of 1823" continued by the scalloped line, "willows and heavy timber"?

A. My knowledge will be derived from the study of the map prior to 1876, to-wit: The map of Col. Suter of 1874, which according to this plat, shows that a depression was existing between the line indicated as "middle of bed prior to cut-off" and line shown as "bank line of 1823" continued northward by the line of "willows and heavy timber" in 1874, which enabled me to say that water was at a certain stage of the river flowing between the line "middle of bed" and the northern line just mentioned.

671 Q. 6. Now what is there on the map of 1874, or any other map which shows that there was at ordinary stages of water, a stream flowing between those lines?

A. On the map of Col. Suter of 1874, between longitude 90-03 and 90-02, a pond was existing, situated between the tow-head and the main Deans Island. North of that point was a sand bar and east of the sand pond was also a sand bar. Therefore, it is easy to derive that during ordinary stage, water was flowing through the sand bar into the pond in a northward direction.

Q. 7. When we use the word pond in this country don't we mean a body of water that does not flow, but is surrounded on all sides by land?

A. When we apply the word pond to bodies of water situated in the sand bars along the Mississippi River, it is intimate that a deep depression is existing in such locality, which, when the water receeded, leaves the pond without any exit. As the water rises, said pond is a part of the channel through which the increased flood of the Mississippi River flows.

Q. 8. That pond of 1874 is marked at either end by a curved dotted line is it not?

A. Yes sir.

Q. 9. And those curved dotted lines indicate the end of the pond in either direction?

A. Yes, at the time of the survey.

Q. 10. Now immediately to the eastward of that pond you find upon the map marked, "willows and heavy timber" do you not?

A. Yes, that is, on the map of 1878.

Q. 11. Immediately to the northwest of that pond you find a

line indicating "willows subject to inundation" and that that line lies between the line marked "willows and heavy timber" on the northeast, and "Willows and heavy timber" on the northwest thereof?

672 A. The line marked "willows subject to inundation on the northwest, below the line "willows and heavy timber", belongs to the 1874 survey. The line south of it, marked "willows and heavy timber" belongs to the survey of 1878.

Q. 12. The legend "willows and heavy timber" lying immediately west of the pond, is over a slight black line with perpendicular dashes, extending from it. That line I find, is continued in a curve from the upper end of Barnay Chute, down south to the pond, and away back until it reaches pretty nearly to Barnay Chute, on the northeast corner of the map, That line indicates, as I understand you, the willows and heavy timber as shown by the map of 1878. That is, the whole of that line?

A. It does.

Q. 13. Can you state at what stage of the water, the survey of 1874 and the survey of 1878 was made, or is there anything in the records of the Mississippi River Commission to show it?

A. I could not tell from recollection, what was the exact stage of the water at the date of the two surveys, but the date of the survey of Col. Suter, and also that for the Mississippi River Commission, will show the exact *guage* reading at the time the surveys were made.

Q. 14. Will you please make a memorandum of the exact *guage* reading at the date of these surveys from the records so far as they show the same, and attach this document to your deposition, signed by you, for purposes of identification, as Exhibit Z?

A. I will do so.

A. 15. Are you able to state, and if so, give us the source of your information, at what stage of water, low, medium or high

673 the territory was subject to inundation along the line over which the words "willows subject to inundation"—that line lying between the bank of 1823 and the middle bed prior to cut-off?

A. That line is the 1874 line, and I have no data to state at what *guage* this line would be covered.

Q. 16. Then you can't state at what stage of the water there would be a flood of water along that line?

A. I can certainly state that a flood of water through this depression, would have taken place between medium and bank full stage.

Q. 17. And by bank full stage, you mean to refer to the bank line of 1823, and extended by willows and heavy timber?

A. I do.

Re-examination by Mr. Biggs:

Q. 1. Barren sand bars only appear at what stage of the river?

A. Below medium *guage*.

674 The next witness, GEORGE DE BEUGHEM, testified as follows:

Q. 1. What is your name and where do you reside?

A. George de Beughem, residence Memphis, Shelby County, Tennessee.

Q. 2. What is your present occupation?

A. Civil Engineer.

Q. 3. How were you qualified for your profession?

A. I graduated from the Belgian Military Academy Engineering Corps at La Cambre, near Brussels, in 1886.

Q. 4. Did you have any service in the Army of Belgium?

A. Yes, six years.

Q. 5. In what capacity did you serve?

A. When I resigned I was Second Lieutenant in the Engineering Corps.

Q. 6. Have you had any experience working for the Mississippi River Commission?

A. I worked for nearly five years in Memphis, for the U. S. Government in the First and Second Districts.

Q. 7. When did you sever your connection with the U. S. Army Mississippi River Commission?

A. October 1st 1904.

Q. 8. In what work did you then engage?

A. I was employed by Mr. Biggs to make a survey to determine the State line between Tennessee and Arkansas in the vicinity of Pecan Point, Centennial Island, Island 37, etc.

Q. 9. Were you employed in connection with Capt. Chas. Le Vasseur?

A. I was under the direction of Capt. Chas. Le Vasseur.

675 Q. 10. What is your present occupation?

A. I am Chief Engineer of the *Levy* District No. 1 Faulkner County, Ark.

Q. 11. In making this survey of the Mississippi River, which you have just stated, were you the active man in the field? The man behind the gun?

A. Yes sir.

Q. 12. Have you procured a series of maps representing this section, and if so, will you file them as Exhibits Nos. 1-2 and 3 to your deposition?

A. Yes sir, I did and I do so.

Q. 13. What is the difference between the map you exhibit as Exhibit 1-2 and 3 to your deposition, and those which are exhibited as Exhibits 8-9 and 10 to the deposition of Capt Chas. La Vasseur?

A. The only difference is that the different bank lines of different years instead of being colored, are all marked in black ink, but with different signs for each different year.

Q. 14. There is no difference in the measurements then, unless it is due to shrinkage of paper?

A. No sir, one is placed on the other.

Q. 15. In making this survey did you keep field notes of your operations?

A. I most certainly did.

Q. 16. I notice along Barry Chute, and by the way, referring to Exhibit No. 3, I first ask you if you have traced Barnay Chute on this map Exhibit No. 3, as that chute was located at the time you made this survey?

A. That is Barnay Chute as it actually is.

Q. 17. I notice along Barnay Chute a series of numbers being placed on the north bank, 5-6-7-8-9-10, etc. What do those numbers indicate?

676 A. Different transit stations.

Q. 18. What do you mean by transit stations?

A. It is the point I occupied with my instrument, and the next point to it in number, is the point occupied by my rodman, while making the observations, which point I subsequently occupied with my instrument. I also had stadea reading across Barney chute. Also places I did not occupy. All the stations marked by either numbers or letters, were occupied by transits.

Q. 19. I will ask you to refresh your memory from your field notes made at that time, and state what was the character of the Bank of Barnay Chute along the line 5-6-7-8 *and* etc., and also the bank of the opposite side?

A. I have a remark at Station 5 in my field notes, showing that it is a bluff bank at that point. At Station 6 another remark, bluff bank on south side stops between 6 and 7. At 7 another remark, sloping bank on the south side.

Q. 20. In other words, the result of your observations at that point was that between the stations marked 6 and 7 on the south bank of Barnay Chute, the blu*dd* bank ceased and at point 7 there was a sloping bank in the south side of Barnay Chute?

A. Yes.

Q. 21. I also see along Campbell's Lake, certain stations lettered *o*,—*p*,—*r*. Will you refer to your notes and the character of the country at those places?

A. At station *o*, which is at the north extremity of Campbell's Lake, I have the following remarks:—From station *o* on an azimuth of 350 degrees 15 minutes, on a length of 600 feet. Long Lake empties into Old River. From *o*, the old river territory is flat and swampy.

677 Q. 22. Then your letter *o* was on Long Lake instead of Campbell's Lake. Is that correct?

A. *o* is on Long Lake.

Q. 23. Then as I understand you, the character of the country from station *o* on Long Lake, which is between parallel 35 degrees and 27 minutes and 35 degrees and 28 minutes, and between meridians 90-03 and 90-04, and sloping into 90-04, the character of the territory is as you have stated?

A. Low and swampy.

Q. 24. I notice two other transit stations upon Long Lake, which are *m* and *n*. What is the character of the land at these points?

A. At *m* I have the following remark:—"On bank of lake known as Long Lake, which appears to be a long wash due to the current,

the west bank of Long Lake, opposite, is higher then the bank at *m*. At *n* the lake is losing itself in the surrounding country.

Q. 25. What do you mean by losing itself in the surrounding country?

A. I mean to say that the elevation of the surrounding territory at that point is equal, or very near to that of the bottom of the lake.

Q. 26. This Long Lake appears on the map, just east of the meridian 90-04 and extends from a point near the parallel 33-28 to a point south of the parallel 35-27. Is that correct?

A. Yes sir.

Q. 27. Is it south of parallel 35-27 that Long Lake loses itself in the surrounding territory?

A. Yes sir, about 1200 feet.

678 Q. 28. Did you give the length of this lake?

A. The map will show the length of the lake.

Q. 29. Now I asked you a while ago about some readings on Campbell's Lake, and I used the transit station *o*, which was a mistake, as I now perceive. As it appears to me, the transit stations marked upon Campbell's Lake are *p* and *r*. Will you give the character of Campbell's Lake at these points?

A. At station *r* I have these remarks: From station *r* on an azimuth of 134 degrees 30 minutes, distance 100 feet the lake is well defined. It is the opening of the lake opposite station 9 on main bank of Barnay Chute. The banks are low, being a depression in swampy land between Island 37 and Barnay Chute.

Q. 30. When you speak of the azimuth 134-30, what do you mean by that?

A. The azimuth of a place is the direction from one place to another as compared with the meridian line.

Q. 31. The station R, is towards the southern extremity of Campbell's Lake?

A. No, station *p* appears near the middle of Campbell's Lake and on its west bank.

Q. 32. What is the character of the bank at *p*?

A. I have no remark at all opposite *p*.

Q. 33. Have you no remark at all opposite Campbell's Lake?

A. I have none.

Q. 34. I see some transit stations along middle pond—I-H-B-C-D-E-F and G, beginning at the north of Middle Pond and running along the east bank of the most southern point which is nearly at the intersection of 90-03 and 35-26. Will you

679 please refresh your memory from your notes, and state the character of Middle Pond and its banks?

A. At station B, I made the following remark:—On bank of slough well defined banks with pools of water and dry places. The territory *a* to *b* is corrugated, as cut off by current during high water. The elevation is increasing from Barnay Chute towards the edge of the slough.

Q. 35. You refer to point *a*. That point lies northeast of point *b* and between point *b* and Barnay Chute?

A. It does.

Q. 36. Now between that point and point *b* you say the territory is corrugated. What do you mean by that?

A. I mean to say that no well defined ridges can be found, only lumps, I should say, one higher than the other, and losing itself right away. Going down 100 feet and losing itself, and another one springing up.

Q. 37. Then it is a country with ridges in it?

A. I would not call them ridges. They are just high places, due to the deposit of the river which have not been cut by the high water as deed as others.

Q. 38. What other remarks have you along Middle Pond, at the various stations, and give the character of the banks of Middle Pond at the other places?

A. At station *c*, which is south of station B, I have the remark:—The bank opposite (the south bank) appears to be a little higher then the north bank. Another remark at F; From E to F the banks are not so well defined, and from B to G the banks of the slough are somewhat decreasing in height. At G the slough seem to be well defined in its bank, and spreads out to the elevation of the surrounding country.

680 Q. 39. Then as I understand you, B appears to be the highest station along the Middle Pond, and from B in a southeast direction, towards the end of the slough, which is close to the intersection of 35-26 and 90-03, the bank gradually decreases in size and at the point G the slough looses its identity and passes out on a level with the surrounding country, is that correct?

A. Yes sir. B perhaps is not exactly the highest point. It might be 100 feet to the north or south of it.

Q. 40. You seem to have observation along Powell's Pond, beginning at 3,-4,-5,-6,- and 7, these stations appearing along the east bank of Island 37. What is the character of that bank?

A. At station 3, which is at the northeast of Powell's Pond, I have the following remark:—Head of Powell's Pond, under the bank of Island 37. The bank of 37 is bluff. Powell's Lake 100 feet wide. Station 8 is the south point of Island 37 and chute.

Q. 41. Was there any difference in the bank of Island 37, between point 3, and head of Powell's Pond and point 8 the foot of Island 37, such as to cause you to make a note of it?

A. No sir.

Q. 42. I see you have made some stations and taken observations along the east bank of what appears as the chute east of Centennial Island, beginning at 9 and running to 13, and 14, where the chute joins with a pond, or Sandy Chute.

A. At station 14, which is the junction of the pond or Sandy Chute, with the chute east of Centennial Island, I have the following remark:—From 8 to 14 the bank of chute on the east is decreasing in height from Island 37 towards the river. The

681 shore of the chute is shelf bank. The opposite bank to Centennial is a bluff bank with its maximum height on southeast portion towards the landing of Corona.

Q. 43. Corona is at the southeast corner of Centennial Island, or close to it?

A. Yes sir.

Q. 44. Now I see some readings along this Pond, 15 to 22. This pond is called on the map of Maj. Humphreys, and some of the witnesses as Sandy Chute. What was the result of your observations along this chute?

A. At Station 15 I have the following remark:—Between 14 and 15 is a marked depression, well defined, running due east, partially filled with water. At Station 22, which is the extreme eastern station on said pond, the edge of the depression is filled with sand, on the same level as the surrounding territory.

Q. 45. I notice some readings, 23 to 36, south of this chute. What does this indicate, and have you any remarks thereon?

A. At station 37 is the north edge of the depression east and west. At 29 this depression attains the elevation of the surrounding territory, and loses itself, that being the eastern station on said depression. At 31, west end of the depression, which at 31 is 320 feet wide.

Q. 46. How did you, in the territory bounded on the north by the northern outlet of Long Lake, and on the south by the Mississippi River, and between Barney Chute and Centennial Island, take observations of all depressions and lakes and ridges of every size?

A. Yes sir, before running my line, I would tramp all over the country and follow every ridge or depression, to see what it
682 amounted to, and did not find in the territory just described by Mr. Biggs, any other lakes and ridges worth mentioning.

Q. 47. In making this survey were you given any property lines at all?

A. None whatever.

A. 48. As a result of your survey, which occupied some length of time as I understand it, did you find, and do you think, that the Arkansas Bank of the Mississippi River, prior to the cut-off, can be located on the ground from any topographical feature now existing?

A. No sir, it cannot.

Q. 49. How long were you occupied in making this survey, actually in the field?

A. Close to two months.

Q. 50. I see on one of your maps, there is projected the township, range and section lines from Arkansas shore, as of the Land Office survey in 1823. Did you have with you the Original notes of the Land Office?

A. Yes sir.

Q. 51. What place did you use as a starting point in making this survey?

A. Section corners 18-19-13- and 24.

Q. 52. Who showed you the original corners used as a starting point?

A. One of them was Mr. Uzzell of Pecan Point.

Q. 53. Was the original corner still remaining?

683 A. The witness trees at that special corner are not existing any more, but holes in the ground, corresponding in distance to two of the witness trees, were plainly seen, and Mr. Friend an old resident of Peach Point, remembers those trees when they were yet standing. The other corner was shown to me by a negro, I don't know his name. There is an iron axle, some blazed trees, but not the original.

Q. 54. Were you down around the point opposite Island 37 on the old river, where the original Shau-nee Landing was?

A. Yes sir.

Q. 55. Was there any water in the river at that point when you were there?

A. No, it was dry.

Cross-examination by R. G. Brown, for Muncie Pulp Company:

Q. 1. Mr. De Beughem, in your Exhibit 3, I notice the territory between the red line marked on here as the middle of the river prior to the cut-off that there are no topographical signs at all until you get to the eastern bank of the chute between Deans Island and Centennial Island. Did you make the same character of observations in that territory that you did to the bar to the south of Deans Island?

A. I walked through the country, yes sir.

Q. 2. Why is it that territory does not show the marks that are shown on the territory south of Deans Island?

A. What marks do you refer to?

Q. 3. I notice that the territory south of the depression which you have marked pond, and which the other witnesses, and Capt. De Vasseur have designated as Sandy Chute, that the whole territory is freckled with topographical marks and numbers indi-

684 cating that these were transit stations according to your previous evidence. That is what they indicate is it not?

A. Yes sir.

Q. 4. Why is it that the projection of the township line between townships 9 and 10 north, and going from Deans Island to the east bank of Centennial Island, have no such transit stations marked on it?

A. As I last said in direct examination, I only run my transit line where they are needed to establish the ridges and the ponds, and I did not run any transit lines through there, it is because I did not see anything which would require it.

Q. 5. I will ask you to mark on this map, Exhibit 3 to your deposition, a point 98 chains due west of the common corner of sections 32-33-5-4.

A. The point called for, falls on the red line marked on this map as the middle of bed prior to cut-off.

Q. 6. I will ask you whether or nit at that point you found the bank varying from 5 to 8 feet in height above the territory immediately to the west of that line?

A. I saw through that territory, some knolls or ridges, but none of them and would vary to any distance. This is they did not extend any great distance in the direction which they ran.

Q. 7. I will ask you if you did not find, just east of the point indicated on the map, a tram-road constructed by the Muncie Pulp Company, and in operation at the time you were making this survey?

A. I crossed the tram-road two or three times, but whether it was exactly at the point you mention, I can't tell.

685 Q. 8. Did you observe this territory between the transit stations, which you have marked as H, B, C, D, E, F, and G on the east bank of Centennial Island, with the same care and thoroughness that you examined the balance of the territory?

A. Yes.

Q. 9. Did you examine the timber?

A. No, I never looked at the timber.

Q. 10. Is it not a fact that among Civil Engineers and Surveyors, the size and character of the timber is most frequently used to determine the age of the alluvial formations?

A. No, sir, because on alluvial lands trees grow very differently from one place to another. In some places they grow very fast, and you can't base any accurate deductions as to the age of the land from the growth of the timber.

Q. 11. You mean to say then, if you were attempting to locate the bank of the river from an inspection of the ground that you would not take into consideration the size of the trees on different portions of the tract, in arriving at a conclusion to which part of the land was formed first or last?

A. I had not to arrive at any conclusions whatever. It was not my part. My part was merely to survey the land and find where the ridges, the depression in the ground were, which could lead or give some light on the question.

Q. 12. I call your attention to a line marked on your map, running from the line drawn to indicate the middle of the bed of 1823, approximately to the north bank of the tract that you have marked pond, being the south line of the tract claimed by the State

686 of Tennessee in this case, and I will ask you whether or not there was any depression or ridges between the beginning and the terminal point of this above described?

A. I don't know anything at all about that line.

Q. 13. As a matter of fact, that line was plotted upon your map after it was made from your field observations?

A. Yes, I did not know at the time about property lines. That line was plotted from measurements given to me by Mr. Biggs, for a starting point ascertained by some other surveyor.

Q. 14. Regardless of the line there, from the point on your map where this line begins, to the point on your map where the line ends as described in the previous question do you undertake to say that all of that territory was of the same formation, with no ridges and depressions in it?

A. I don't infer that. There might be as I said before, some small ridges which lose themselves right away.

Q. 15. Then you mean to say that there were no ridges following approximately through this territory, the line marked on your map in red, and denominated middle of bed prior to cut-off?

A. The territory between Middle Pond and Long Lake is somewhat higher, of course than the ponds, but I would not call it a ridge.

Q. 16. Please read to the witness the last question asked, and Mr. De Beughem, please pay attention to it and answer that question.

(Previous question read to witness.)

A. None that I found.

687 Q. 17. You state in your direct examination that Powell Pond was about 100 feet wide. Is that a fact?

A. At what place?

Q. 18. Through its entire length?

A. I never stated that. Perhaps at a certain station. At station 3 it is 100 feet wide.

Q. 19. Please give the width of it at stations 4, 5, 6, 7, 8?

A. In some places there is water. Do you mean the width of the water, or the width of the pond?

Q. 20. I mean the width of the pond.

A. At station 4 it is about 300 feet. At station 5 275 feet. At station 6 I have no measurement. At station 7 it is 112.

Q. 21. And at station 8?

A. Station 8, I have not got.

Q. 22. Was there water in Powell's Pond when you were there?

A. It may be right. One of the ponds has some water in it, but I can't remember now which one it was. I don't think there was any water in Powell's Pond.

Q. 23. The bank of Island 37 you have stated was a bluff bank. How high was that bank above the bottom of Powell's Pond?

A. I did not take any levels, but I should judge it is about, from where my transit was at, station 8, the bank was 6 or seven feet.

Q. 24. You mean to say that the bank of Island 37, at station 8 was 6 or seven feet above dry bottom of Powell's Pond, or above the bank of Powell's Pond?

A. About 6 or 7 feet from where I stood.

688 Q. 25. Did you stand in the bottom of Powel's Pond or upon the bank of it?

A. I stood just under the ridge or bank of Island 37.

Q. 26. How much lower than the point where you stood would you say was the bottom of Powel's Pond?

A. I should say about 2 feet.

Q. 27. Now in this depression, immediately to the east of Centennial Island, which is open, was there water at the time you made these observations?

A. I don't think there was.

Q. 28. What was the character of the bank of Centennial at that point?

A. A bluff bank.

Q. 29. How high is that bluff bank above the bottom of the depression?

A. I have no note in my field notes on this point.

Q. 30. Give your best recollection as to how high the Centennial Island bank was above the bottom of this depression?

A. The bank is higher when it gets to the Mississippi River where the chute empties into the Mississippi River.

Q. 31. How high is the bank there, according to your best recollection?

A. It may be about ten feet.

Cross-examination by Mr. Ewing:

Q. 1. On map No. 1, do you represent the chute known as Sandy Chute?

A. Sandy chute is not there. The beginning of Sandy Chute, what will be sandy chute is there. (In here, pointing to the
689 word pond between the tow head and Dean's Island.)

Q. 2. Do you, on No. 1, correctly represent the condition up there at the time you made this survey and map?

A. In 1823.

Q. 3. What does this map No. 1 represent?

A. 1823 survey, and the line of 1874-1878 as projected from the maps of the survey of 74, of Col. Suter.

Q. 4. Does it represent an accurate condition of affairs now?

A. That is a survey of 1874 and 1823.

Q. 5. Where did the river run in 1874?

A. I know nothing about it, I was employed to make the survey. That is not my part.

Q. 6. Can you say where was the Tennessee bank of the river of 1874 on this map No. 1?

A. I can only, by the projection of the map of Col. Suter, find where the 1874 lines begun on the ground. There is nothing to show where that line was.

Q. 7. Will you point out the line on this map which represents the Tennessee shore of 1874?

A. I designate the lower black undotted line.

Q. 8. Where was the Arkansas bank line of 1874?

A. This undotted line along which I have written "willows subject to inundations."

Q. 9. You mark middle bed, prior to cut-off by a red line. At what stage of water was the middle mark?

A. I have nothing to do with that. That belongs to Capt. Le Vasseur. I only made the survey. You refer to the 1874 line which I know nothing about.

690 Q. 10. Did you make this map, Exhibit No. 1?

A. Yes sir.

Q. 11. Did you draw this red line?

A. Yes sir.

Q. 12. How came you to draw it there?

A. Under the instructions of Capt. Le Vasseur.

Q. 13. Did you tell him or did he tell you where to make it?

A. He told me.

Q. 14. You do not know whether that was high or medium stage of water?

A. I never inquired about it.

Q. 15. You made no measurements for the purpose of locating either at low, medium or high water, this middle or centre of the bed, prior to the cut-off?

A. Mr. Le Vasseur made some measurements on our original map, and drew this line which I had only to trace.

Q. 16. You do not answer the question, because you possibly fail to understand me. Did you make any measurements (and I am not asking you what Capt. Le Vasseur did) which enabled you to fix the center of the river of 1874?

A. I did not. This is an exact copy of Capt. Le Vasseur's map, and that is all this tracing is intended to be, and was made simply for the purpose of furnishing maps which did not have the different colors on them.

Q. 17. You were the man who actually did the surveying?

A. Yes.

Q. 18. It was your survey that was made the basis of Cap-. Le Vasseur's maps?

A. Yes sir.

691 Q. 19. Your survey did not disclose what was the center of the stream for any particular years, but that information was gotten by Capt. Le Vasseur from other tracings?

A. No, not only from other maps, but from information he got out of me as to the lay of the country.

Q. 20. Will you give us the information which you gave Capt. Le Vasseur, which enabled him to locate this red line, and the middle of the river in 1874?

A. I can give you my field notes.

Q. 21. Where are your field notes?

A. I have them here.

Q. 22. Will your field notes enable you to say what was the middle of the river in 1874?

A. The only thing I—I can't answer your question that way. I had nothing to do with the 1874 survey.

Q. 23. All I ask is that you give me now, the information you gave Capr. Le Vasseur, which enabled him to locate this red line as the middle of the river of 1874?

A. I can furnish you all my field notes, but I don't know which particular one would answer for that purpose. The whole might.

Q. 24. Can you tell from your field notes, where the middle of the river of 1874 was?

A. I think if we take the maps of Col. Suter as correct, the survey of 1823 was in some places re-traced, and I found how the lines of 1823 never would compare, or did compare with the actual geographical position of the place, and if Col. Suter's maps are correct, the lines traced upon the 1874 survey are correct too, by which means you can determine what was the center of the stream at that time. You take the scale, and measure from bank to bank

normal to the current, and take half of it, and you get the middle of the river.

692 Q. 25. Will you please tell me now, anything you know, that will enable any human being on earth to locate the middle of the river in 1874 in the field or on the map or anywhere?

A. No sir.

Q. 26. Is it not true that no survey that you made will tell what was the middle of the river of 1874?

A. There is nothing on the ground which will show where the banks were in 1874. Nothing tangible.

Q. 27. Do you now say that this red line marked as the middle of the bed prior to the cut-off, doed or does not represent a point in the middle of the then river?

A. It represents it as near as it can be figured.

Q. 28. And that figuring is done from Suter's map, and the survey of 1823, and not from your recent survey?

A. No, it has nothing to do with my recent survey.

Q. 29. Your recent survey does not throw any light whatever on what was the middle of the river of 1874?

A. I don't think it does.

Q. 30. You say these red lines represent as near the middle of the river of 1874 as can be gotten at from Col. Suter's survey, and the survey of 1823. Is that correct?

A Yes.

Q. 31. At what stage of the water?

A. At about medium stage it might be. I don't know where the banks were at that time here.

Q. 32. Did any survey that you made enable anybody to lay off the land and river lines of 1823?

693 A. It seems that somebody well acquainted with the Mississippi River and who — something about sand bar formation and hydraulics, etc., would be able to come very near to determine where the center of the river was.

Q. 33. The question I asked you is this:—Did any survey you made, enable anyone, from your work, to lay off the land and river lines of 1823?

A. Just as I told you, somebody who was acquainted with the sand bar formations in the Mississippi River could very near tell where the center of the channel was in 1823.

Q. 34. Now what survey did you make which dealt with the land and river lines of 1823?

A. I retraced part of the survey of 1823, according to the Land Office notes and actually——

Q. 35. I want to know whether you did any work that threw any light on the conditions in 1823?

A. In this respect, that I traced the 1823 survey and found the geographical position of those section corners of the 1823 survey, which enabled me to make the survey of 1805, so that all of my lines would be in accordance with the 1823 survey.

Q. 36. Did the 1823 survey do anything except give you the

lines of Dean's Island which are included here by the black line backed with right angle short lines?

A. It gave me the whole of Dean's Island. If I had taken the tracings, I would have retraced nearly all of Dean's Island.

Q. 37. What is this line, running from practically opposite the figure 32, and on the other side of Barnay Chute, in a southeasterly direction, which you have differentiated from other lines along there by little right angle short lines?

694 A. It is the shore line of Dean's Island in 1823.

Q. 38. And when you traced the survey of 1823, you re-traced with that line did you?

A. I did not re-trace the shore line of 1823 at all, because I could not fine any ridge or anything which would correspond to that bank line.

Q. 39. Why, if you say you never run this line, was it put right there where it is now on the map?

A. That was taken from the land office notes

Q. 40. What is exactly what I am getting at. No survey you made and no line you run had anything to do with placing that line where it is on this map?

A. Yes sir.

Q. 41. Did you run that line?

A. No sir.

Q. 42. Did you survey it in any way?

A. No sir.

Q. 43. What did you do that enabled the maker of this map, from your work to locate that line where it is?

A. I located it from the Land Office notes and what I surveyed above.

Q. 44. You could have done that as well in your office here, as up there?

A. No, sir, because I did not know where that line was, compared to 1904, the actual survey made.

Q. 45. I notice willows and heavy timber marked here up at the head of Barnay Chute, or rather its mouth. When was that

695 there?

A. I know nothing about timber. Never looked at any timber.

Q. 46. What information was gotten from your survey, which enabled those words to be placed there?

A. You are taking the wrong map. This is the map of 1874, which I had nothing to do with; which is a copy of Col. Suter's map.

Q. 47. Did anything that you did, enable anybody to place willows and heavy timber right there?

A. No, sir. It is a copy of the 1874 map.

Q. 48. I notice just southeast of this legend up there, the words "willows subject to inundation." No survey you made had anything to do with ascertaining these facts?

A. No sir.

Q. 49. I notice a line black marked interspersed with black dots marked as the middle of bed of 1823. Did anything you did have anything to do with locating that mark?

A. No, it only could be taken from the map.

Q. 50. I am getting at your particular survey.

A. No sir, not at my survey.

Q. 51. Did any survey you made, or any work you performed, have to do with the location of willows subject to inundation on the tow-head, as marked on this map?

A. No sir.

Q. 52. Did any service you performed or any survey you made have to do with any personal ability to locate the Arkansas Bank of 1876 on Dean's Island, just prior to the cut-off?

A. No sir.

Q. 53. There is a black line with feathered edges which I presume is intended to represent the property in controversy. Is that correct?

696 A. Yes sir.

Q. 54. Did you lay off that land, or run those lines?

A. I didn't know at the time there was any land in controversy at all, and I did not run those lines.

Q. 55. So these feathered lines, inclosing the property in controversy, are not attributable to any survey made by you?

A. No sir.

Q. 56. You never run the Dean's Island shore line of 1823, I understand?

A. No sir.

Q. 57. Did you run the shore line of 1823 from the northwest point of Dean's Island down as far as the intersection of it with longitudinal lines 90-02?

A. I did not.

Q. 58. Did you go up into the territory where that line would ordinarily be?

A. I tramped all that territory.

Q. 59. What was the condition of the timber there at that point about which I asked you? Large or small?

A. If I remember right, in the high spots in there—not particularly on that line of Dean's Island, which I did not know where it was, but run there, the heaviest timber was generally on the highest spots.

Q. 60. Did you tramp around the quarter or half mile west of the spot along where the D is situated on this map?

A. Let me see my other map.

697 Q. 61. I show you your map No. 3, and ask you if you tramped around where 90-03 and 35-26 would intersect?

A. Yes.

Q. 62. What was the condition of the timber in there?

A. I told you before I did not look much at the timber. I noticed there was timber on it, but I could not tell the condition of the timber. I am not much of a timber man any how.

Q. 63. If I understand it, all these lines showing what was the

middle of the bed of 1823, and also in 1874, are lines drawn by Capr. Le Vasseur?

A. Yes sir.

Q. 64. You had nothing to do with locating those lines?

A. No sir.

Q. 65. Exactly what was your survey? What did you do?

A. To re-trace the survey of 1823, and to establish the geographical position of those section corners from government stones, which geographical position is known, and then go through the country as I did, to find all the depressions and all the ponds and all the ridges that were in the country. Wherever I would find any, to re-trace them, and see if they would agree with either the 1874 or the 1823 bank.

Q. 66. You re-traced the survey of 1823, for the purpose of seeing if a re-survey would correspond with the Government survey?

A. No sir, to find if there was anything in the territory which would actually show where those different bank lines were.

Q. 67. Did you find anything to show where the bank of 1823 was?

698 A. In some places, yes.

Q. 68. Do you show these on your map?

A. Yes, on Exhibit No. 3.

Q. 68. Point out the bank of 1823 in any place shown on the map?

A. Here. (Indicating the head of Island 37.)

Q. 70. Did you find anything on the Arkansas side, or Dean's Island, indicating where the bank of 1823 was?

A. Barnay chute had hardly changed any.

Q. 71. Now leaving the Tennessee shore, and leaving Barnay Chute, did you find any bank representing the bank of 1823 of Dean's Island?

A. No sir.

Q. 72. Did you find anything indicating the Dean's Island river bank of 1874?

A. No sir, I told you before.

Q. 73. So your survey, so far as it located, or undertook to find, by re-tracing the survey of 1823, the Dean's Island river bank, resulted in not discovering it?

A. No sir, there is nothing tangible there to show where the bank was.

Q. Now you re-traced the survey of 1874, Col. Suter's map, with a view of locating, if possible, the Dean's Island river bank of 1874, and you found nothing there?

A. The river bank? no sir.

Q. What does the figure G represent at about the intersection of 90-03 and 35-26?

A. A transit station.

699 Q. 27. What do you mean by that?

A. The point I occupied with my instrument.

Q. 77. Do you recall whether there was or was not, large timber running sometimes like three feet in diameter, about there?

A. I have nothing about timber in my field notes.

Q. 78. Along that dotted line, where the letters appear, in so far as it related to the bank of the pond, what was the condition of the timber?

A. I have no notes about timber at all.

Q. 79. What do the figures 23-24-24, etc., represent to the south of what you have marked as the pond?

A. The Transit stations again, on different lines.

Q. 80. This Middle Pond, up immediately west, of the B in Barnay Chute, or about transit station C., is in a swag is it not?

A. The banks of the slough are well defined banks.

Q. 81. The west bank right there is also well defined? Is that so?

A. Yes.

Q. 82. And there is then a rise, gradual from that bank on westwardly, or not?

A. From down here at a point opposite C, going west the territory decreases in height.

Q. 83. The left bank of what you have marked Middle Pond simply is a ridge separating the pond from the gradual slope?

A. It seems to be a wash, due to high water.

700 Q. 84. From transit station- 5-6-7 on Barnay chute toward Middle Pond, there is a gradual incline is there not?

A. The elevation is increasing from Barnay Chute towards the edge of the slough.

Q. 85. From Barnay chute and within the territory where the letters B *ar* appear, due west towards Middle Pond, is a gradual elevation or rise?

A. The territory is corrugated. Is cut out by current.

Q. 86. Is there a slope or rise or an average level between that point on Barnay chute and Middle Pond?

A. As I told you, from Barnay Chute west to the east bank of Middle Pond, the elevation was increasing.

Q. 87. Then Middle Pond appears to have been a wash out from current action, and after you cross it and go west there is a sloping tendency?

A. It is a little, but all that is pretty flat.

Q. 88. From station 5 on Barnay Chute, to Station G, is sloping or reasonably level?

A. I don't remember running a line from those points.

Q. 89. Was any water in that Middle Pond when you made your survey?

A. Only a little pool once and a while.

Q. 90. This pond that is marked on this map, south of Dean's Island, was filled with water or dry?

A. No that was practically dry.

Q. 91. What was the condition with reference to whether from Dean's Island proper to the Pond, the ground fell or rose?

A. A sloping down towards the pond.

Q. 92. From the pond down southwestwardly, what was

701 the condition with regard to sloping or rising?

A. Outside of the small undulations due to the little sand

being deposited in one place more than in another, the whole land sloped toward the river.

Q. 93. Outside and independent of these occasional mounds or undulations, from Dean's Island property to the river was a gradual slope?

A. Towards the south, yes.

Q. 94. How was it towards the west. That is, towards Centennial Island?

A. From Barnay Chute to the north part of Middle Pond the ground is rising.

Q. 95. Then from Middle Pond towards Island 37 and Centennial Island, what is the lay of the land?

A. It is pretty flat except when you come to the edge of the chute around Centennial Island, where you have a bank.

Re-examination:

Q. 1. You say you made this survey under the direction of Capt. Charles Le Vasseur?

A. Yes sir.

Q. 2. Capt. Le Vasseur was present during the survey from time to time, and was on the ground and gave directions?

A. He came about five or six times during the month.

Q. 3. And as I understand you you had nothing to do with making the maps which you have re-traced from Capt. Le Vasseur's maps as showing the conditions existing in 1823 and 1874 and 1879?

A. I made the maps of 1823.

Q. 4. But I mean your survey had nothing to do with Capt. Le Vasseur's maps of 1874 and 1878?

702 A. Not that I know of.

Q. 5. And only in the maps of 1823, in so far as the re-tracing of some section, township and range lines, for the purpose of ascertaining their present situation in regard to certain bench marks placed upon the river?

A. We had no geographical position on the 1823 map at all.

Q. 6. Did you ascertain the relationship of the section and range lines to the present bench marks?

A. Yes sir.

Q. 7. You did that?

A. Yes sir.

Q. 8. Then you ascertained the distance from, and the situation of these bench marks in relation to the survey of 1823?

A. Yes sir.

Q. 9. You had nothing to do with undertaking to lay off the middle channel of the river of 1823 or 1874 on these maps?

A. No sir.

Q. 10. You knew nothing about it?

A. No sir.

Q. 11. What you did was simply to make the survey of the present situation of this territory, making your observations and field

notes so that you could make a map representing the present condition, without regard to any former maps which were made. Is that right?

A. The present conditions, so that they will agree with the 1823 maps, with the Government Land Office notes of 1823.

703 Q. 12. And as I understand you, from the present situation of the country, its topography, etc., you were not able to find anything which, on the Arkansas Dean's Island Side the river bank, might have been the river bank in 1876?

A. Nothing tangible.

Q. 13. And therefore you were not able to locate on the ground of the map, where the middle of the river was in 1876. Is that correct?

A. No, I can't locate it on the map.

Q. 14. Could you have located it on the ground there, from the present situation of things?

A. No sir.

Recross-examination:

Q. 1. Who made this recent survey? You and who else?

A. Me and two chainmen.

Q. 2. Who was the surveyor?

A. I was.

Q. 3. Anybody else?

A. There was only one man who run shore line from Corona down to the head of Old River.

Q. 4. Who but yourself was in charge of the survey up here, about which you have been talking?

A. Myself.

Q. 5. Did Capt. Le Vasseur do any of the actual surveying?

A. I only worked under the direction of Capt. Le Vasseur. Capt. Le Vasseur was telling me what to do, and seeing if my notes checked.

Q. 6. How checked?

A. I would check on bench marks and another stake. I would always run two lines to same stake, to be sure I was correct.

704 Q. 7. How long did it take you?

A. A little over a month and a half.

Q. 8. How much of the time did Capt. Le Vasseur spend up there?

A. He came as I said before, if I remember right, about five or six times, perhaps seven times.

Q. 9. Did he do any of the actual surveying, or was that your work?

A. Actual surveying, he did not. He was not the man behind the instrument.

Q. 10. He merely generally supervised the work you did?

A. Yes sir.

705 The next witness, Captain F. B. MONTANA, being first duly sworn, testified as follows:

Q. 1. What is your age, and where do you reside?
A. I will be 75 years old in March, and live in Memphis.
Q. 2. How long have you been a citizen and resident of Memphis, Tenn.?
A. About 61 or 62 years.
Q. 3. During that time, what has been your occupation?
A. Steamboat pilot and Captain.
Q. 4. When did you first begin to run on a steamboat?
A. I commenced when I was a little boy, about 12 years old. I was not a pilot then.
Q. 5. When did you become a pilot?
A. In 1846 and 1847, long before there were any license- issued by the Government.
Q. 6. How long did you remain actively in the steamboat business?
A. Up to about two years ago.
Q. 7. Are you acquainted and familiar with the Mississippi River from Pecan Point to Memphis?
A. Yes, sir.
Q. 8. How long have you been going over that portion of the Mississippi River?
A. I used to go over it on-e a week for a great many years. I run from here to St. Louis, Mo., and Pecan Point is between here and St. Louis.
Q. 9. Then you were running on the Mississippi River between Memphis and St. Louis, before the Centennial cut-off in 1876 was made?
A. Yes sir.
Q. 10. At that time, where were you running a boat from?
706 A. From here to St. Louis.
Q. 11. Do you remember when the Centennial cut-off was made?
A. Yes.
Q. 12. Did you see the cut-off as it was made then?
A. I saw it after it was made.
Q. 13. How long after it was made, before you saw it?
A. About three months I guess. I was running in White River then, I think.
Q. 14. During the year 1875, did you run from here to St. Louis on the Mississippi River?
A. I run from here to Louisville, but I passed Dean's Island and Devil's Elbow.
Q. 15. Were you acquainted then with the Mississippi River around Dean's Island, and the Devil's Elbow in 1875?
A. Yes sir.
Q. 16. Were you then practicing as pilot?
A. Yes sir.
Q. 17. What are the duties of a pilot?

A. To manage the steamboat, and pilot it, and keep her in the channel.

Q. 18. Then it was necessary for a pilot to be familiar with what?

A. With the landings, banks, fills-up, caves-off, and sand bars that may form, or have already formed.

Q. 19. Do you know where Thomas' landing was?

A. Yes sir.

Q. 20. Where was it with reference to Dean's Island?

A. Across the river, a little below it.

A. 21. On the Tennessee side?

A. Yes sir.

Q. 22. Dean's Island was in what State?

A. On the Arkansas side.

Q. 23. Do you know where Densford's wood yard was?

707 A. Above Thomas' Landing, in the bend above.

Q. 24. Prior to the Centennial cut-off, and up to that time, what was there between Dean's Island and Thomas' Landing, on the Tennessee bank?

A. A tow-head.

Q. 25. Was this tow-head connected with Dean's Island or not?

A. Not at that time, only in low water.

Q. 26. What separated the tow-head from Dean's Island?

A. A chute—the water through there.

Q. 27. Could boats go through this chute?

A. Yes, at medium stage they run through it.

Q. 28. What do you mean by medium stage?

A. 10 or 12 feet stage.

Q. 29. In higher stages of water than that, did large boats go through that channel?

A. Yes. All the Memphis and St. Louis Packet Company's boats used to go through there, unless they had business below,—outside of it.

Q. 30. How wide was the Mississippi River around Dean's Island before the cut-off?

A. I suppose it was a mile and a quarter or a mile and a half. It was fully a mile there at Densford's corner of Dean's Island, and as you went down the river it got wider. At Thomas' Landing I suppose it was a mile and a quarter to a mile and a half.

Q. 31. How wide was the river opposite the Tennessee bank, just south of McKenzie Chute?

A. I reckon a mile and a quarter.

Q. 32. Was there a sand bar in the river, and if so, where was it?

A. Along side of the tow-head.

Q. 33. At what stage of the river did this sand bar appear?

708 A. In low water.

Q. 34. Where there was, say 8 or 9 feet above low water——

A. The bar did not show.

Q. 35. At that time, could or not, boats go over where the sand bar was?

A. Yes sir.

Q. 36. Could the boats, in any stage of water, land up against Dean's Island, and if so, in what stage?

A. They land there most all the time, except in some few places, where there are shoals.

Q. 37. In very low water, did this sand bar extend to Dean's Island, that was around the tow-head, and close up the chute entirely?

A. Yes, in right low water. It got about dry between the tow-head and Dean's Island.

Q. 38. Prior to the cut-off, had there been or not, accretions to Dean's Island?

A. No, I don't think there was any before the cut-off.

Q. 39. After the cut-off, were there any?

A. Yes, I think there was. They grew fast. The water leaving there it drew the current away, and left the sand.

Q. 40. You say you went back up the river about three months after the cut-off, did you then go through the cut-off or around by McKenzie Chute?

A. I went through the cut-off.

Q. 41. After the cut-off, what was the channel which was used by steamboats generally?

A. They went through Fogleman's Chute and the cut-off.

Q. 42. Before the cut-off, was the Tennessee bank caving opposite Brandywine Island?

A. Yes, sir; some little. I think the Brandywine side was caving most. That was what made the cut-off. It takes a long time to cave off unless it is caving on both sides. To make a cut-off
709 you have got to have at least 3 inches fall to the mile.

Cross-examination by R. G. Brown, counsel for the Muncie Pulp Co., and Leo Oppenheimer, receiver:

Q. 1. Captain I show you here a map of the Mississippi River prior to the cut-off of 1876, the map being Exhibit "3" to Le Vasseur's deposition, and I call your attention to the out line of Dean's Island, and I will ask you whether or not that was a correct representation of Dean's Island, and the sand bar, to the South of it, just before the cut-off of 1876?

A. Yes, sir.

Q. 2. Now will you please state how wide was the channel between the sand bar and the Tennessee side of the Mississippi River on the meridian of 90° 03″?

A. I suppose between a mile and a quarter and a mile and a half.

Q. 3. I am not asking you to state how far it was from the Tennessee bank up to the survey of Dean's Island, but from the sand bar to the Tennessee bank?

A. Well, I suppose it was ¾ths of a mile—between ¾ths.

Q. 4. And that was the width at low water?

A. Yes, sir.

Q. 5. Then how wide was it up to the tow-head, shown on the map to be covered with timber?

A. Well, I suppose it was a mile and a quarter, or a mile and a half to that tow-head.

Q. 6. Now how much above the water was the Tennessee bank at that time that the tow-head was covered with timber, as shown on this map?

A. Well, I suppose this bank was fourteen feet about higher than this tow-head.

710 Q. 7. You say at high water, at medium stage, boats run between that tow-head and Dean's Island, now that was just prior to the cut-off?

A. Yes sir.

Q. 8. And ran through there at a medium stage of water?

A. Yes sir, There was a sand bar to the south and west of the tow-head south of Dean's Island, which disappeared at a medium stage of water and showed at low dead water.

Q. 9. Now, do you mean to say, Captain, that when the river stood say 8 feet on the gauge at Fulton, that that sand bar did not appear?

A. Well no.

Q. 10. Could you run a steamboat through there at 5 feet on the guage at Fulton?

A. Not at 5 feet would not take the chances of going through. I expect it would go through, though would not take the chance.

Q. 11. That the sand bar connected at 5 feet on the gauge at Fulton to the tow-head as covered with timber, as shown on Exhibit "3" to Capt. Le Vasseur's deposition, with Dean's Island proper?

A. Yes sir.

Q. 12. Now how wide was the open river at low water, between the sand bar to the West of Dean's Island and the Tennessee shore, just where the McKenzie channel went through between Island 37 and the main land?

A. That was fully ¾th to ⅞ of a mile wide?

Q. 15. How wide was the river between Dean's Island and the Island 37?

A. This is the old channel which went over ½ to ¾ths of a mile, going round the old channel. They quit that years ago and went through this channel 37.

711 Q. 14. Now Captain, after the cut-off was made, which is shown on this map by red lines, did, or did not the old channel through McKenzie Chute, remain open so that steamboats could pass through there?

A. It did for a while.

Q. 15. How long?

A. Well, I suppose for 4 or 5 years, and you could go through that channel and between Dean's Island and the Tennessee shore at a medium stage of water if you wanted to.

Q. 16. For 5 or 6 years after the cut-off took place?

A. Yes, of course. They could go around there for business, but went around to Shawnee from Devil's Elbow, and came back the same way. The boats quit that, unless they had business, and didn't go there at all.

Q. 17. You were on a through packet were you not, Captain?

A. I run to St. Louis and to Louisville. That was what they called a through packet.

Q. 18. And you did not look for local business?

A. No sir, a through packet.

Q. 19. Then, as I understand you, Captain, the through packet which were not looking for local business, u-ed the cut-off after it was under?

A. Yes, sir.

Q. 20. Because it cut-off the distance and was a more open channel?

A. Yes, sir.

Q. 21. But, is it not a fact, Captain, that local packets for seven, eight or nine years after that cut-off took place, could and did use McKenzie Channel and the river between Dean's Island and the Tennessee shore when they were looking for local business, at a medium stage of the water?

712 A. Well, I suppose they did at half bank full stage.

Q. 22. As soon as the cut-off was made, then those places commenced filling up with sand? But they did not fill up with sand in such a way as to prevent McKenzie Chute and the river to the north of it from being used as a ste-mboat channel for five or six years?

A. They kinder quit going through McKenzie channel, and come around to Devil's Elbow.

Q. 23. But that was done simply because of the convenience of the steamboats, and not because they couldn't do it?

A. No, it had filled up, you know.

Q. 24. How many years after the cut-off was it that it filled up so that they could not go through there?

A. I suppose two or three years. When the cut-off was made, it commenced filling up at the end.

Q. 25. In other words, Captain, the filling up took place because of the lack of current in the old river, and the water was, so to speak, dead there, and the sediment began to deposit it along the side of the land?

A. Yes.

Q. 26. Then, Captain, the filling up of the McKenzie channel and the Mississippi River between Island 37 and the old Tennessee shore, was a gradual thing, and came year by year and month by month?

A. Yes, the sediment formed on to Dean's Island, after the cut-off you know, and flowed down and across the river, over into the Elbow.

Q. 27. Now, Captain, is it not a fact that at the time this cut-off took place, the deep channel of the river, the steamboat channel the one that was used by the large boats, is over on the Tennessee shore?

A. Yes, sir. Right down the bank.

713 Q. 28. And the Arkansas bank gradually sloped out and was a low bank, and the sediment was deposited on this bank?

A. The Arkansas bank, now the Arkansas bar, was a kind of bluff bank before that cut-off was formed, and you could land anywhere at medium stage of the water on Dean's Island.

Q. 29. But, Captain, my question is: After this cut-off took place and the sediment begun to deposit, it deposited on this sand bar, did it not? And raised the sand bar?

A. Yes, sir, raised the sand bar.

Q. 30. Now the deep channel being on the Tennessee side, there was no deposit of sediment in the deep channel on the land?

A. No sir.

Q. 31. Then all of the filling took place, there was filling from the Arkansas side out towards the Tennessee side?

A. Crossing the channel to the Tennessee side.

Q. 32. And all the land that was formed attached to the Arkansas side, did it not?

A. Well, some did, and some did not. Some got it below where the cut-off was formed.

Q. 33. What do you mean below where the cut-off was formed?

A. Down on the maon Tennessee shore.

Q. 34. Please indicate on this map where that formation took place that you have just referred to?

A. It for-ed some along the east of Tennessee bank of the river, below the cut-off.

Q. 35. Captain, is it not a fact, and does not the map of the Mississippi River Commission of 1884, show that there was open water between the formation on the Arkansas side and the point on this map that you have indicated? I -how you here, the map that I refer to, which is Charter 18 of the Mississippi River Commission.

A. It may show open water, but I don't think there was
714 open water there.

Q. 36. Captain, how deed was the channel of the Tennessee side of the river at the time of the cut-off at the point which was the northeast corner of the Tennessee shore where McKenzie Channel left the Mississippi River?

A. Well, I suppose it was 40 or 50 feet deep—the channel of the river on that bank.

Q. 37. Is, or is not, the deepest part of this channel right up against the Tennessee bank?

A. Yes, sir.

Q. 38. Now, Captain, if the water was 40 feet deep on the Tennessee side at the point you have indicated, please state how deep is the water on this sand bar at low water on Dean's Island?

A. At dead low water I think — would be 2 or 3 feet on it.

Q. 39. Then Captain, the bed of the river sloped gradually over to the Tennesse side, did it?

A. Yes sir.

Q. 40. Well, if the deposit was made there, at that time, it deposited as much in shallow water as it did in the deep water didn't it?

A. It was more in shallow water the current left it, but after the cut-off was made, it formed in below. It crowded the current over the Arkansas side, the bar formed on both sides, you know.

Q. 41. Has the current ever been over on the Arkansas side since the cut-off was made?

A. No the current has never been over there, I don't think. You

know if the current goes very far, it goes down through the high water, you know water will seek its level, and goes the nearest way. It all formed a lake up there after the cut-off.

715 Examined by Mr. Biggs:

Q. 1. As I understand you, Captain, prior to the cut-off, at a medium stage of the river, boats went through between the tow-head, south of Dean's Island, and Dean's Island proper?

A. Yes. It used to come up through Devil's Elbow, and on up through McKenzie channel, and on through, between Dean's Island and the tow-head, and follow the island up to the corner of Dean's Island, and went on up to the foot of 35, which was a wood yard there. It is now called Cedar Point.

Q. 2. After the cut-off was made, you running on a through boat, rarely ever went up through McKenzie channel?

A. No, sir, went through the cut-off, the near way. About eleven years ago I took the Gayoso to Paducah, and went around old River, Devil's Island, through Barney Channel to Pecan Point.

Q. 3. What was the stage of the river then, high stage?

A. Well, no. It was about medium. ½ bank full.

Q. 4. Do you remember what year that was?

A. No, I don't. I could find out by asking the Lee what time she went up there to repair. I took note of that and let Lee have my book, but she lost it. Cap. Joplin was Captain of the boat. He and Foster took her up.

Q. 5. After the cut-off was made, as I understand you, there was a current around through McKenzie Channel and up in the old river?

A. No, it became a lake, dead.

Q. 6. And the sediment was deposited all along the old river bed?

A. Old river bed, yes.

Q. 7. It formed to the Tennessee side as well as to the Arkansas side, did it?

716 A. Yes sir.

Q. 8. And it necessarily formed faster where there was water than where there was no water, because the sediment couldn't settle unless there was water?

A. In high water the river would fall, and it would drop the sediment and make the accretion.

Examination by Mr. Brown:

Q. 1. Captain, at the time that you took Gayoso around through Barney Channel, about which you have testified, you could have gone from McKenzie Channel around to the West and South of Dean's Island could you not?

A. Yes, I could have went to the right of it going up, but it was out of the way after getting in there. It was nearer going through Barney Channel.

Q. 2. There was a channel in there?

A. Yes sir.

The next witness, R. W. FRIEND, duly sworn says:

Q. Where do you live?
A. At Pecan Point.
Q. How long have you lived at Pecan Point?
A. Thirty years.
Q. 3. Prior to moving to Pecan Point, where did you live?
A. At Thomas' Landing, Tenn.
Q. Thomas' Landing is on the Tennessee side, immediately opposite and south of the original Dean's Island?
A. Yes sir.
Q. 5. How long did you live at Thomas' Landing?
A. Two years.
717 Q. 6. How long before the Centennial Island cut-off had you been acquainted with the Mississippi River around Dean's Island?
A. About five years.
Q. 7. Prior to the cut-off, was there or not anything between Dean's Island and the Tennessee shore, at Thomas' Landing?
A. There was a big sand bar and a chute—we called it the tow-head—running through the bar and next to the Dean's Island shore.
Q. 8. You speak of a big sand bar. At a medium stage of the river, what was the condition of this sand bar?
A. It all went under water, except in very low water you could see a big bar.
Q. 9. Did you, or not, ever see any boats go through the chute between the tow-head and the Island proper?
A. Yes, the largest boats went through there in hight water. Anchor lines.
Q. 10. The Anchor linesers were then the largest steamboats on the river?
A. Yes sir, about the largest.

Cross-examination:

Q. 1. What do you understand by a medium stage of water?
A. I mean about 30 feet on the gauge.
Q. 2. What was the gauge?
A. Memphis gauge; 25 or 30 feet.
Q. 3. Then the bar went under only when the river got to be about 35 or 40 feet on the Memphis gauge?
A. It went under at 25 feet on the Memphis gauge, as I remember.
Q. 4. That then, you consider a medium stage of water?
A. Yes sir.
Q. 5. How low did the river have to be for this bar to be exposed?
718 A. I could not tell you exactly. I know we could see the bar from our side of the river, the biggest part of the year.
Q. 5. Captain, when that bar was exposed in this way, no boats could go through that chute between the bar and the Island?
A. Small boats could, but not the larger ones.

Q. 7. Could small boats go through there at all stages of low water?

A. No sir.

Q. 8. Captain, were you present in that vicinity, when the cut-off of 1876 took place?

A. I was living where I am now, Pecan Point.

Q. 9. After the cut-off took place, for how many years did boats use the channel between Centennial and Dean's Island?

A. I don't remember that they used it — all afterwards. I don't remember that. I don't think they used it but a very short time after the cut-off.

Q. 10. Your memory, however, on that, is not certain or perfect?

A. They used it only in high water, and that too for small boats in my recollection. I never went through there any more after the cut-off, on a boat, but went through the cut-off.

Q. 11. You will not state, however, that boats did not go around in there for a good many years?

A. No, sir, I would not, because I don't know.

Q. 12. Do you recollect how wide the river was at low water, between Dean's Island and the Tennessee shore at that part of it known as Centennial Island, just prior to the cut-off?

A. It was pretty narrow, I don't know the width.

Q. 13. About how wide would you say?

A. It is all guess work to guess the width of the Mississippi River, but it was narrow.

719 Q. 14. Could you say that the river at that point,—I mean west shore of Dean's Island—and the east shore of Tennessee, and the east shore of Island 37, was as much as half a mile wide just before the cut-off?

A. Oh, yes, it was that wide.

Q. 15. Was it as much as ¾ of a mile wide?

A. If I was going to guess for my live, I would say it was a half mile wide in low water. In high water it was miles.

Q. 16. In high water it went all over that section of Arkansas, did it not?

A. It went all over that part of the Island.

Q. 17. Did it not go further west than the Island?

A. Yes, it went all over into Arkansas.

Q. 18. Do you know anything about what timber there was growing on Dean's Island, just before the cut-off took place?

A. No, sir, I don't know anything about the timber on Dean's Island. I never went over it and never examined it.

Q. 19. You do, however, know that just before the cut-off, at low water, this sand bar was connected with Dean's Island so that boats could not go through it, even small boats?

A. At low water.

Re-examination:

Q. 1. Then as I understand you, Mr. Friend, it was only at low water that -ll of this sand bar appeared?

A. That's right.

Recross-examination:

Q. 1. Captain, do you mean to say that none of the sand bar appeared except at extreme low water?

A. No, sir, I don't mean that. The sand bar slopes from the water back, and of course the farther back you go the higher the
720 bar is, and you could see a good deal of that bar at a pretty good stage of water. You could only see it all at a low stage of water.

Q. 2. In other words, you mean to say that the lower the water got, the more of the bar showed up?

A. Yes, sir.

Re-examination:

Q. 1. I believe you saud that at high stage of water, the Anchor Liners could go through the chute?

A. Yes, sir, the largest boats went between the tow-head and the main Island shore.

Q. 2. And small boats could go through it, except in low water?

A. Yes sir.

The next witness, J. H. HUMPHREYS, being duly sworn, says:

Q. 1. Where do you reside and what is your occupation?

A. I reside in Shelby County, Tennessee, and am a Civil Engineer.

Q. 2. How long have you lived in Shelby County?

A. I think I have been living in Shelby County since 1858.

Q. 3. How long have you been a Civil Engineer?

A. About fifty years.

Q. 4. During that time have you had much or little experience in surveying and platting grants and other field work?

A. Yes, about fifteen years of that time I have been engaged in land surveying exclusively.

Q. 5. Were you called upon at any time recently to make a survey of the original grants from the State of Tennessee covering what is now Centennial Island, and what was formerly the Devil's
721 Elbow and Island 37 on the Tennessee side, in Tipton County, Tennessee?

A. Yes sir.

Q. 6. Did you also make a survey and map of Dean's Island and the Arkansas shore opposite to Island 37 and Centennial Island?

A. Yes, I made such a survey in both cases as necessary for me to make a map of the ground as it existed at the time the lands were surveyed by the United States on the Arkansas side and at the time they were entered by persons on the Tennessee side.

Q. 7. That time was approximately the year 1823, was it not?

A. Yes, from 1823 to 1830.

Q. 8. I here hand you a map and ask you if that is a map made by you of the land in question?

A. Yes.

Q. 9. In making this, I see you have plotted out a number of

entries and surveys on the Tennessee side, and especially on Island 37. I will ask you if, in making these surveys, you had access to the original records in the Register's Office of Tipton County, Tennessee and to certified copies of the original grants themselves?

A. I had copies, not certified by the Register, but I verified thereby referring to the records, both in Shelby and Tipton Counties.

Q. 10. Then as I understand you, this map correctly represents the various calls as they appear upon the record books themselves?

A. Yes.

Q. 11. Did you afterwards compare this map with certified copies furnished you by anyone?

A. Yes, subsequently certified copies were furnished me by

722 Mr. McSpadden.

Q. 12. At what place on the Tennessee side did you start, in making your survey?

A. The northwest corner of the Benton 1436 acres.

Q. 13. Do you remember who showed you that corner?

A. Mr. Massey, an old gentleman who is since dead, but who had previously been a surveyor in Tipton County and Mr. Bateman, they called him Toney Bateman.

Q. 14. Was he an old resident of Tipton County?

A. Yes, born and raised in that neighborhood.

Q. 15. Did you find a marked corner at that place?

A. No, there was no marked corner there, but there were evidences of lines running in both directions,—that is fence lines.

Q. 16. Using that place as a star-ing point, were you able to run lines and make surveys which convinced you that that was the northwest corner of the Benton 1436 acres?

A. I had to take that corner on the authority of these two men. There were no original corners anywhere in that neighborhood, and none on Centennial Island.

Q. 17. Did you find any corners on Island 37? Were any shown you there?

A. Yes.

Q. 18. What corners did you find on Island 37?

A. I first found a corner of part of the Potter tract, that had been conveyed to Stockley, and then run that line to the north line of the Potter tract, and then east to the northeast corner of the Trigg 100 acres. I was subsequently shown two other lines north of that, on the north line of the Hal- 610 acres. They were marked lines, and I ran them together, so they intersected, and ascertained a corner in that way. I then ran from that down to the northeast

723 corner of the Trigg 100 acres, and in that way verified the former survey, and located the corner of the Trigg tract at the same place.

Q. 19. Did you run a line from the Huddleston grant or the Bateman grant, or any other fixed corner on what is now Centennial Island, over to what was Island 37, to points which you ascertained as corners?

A. Yes, I ran from the northeast corner of the Huddleston grant or rather from a point on the north line of the Huddleston grant

which I had located for the northeast corner, and ran from this point a random line to the northeast corner of the Trigg 100 acres on Island 37. I did that for the purpose of ascertaining the relative position of Island 37 and Centennial Island or the Devil's Elbow originally.

Q. 20. Do you remember who showed you the lines and corners on Island 37?

A. A man by the name of Groves. He shows- me one line. The last line that I run.

Q. 21. The corner which you say you found, was that a marked corner?

A. No, sir, that was in the field. That's the corner that I made by running from these other corners.

Q. 22. But I believe you said you found a corner of the Potter 640 acre tract?

A. I found a corner of Stockley's ground on the south line of the Potter 640 acres.

Q. 23. Did you make any surveys on the Arkansas side?

A. Yes, I made a survey for the purpose of locating the original bank in Arkansas, with reference to the Tennessee shore line.

Q. 24. At what point did you start on the Arkansas shore?

A. At the junction of Sections 11-12-13-14, township, 10, range 9.

724 Q. 25. Was that a marked corner?

A. Yes, that was marked, but there was no original witness *threes*. The corner was marked with an iron bar.

Q. 26. Taking that as a *starint* point for the purpose of running lines on the Arkansas shore, did you find any other monuments?

A. Yes, I ran a mile south and found a marked tree there, and two miles east and found a marked tree, not of the original trees, but an iron stake; then half a mile south of that I found another iron stake. Then I proceeded that line on south until I intersected a line which I had run across the bed of the old river from the northeast corner of the Trigg 100 acres, and in that way I connected the Arkansas survey with the Tennessee original survey. I then used the township plats for plotting in that territory over in Arkansas.

Q. 27. Did you have copies of the field notes of the survey made by the U. S. Land Office at the time these plats were made?

A. Yes, the field notes were on the plats.

Q. 28. Were these plats and field notes furnished and certified by the U. S. Land Office?

A. Yes, they either came from Washington or Little Rock, I don't remember which, from the Land Office.

Q. 29. In making these surveys, did you do it in a careful and pains-taking manner?

A. Yes.

Q. 30. Were you satisfied with its correctness when you had run the many lines of which you have spoken?

A. I saw no reason to doubt it.

Q. 31. And the map which you produce, and which I marked as Exhibit "A" to your deposition, is a map as the result of this

725 survey, aided by the grants and entries of the State of Tenn., and the notes and plats from the U. S. Land Office? Is that correct?

A. That is correct.

Q. 32. Then to your best judgment, that map represents the true conditions of the Mississippi River as it it ram at the period you have named, to-wit:—between 1823 and 1830. Is that correct?

Q. Yes that is right.

Q. 33. Who showed you the stake on the Arkansas side, which you used as the beginning corner?

A. A man by the name of Fondvill, who lived in the neighborhood.

Q. 34. In addition to this, did you make a survey for the purpose of plotting the Mississippi River as it then flowed? I mean at the time of the cut-off, and is that represented on this map, and if so, how?

A. The Mississippi River as it existed at the time I made the survey, is represented here by blue lines and are marked "present channel of the Mississippi Rover."

Q. 35. Is that present channel correctly shown on that map?

A. The north shore of it is correctly shown. That was the only shore I had anything to do with.

Q. 36. You did not undertake to correctly show the north bank of the river?

A. No. In running through the Benton tract, I located simply one point of that bank.

Q. 37. Do you remember when you made this survey?

A. November 1901, is the date on the mao, and that was the date of the survey.

Q. 38. You have a chute here which you mark Sandy Chute. Is that correctly located?

A. Yes, it was located by actual survey.

726 Q. 39. This part which is marked Mississippi River, representing the river of 1823, lying north of Sandy Chute at the time you made the survey, what was the character of that country there? Was it covered with water?

A. No, it was all dry land, except a few ponds, and covered with timber.

The examination of J. H. HUMPHREYS, resumed on Monday morning, March 20th, 1905:

Q. 40. In your last answer on Saturday afternoon, you said that the old bed of the river was dry except a few ponds, and was covered with timber. Now what was the character of that river-bed?

A. It was nearly flat, with some undulations in it as are generally found in alluvial lands, along the Mississippi River.

Q. 41. Quite a good deal has been said about a bank which is distinguishable from the other undulation, and which has the appearance of being an old river bank, in that river bed, and all of

the land to the east of that bank is on a higher plane than the land to the west of it. Did you or not, find any such land?

A. I did not find any ridge which seemed to me to have been the bank of the Mississippi River. On the contrary, the largest body of water I had to cross, and the deepest, was just against the Arkansas shore of the river.

Q. 42. And that was the out-let of Barnay Chute, was it?

A. I think so.

Q. 43. These ridges, which you found, went down, or dipped on both sides, did they not, the land being low on both sides of the ridges?

A. There were some of them wider than others, and some of them nearly flat for a considerable width on top. Some of them would rise up from the low ground by a very easy slope, and some of them more abrupt. There is a considerable ridge between
727 Campbell's Lake and the body of water next to the Arkansas shore.

Q. 44. You mean the ridge which lies east of Campbell's Lake is the only ridge which you saw that looked to you as though it might have been a permanent bank of the Mississippi River? Is that correct?

A. I can't say that it looked to me like it might have been the permanent bank of the Mississippi River. I think it was rather higher than any other ridge that I crossed, but I don't consider that any evidence that it was ever a bank of the river. We see a sand bar accumulate and form an island in the middle of the river.

Q. 45. Were the banks on either side of Middle Pond, higher or more pronounced than the other ridges you found in the bed of the river?

A. They were not.

Q. 46. Did you plot, on the map, in red lines, the lands described in the pleadings in this cause?

A. Yes, I think I did.

Q. 47. Did you survey that tract of land?

A. I surveyed and plotted on the map in red lines, the tract beginning at the northeast corner of the Trigg 152 acre tract; and running north 72 degrees and 20 minutes east, 36 chains; thence south 17 degrees and 40 minutes east, 77.86 chains; thence south 33 degrees and 20 minutes east, 64.04 chains; thence south 49 degrees west, 42.50 chains to the northeast corner of the Huddleston 2000 acre grant; thence with north line of Huddleston grant, south 82 degrees west 34 chains; thence with Huddleston's north line north 71 degrees west 15.32 chains; thence north 8 1/2 degrees west, 66 chains to the southeast corner of M. Potter's 640 acre tract, on Island 37; thence north 55 chains to the northeast corner
728 of John Trigg's 100 acre tract; thence east 18.75 chains to the beginning point. This tract includes the Trigg 152 acres, the Trigg 37 acres, and part of the Chalmers 135 acre tract, about 20 acres of the last named tract.

Q. 49. How does that tract which you have surveyed and plot-

ted lie on the Tennessee side, or west of the middle of the Mississippi River, as it flowed at the time the grants on the Tennessee side were made, and at the time the surveys in Arkansas were made?

A. Yes, it does. The east line of this tract was laid down as being midway between the original shore lines.

Q. 50. And in making the east line of this tract, you undertook to follow the middle of the river at the time of these surveys, did you?

A. Yes.

Q. 51. A good deal has been said about the size of timber on this tract, and that timber which lies in the old bed of the river to the west of this tract. Now state what was the result of your observations in regard to the timber in the bed of the river?

A. I don't know *what* I noted that the timber was different in one part of the old river bed from another, except that it was larger on the ridges than it was on the low land.

Q. 52. And this you noticed in the several ridges scattered through the bed of the old river?

A. Yes, except that the ridges between Campbell's Lake and the Arkansas shore, where I crossed it, appeared to have been put in cultivation at some time, and the top of it had no timber on it.

Q. 53. How do you account for the fact that on this ridge
729 the timber was larger than in the low flat places between the ridges?

A. I have little doubt that it is due to the fact that the ridges were first above water, and the timber begun to grow there earlier than it did at other places which were submerged longer.

Q. 54. What is the difference between the method of surveying used in Arkansas, and that used in Tennessee?

A. As far as I know the method is the same, but in the original surveys in Arkansas, the surveyors used a different variation of the needle from that used by the Tennessee surveyors. Also Arkansas was laid off by the United States Government according to what is known as the Mansfield System, in ranges, townships and sections. Tennessee was laid off in grants of various sizes, ranging from 20 acres to 5000 acres, grants from the States of North Carolina and the State of Tennessee. The earlier grants were from the State of North Carolina, and the latter grants from the State of Tennessee.

Q. 55. How was Island 37 surveyed? In the U. S. Government survey of Arkansas, or in the survey of Tennessee?

A. It was surveyed in grants from the State of Tennessee, dating back from 1823 to 1830.

Q. 56. Then as I understand you, as far back as from 1823 to 183-, the State of Tennessee claimed Island 37 as a part of its domain, and made grants of the same?

A. They made grants, and I take it for granted that it claimed it.

Q. 57. The people now living on Island 37 and owning land there, claim under these grants do they not?

A. Yes, and claim to be in the State of Tennessee, and have a magistrate over there of Tipton County, Tennessee.

Cross-examination by Mr. Ewing:

730 Q. 1. You indicated by the red lines, the middle of the river as it existed in 1823, did you not?

A. Well, at about that period. Some of these shore lines were made about that period. They were all made about that period, I stated in my direct examination that the shore lines were made from 1823 to 1830.

Q. 2. You commenced your survey by laying off the lines in controversy, at the point on the Tennessee bank of the river, about 1823?

A. I think the Huddleston grant was -ade about that date.

Q. 3. That point is approximately on the North bank of Sandy Chute?

A. Yes.

Q. 4. In 1876, prior to the cut-off, was that point which you used as a starting point, under water or not?

A. I think it was.

Q. 5. In 1876, and prior to the cut-off, had not the Trigg 37 acres disappeared?

A. I can't say certainly as to that. My impression is that it had. The appearance of the ground there indicates that it had been washed away and filled up. Here is plainly the shore line before the cut-off, right along here and pretty well under that road.

Q. 6. You indicated a point which is west of the Trigg 37 acres and a part of the land which is Chalmers' and others 135 acres, do you not?

A. Yes, it levees a part of the Trigg 152 acres, a small part of it in the northwest corner which has plainly not been washed away.

Q. 7. Now the 131 acres laid off on your map, as southwestt of the river, where it becomes McKenzie Chute, had also disappeared in 1876, had it not?

731 A. That is my understanding.

Q. 8. And if that had been true, the point which you used as a beginning point, necessarily was in the river of 1876, was it not?

A. Yes, if that be true it was.

Q. 9. Have you any reason to doubt that that was so?

A. None at all.

Q. 10. You could not have run this line in the fall of 1875, could you?

A. I think not.

Q. 11. The survey which was made, only became possible by reason of the cut-off, whereby the water was diverted from the old channel into the present channel. That is true, is it not?

A. Yes, the reformation of the ground there results from the cut-off and the changes in the river subsequent to the cut-off.

Q. 12. In other words, without the cut-off, you could not have run these lines?

A. No, I could not. If I did, I would have had to establish points in the sand, as I understand. Personally, I don't know anything about these things.

Q. 13. You know as much about that as you do about any of these lines which you have drawn on this map?

A. No, I don't. When I said that I don't know as much about these lines, I meant that I did not personally know as to where the encroachment of the river had stopped before the cut-off, of my own knowledge.

Q. 14. You mark old river on your map. Do you think you have marked it reasonably correct?

A. I do.

Q. 15. There was very little caving to the west of old river, after the cut-off, was there not?

732 A. I want to say that old river is merely a name for the depression through which the water flows before the water gets up to the top of the bank at the present time. That is all there is in the name.

Q. 16. You don't know whether that depression which you mark "old River," was the place where the river run just preceding the cut-off, do you?

A. No I don't recollect it. I don't think it did, altogether, I have just said that the north bank of what is now called old river is plainly the limit of the encroachment of the river in the Potter 640 acres. There is no indication below the old McKenzie chute that this was ever the old river.

Q. 17. Will you mind saying where you think the river ran in 1876, if it don't run through what you think is old river?

A. My information up there is that the river broke right across here, somewhere not far from the present connection of what is marked "Old River," with the present channel of the river. That is the impression that I gained from people who knew something about it.

Q. 18. Suppose somebody were to ask you to mark the middle of the river in 1876——

A. I could not undertake to do it.

Q. 19. And this map is not drawn with a view to locating the middle of the river in 1876 at all?

A. Not at all.

Cross-examination by Mr. R. G. Brown, counsel for The Muncie Pulp Company:

Q. 1. Maj. Humphreys, this map of yours is drawn to scale is it not?

A. 30 chains to the inch.

Q. 2. Will you please measure from the common corner of Sections 32-33-4-5 to the point shown on your map as to the Tennessee bank of old river, and state how far that is upon your map?

733 A. I don't understand that as the Tennessee bank. It is the west bank of what I marked old river. About 176 chains, and 176 chains is 11,616 feet.

Q. 3. That is something over two miles, is it not?
A. Yes sir.
Q. 4. Is not the little blue line on your map that you have marked as the west bank of what you denominate old river, the old bank of the Mississippi River, just prior to the cut-off?
A. I do not see any reason to suppose so.
Q. 5. How high is that bank above the territory immediately east of it?
A. At that point I don't think it is any higher.
Q. 5. Please state how much higher is this west bank of what you have marked as old river, or above the territory immediately to the east of it, at a point where the blue line intersects with the south line of what you have marked as McKenzie Chute of 1823?
A. You ask the question about a piece of ground I was on. I run that line. I don't believe that there is any difference say any considerable difference, between the bank there, either. It had been washed away on both sides.
Q. 7. Do you mean to say that the blue line which you have marked as the eastern bank of what is known as Centennial Island, and which is indicated by the words, "H. W. Stockley" on your map, is not higher than the land immediately to the east of it?
A. It is very much higher south of Sandy Chute, but north of Sandy Chute I don't think it is any higher.
Q. 9. How much *lighter* than contiguous territory is it at the point south of Sandy Chute?
734 A. The bank south of Sandy Chute is pretty low in the east side, and I should guess it was ten or twelve feet higher on the west side there.
Q. 10. Is it not a fact that the same altitude of 10 or 12 feet is found entirely along that bank, being the east line of what you have marked as McKenzie Chute, down to the point that you have marked Huddleston's 2000 acres?
A. I think not, though I guess it gradually diminishes a little as you go northward on it, but the r-ason why these two banks are nearly on a level down here is that the bank on the east side of old river at that point, is very much lower than it is south of Sandy Chute.
Q. 11. At the time that you made this survey, which I understand to be in November, 1901, was there any water in the place that you have marked on your map as old River?
A. I would not undertake to say. I have dated that map November 1901, but I was up there more than once before I made this map, and I don't undertake to say whether there was water in old river in November 1901. The first time I went up there, I don't know the exact date, but it was somewhere not far from that date, the river was high enough to put water through old river, and it was barely fordable on horseback.
Q. 12. At that time was there any water over the land immediately to the east of what you have marked as old river?
A. No.

Q. —. That land then, immediately to the east of old river, was dry?

A. Yes.

Q. 14. And the part that you have marked old river, was barely fordable on horseback?

A. Yes.

735 Q. 15. In other words, the bottom of the track which you have marked old river is from 3 to 4 feet lower than the land lying immediatelt to the east of old river?

A. Yes, and more than that. Much more than that from every part of it north of Sandy Chute.

Q. 16. Was there any water at that time in Sandy Chute?

A. No.

Q. 17. You have testified in your direct examination in rehard to the timber which you found in the bed of the Mississippi River between the Tennessee shore and the old original shore of Dean's Island. I will ask you what is the character of the timber which you found on the land immediately to the east of the point on your map which you have marked as old river?

A. Up near Sandy Chute the timber is good sized, but it gradually diminishes in size as you go north to the drain marked on the map, which leads into old river.

Q. 18. What do you mean by a good size. What diameter was the timber at the point where I now indicate to you, being the curve of Sandy chute into Old River?

A. There were some trees up there two feet in diameter.

Q. 19. Were those trees found immediately along the bank of what you have indicated as old river?

A. They were on what you might call the high bank. Upon the level.

Q. 20. Is it not a fact that all along Sandy Chute from the point you have marked as the northeast corner of Huddleston's tract, along the curve of Sandy Chute, and old River, up to the southeastern point of Trigg's 100 acres, there is a low willow flat, and that none of the timber along there is anything but small willows and small cottonwood?

A. No, that is not the fact. That 131 acres is higher ground and has good timber on it. After you pass further north, the timber is of the character that you describe.

736 Q. 21. Did you measure any of those trees?

A. No.

Q. 22. In going east from the Tennessee bank to what you have marked as old river, over to Dean's Island, did you or not find at the point 77 chains east of the Tennessee bank on a projection of the section line between 33-24-5-4, a distinct bank higher than the inland to the west of it?

A. Two of them.

Q. 23. You found two banks at that point?

A. Two banks between those points.

Q. 24. I did not ask you about finding two banks between the

points, but whether or not you found a high bank at the point 77 chains from the Tennessee bank?

A. I don't know. I never was on that ground.

Q. 25. You mean to say that you were not on the ground at the point 77 chains east of the Tennessee bank on the projection——

Witness asks: What do you mean by the Tennessee bank?

Mr. Brown: I mean the bank, the west bank od what you have marked as old river.

—. There is a ridge around there.

Q. 26. How much higher is that ridge than the land immediately to the west of it?

A. I don't know. There is a ridge to the west of it, and then another ridge.

Q. 27. I am not asking you about another ridge. I am asking you about this ridge. Is or is there not a distinct bank at the point 77 chains east of what you have marked on your map as the Tennessee bank of old river?

A. There is a distinct ridge, yes.

Q. 28. How much higher is that ridge, if you wish to call it a ridge——

737 A. It is a ridge, surely.

Q. Than the land immediately west of it?

A. I don't know how much higher it is. It is distinctly higher though.

Q. 29. Did you observe the character of the timber on the top of this ridge?

A. I never went along that ridhe until about three or four months ago. About four or five months ago. The timber was very largely cut off there, but I think there was some good large timber on it, as compared with some other places.

Q. 30. In running your line, which you have marked as the middle of the channel of 1823, did you confine yourself merely to that line?

A. Yes.

Q. 31. You didn't go either to the east or west of it?

A. That line was not run with any reference to the topography of the land.

Q. 32. What character of timber did you find along the line which you did run?

A. As far as the middle pond is shown the line runs through low ground, with bushes in it, and no timber. After leaving middle pond, and between there and the corner of the tract, there was pretty fair timber.

Q. 33. The court will not be advised as to what pretty fair timber means. Will you please give the size of the timber in inches?

A. No, I won't for I don't know.

Q. 34. Have you ever had any experience in observing the growth of cottonwood timber?

A. I don't know, I would not like to say I had not had any, but I have never been a denizen of the bottom, and I don't think

738 I have had a large amount of experience in that line.

Q. 35. Your observation then, in regard to the timber on

this tract was merely casual, and is not given as the testimony of an expert in timber?

A. No, I don't claim to be an expert in timber, but I know how a big tree is when I see it, approximately.

Q. 36. On the edge of this ridge, which you say is at 77 chains from the east of the Tennessee bank, did you or not observe either trees or stumps that would measure from 40 to 45 inches in diameter?

A. I am certain that I never saw a tree anywhere in the bottom that would measure that. If you found any such trees they are exceptions.

Re-examination:

Q. 1. Maj. Humphreys, you speak of the 131 acre tract being high and the timber being large. Is that the tract which is bounded on the north and east by the original boundary line of McKenzie Chute, and on the south and west by Sandy Chute and old river?

A. Yes.

Q. 2. Now the ridge which Mr. Brown has asked you about as being 77 chains east of old river, that ridge is west of Middle Pond, is it not?

A. Yes sir.

Q. 3. Is the timber on that ridge as large as the timber on the 131 acre tract to the south?

A. I could not say. As I said before, the best of that timber and the most of it, had been cut off, before I ever followed it.

Q. 4. But to your best judgment it was no longer than the timber on the 131 acre tract?

739 A. As I said, I would not undertake to say whether it was or was not, but nothing I saw left any such impression on my mind, as that it was larger.

Recross-examination by R. G. Brown:

Q. 1. You state that at the time you went up there to make this map in November, 1901, or shortly prior to that, the timber had been cut off of this 131 acres?

A. I never said anything of the kind.

Q. 2. When was it that the timber was cut off of that?

A. I never said it was cut off of that at all. I said it was cut off the ridge.

Q. 3. In your deposition given in the case of Stockley vs. Cissna you testified directly in regard to the size of this timber, did you not?

A. I don't know. I don't think I testified any more definitely than I have in this case. I certainly never claimed to have measured it.

Q. 4. I read you from page 51 of the record in the case of Stockley v. Cissna, in the U. S. Circuit Court of Appeals, and I will ask you to examine that paper and state whether or not you gave this evidence? "Q. Do you think the river came further over this way

from 1823 to 1876? A. This ground here shows that it had all been in the river up here to this road. Q. Now in order to make it perfectly plain, all this land in here has at one time been under the Mississippi River? A. Yes sir. Q. I will ask you if you know about how long since it has been under the water? A. I don't know anything of my own knowledge, except from the size of the trees I saw there. Q. How old did these trees look to be? A. Some of them were nearly three feet in diameter." Did you not give that testimony?

740 A. Let's see what that applies to. I think it is possible that on that 131 acres some of the trees might have been three feet in diameter. I don't see anything in this question or the answer either, to locate the point you were talking about.

Q. 5. Will you please locate whereabouts on that tract you found the trees 36 inches in diameter, about which you testified?

A. I did not measure any of them. I think that that was a general answer, which applied to all bottom, which I was familiar with.

Q. 6. Did you understand those questions there, to have been put to you in regard to the land which was covered by the Mississippi River, *vefore* the cutoff?

A. Yes sir,

Q. 7. You were testifying then that on the land which was occupied by the Mississippi River at the date of the cut-off, these trees, in 1901, measured 36 inches.

A. No, I didn't testify that. I did not claim to have measured them, and when I said some of the trees were three feet in diameter, it was merely an estimate of mine and that being the limit the presumption is that they were numerous, those three feet in diameter.

Q. 8. If you found trees on this island which was the bottom of the river in 1876, that by 1901 had grown to 36 inches, would it shock your idea of the eternal fitness of things, if by 1905, they had increased to 40 and 42 inches?

A. I would hardly expect that they would increase that much in that period of time.

Q. 9. You meant to state that this 131 acre tract in the bed of the river at the point where the cut-off took place in 1876, did you not?

741 A. If you apply it to the old river, I will say that the present condition with what is marked Old River, on this map, with the present channel of the Mississippi River, is in the neighborhood of where I understand the original cut-off took place, though I have no definite information on the subject.

Q. 10. Will you please lay your rule about where you state the cut-off took place?

A. I should say it was about there.

Q. 11. That is a southwestwardly direction from the point where 35 chains are marked on the bank of the river of 1823, down towards the intersection of the Old River with the present channel?

A. I don't know but that where those figures 35 chains are marked was in the river before the cut-off.

Q. 12. Do you think that the direction was across the point indicated, and in that direction?

A. I have no information as to the direction, and I don't know anything of my own knowledge about it at all. It is just an impression I obtained from people who were there when the cut-off occurred, and I never attempted to locate it on the ground in my life.

Q. 13. Do you think that Sandy Chute, as marked on the present map, was north or south of the river as it ran in 1876?

A. I should say it was probably north, but I don't know. I don't know what there was there in 1876.

Q. 14. Your map and your testimony, and your survey, are addressed exclusively to the period between 1823 and 1830?

A. Except the lines shown in blue and red, which indicate that I found on the ground when I made the survey.

Q. 15. The lines in blue indicate the present river and lines?

A. Yes.

Q. 16. The red lines represent a survey made from a point on the bank of the river in 1823, out to a point in the river
742 of 1823, and is not supposed to deal with the river of 1876, at all?

A. No, sir.

743 The next witness, CHARLES A. STOCKLEY, testified as follows:

Q. 1. Mr. Stockley where do you live?

A. On Centennial Island.

Q. 2. How long have you been living on Centennial Island?

A. Off and on, all my life.

Q. 3. Where were you living at the time of the Cut-off?

A. On Centennial Island when Centennial Island was made.

A. 4. I hand you a map which is marked "Exhibit F." to Col. Suter's deposition, which undertakes to show the Mississippi River in 1874 and I will ask you to take a pen and mark where you lived at the time?

A. I indicate it by drawing a square marked "S." That is on the Devil's Elbow, between the Mississippi River on the south, as it flowed around Brandywine Bar and McKenzie chute on the north, which is to the east of what was the Trigg place and Brown place which was on the Mississippi River, opposite Dean's Island.

Q. 5. Now, Mr. Stockley, according to the best of your recollection, from the Trigg place, which I understand was on the Tennessee bank, across to Dean's Island, was the Mississippi at that point, wide or narrow?

A. It must have been at least a mile and a half, I suppose, from the Tennessee Bank over to Dean's Island. I mean to what we called Devil's Island, which is marked on this map at the point northeast of the Tennessee bank. Dean's Island was northeast of the Trigg Place.

Q. 6. The point of measurement at which you say the river was

a mile and a half was from the Tennessee shore, looking across the current to Dean's Island?

A. Yes, I think it is northeast. I may be wrong about it, but that is the way I remember the direction.

744 Q. 7. Do you remember when the cut-off occurred?

A. Yes sir.

Q. 8. When did it occur?

A. In 1876, on Friday night I think.

Q. 9. How far was the cut-off from your home?

A. Possibly three-quarters of a mile. A little over three-quarters of a mile possibly.

Q. 10. Was it during high water?

A. The banks were very full, and it was over in a great many places.

Q. 11. Did you hear the roar of the water?

A. Oh yes, very plainly.

Q. 12. Did you go down to where the river was cut?

A. Yes we all went down there next morning.

Q. 13. Tell as best you *call,* what you saw.

A. When I first went down there, the river, I guess was possibly as wide as from Front Row to Main Street, as it was continually falling in on both sides in chunks from one foot to ten or fifteen feet wide.

Q. 14. In the course of a short time the river had made a channel through there?

A. The Tug Oriole, I think, went down through there Sunday morning.

Q. 15. And the Cut-off began Friday night?

A. Yes sir. The cut-off went through Saturday morning about three or four o'clock, or sometime Friday night, and the Oriole went down through there on Sunday morning.

Q. 16. Along the east bank of Tennessee, and directly opposite from Dean's Island was or not, that bank caving prior to the cut-off?

A. No, it was not caving west from Dean's Island, but was caving over at Bateman, south of Dean's Island.

745 Q. 17. Was it caving around on the other side, opposite to Brandywine Bar?

A. Oh, yes, caving very rapidly over there.

Q. 18. Could you pilot where the river was running in 1876?

A. I think that map there is a pretty good map of it, to my recollection. (That map is Col. Suter's map, Exhibit F to his deposition.)

Q. 19. Have you recently made any measurements of timber in the old abandoned channel of the river, and if so, at whose request did you make them?

A. I measured timber on Long Lake, at the request of Mr. Biggs, on the east and west side of Long Lake.

Q. 20. Did you measure it going from Island 37 over to Dean's Island?

A. I measured from the east bank of Long Lake over to about the second ridge on the Dean's Island shore. Then I came back, and

measured from the west bank of Long Lake over towards Island 37, about 150 yards.

Q. 21. In making these measurements as you went east from Long Lake did you measure the trees which had been cut?

A. I measured the stumps. The timber had been cut and hauled.

Q. 22. Will you now give the measurements of those trees as you took them?

A. I made a memorandum as we came to the trees, the first one on the bank of the east bank of Long Lake, was 10 inches. The next 18, then 30, then 21, then 36, then 30, then 39, then 38. The last two trees were on the top of the bank of what I took to be Dean's Island. That was on the second ridge.

Q. 23. Now measuring west from that point, how did the measurements run?

746 A. Towards Island 37 the first tree measured on the west side was 6 inches, then 12, then 7, then 9. They seemed to grow smaller as we went down in the flat, until you got over in the black land, and then the trees were larger. That character of trees grow more rapidly in the black land than in the sandy soil.

Q. 24. Along the west bank of Long Lake what was the character of the soil?

A. As far out nearly as I measured, the soil along there is sandy.

Q. 25. What was the character of the soil going towards Dean's Island from Long Lake?

A. Very black and rich.

Q. 26. In measuring the trees which had been cut, did you measure the largest trees you found?

A. Yes, sir. I took a line going west, and measured the stumps as I came to them and they were about the largest I saw around there. About the average. There were no larger ones I am pretty sure.

Q. 27. Do you remember who was with you when you made the measurements?

A. A young man named Davidson and one named McKay.

Q. 28. This measurement was made in January 1905?

A. I think that was it. About January 25th.

Q. 29. What kind of trees were these trees?

A. Those trees on the east side were all cottonwood. Those on the west side were cottonwood, willows and there might have been one or two sycamores, I am not sure.

Q. 30. In what kind of soil does this character of trees grow the fastest?

A. In black soil.

747 Q. 30. Do you know Captain O. K. Joplin?

A. Yes sir, he is my *btoerh*-in-law.

Q. 31. Do you know what his present physical condition is?

A. He is quite a sick man.

Q. 32. Is his physical condition such as to be able to give his deposition?

A. It might be at some time, but he is very easily excited and

goes all to pieces, and I don't think you can get much our of him.

Q. 33. How long has he been in his present state of health?

A. About five months.

Q. 34. Where has he been since about the first of August, 1904?

A. At St. Joseph's Hospital and Covington, Tennessee, and under a doctor's treatment all the time.

Q. 35. Is he able to talk consecutively and intelligently on any subject for more than a few minutes at the time?

A. Only for a few minutes at a time.

Q. 36. Is he attending to the business of managing his plantation, or not?

A. No sir, he is not.

Q. 37. Is he able to attend to it?

A. No. I go in some day to talk to him on some little business proposition about the place, and he goes all to pieces so I have just — to quit and let him alone.

Cross-examination:

Q. 1. Mr. Stockley, I show you here a map made Exhibit 8 to Capt. Le Vasseur's deposition, and I will ask you to mark on that map, by a dotted black line, the line which you took in measuring the timber about which you have testified, and I will ask you to indicate the terminal points of that line by the letters S. and F?

748

A. I do so.

Q. 2. I notice that that point of departure from Island 37, as located by you, is somewhat to the north of Powel's Pond and it goes in a southeasterly direction, to what I understand to be the ridges east of what is indicated on this map as Middle Pond. Is that correct?

A. Yes sir.

Q. 3. Then the trees which you found east of Long Lake grew on the ridges between the Long Lake and Middle Pond?

A. Between Long Lake and Dean's Island. There is a dry place in which I reckon is what you call dry pond. It has grown up in bushes and trees.

Q. 4. I understand but that I want to know if the last two trees which you measured, which were 39 and 38 inches, were to the east of the spot that is known on this map as Middle Pond? Is that a fact?

A. I don't think they were to the east of it. I think they were to the West of Middle Pond. They were on the second ridge east from Long Lake.

Q. 5. Is it not a fact that there is just one ridge between this Dry or Middle Pond and Powell Lake, and the second ridge would come east of Middle Pond, would it not?

A. My recollection is that there is a ridge right along on Long Lake, and after you get over, possibly 100 yards, there is another ridge. Then there is Long Pond or Dry Pond further east. Whether there is another ridge in there or not, I am not positive.

Q. 6. None of these trees which you measured however, are in the tract of land claimed by the State of Tennessee, in this case?

749 A. I could not say that. I don't know exactly where the State of Tennessee is claiming.

Q. 7. Did you ever go over the ground formerly the bed of the Old River, between Island 37 and Dean's Island, at a point opposite where McKenzie chute used to come through?

A. Oh yes.

Q. 8. I will ask you whether or not it is a fact that paralleling the east bank of Island 37, and the east bank of Centennial Island down to the present river channel, the timber immediately next to that bank is what is known as the Willow Flat?

A. Yes, Willow and Cottonwood Flat.

Q. 9. What is the size of the trees next to the Tennessee bank there?

A. The timber in that flat varies in size. They run from 4 inches to 6-8 and 10 inches. Possibly parger in some places.

Q. 10. As you go further to the east towards Dean's Island, does the timber increase or diminish in size?

A. The further you go towards Dean's Island the larger the timber grows.

Q. 11. Do you recollect ever noticing the timber immediately to the east of where the tram-road, built by the Muncie Pulp Company is, on Dean's Island?

A. I have been all over the woods over there while they were cutting timber.

Q. 12. I show you here a map made Exhibit to J. H. Martin's deposition, and I call your attention to a black line, beginning on the Mississippi River at a point marked cord-wood shipping yard, and following the north bank of sandy chute, and then around the west of Dean's Island and crossing the prolongation of the

750 Township line between townships 10 and 9, and I will ask you if you ever noticed what was the character of the timber immediately adjoining the tram-road?

A. Cottonwood.

Q. 13. Is that cottonwood at the point where the tram-road crossed this Township Line, larger or smaller than the timber immediately to the east and going towards the Tennessee shore?

A. Some of it may be larger and some smaller. You will find all sizes of trees in there. It's according to the ages of the trees. You will also find along this tram-road a lot of Elms and other growth which you don't find in the cottonwood flats.

Q. 14. What does that indicate? An older formation of the land, or a newer?

A. I should judge it indicated an older formation of the land.

Q. 15. Is it not a fact that the cottonwood timber to the east of this tram-road, where it crosses the Township Line, is very much larger than the timber to the west?

A. Taken as a body I expect it would run larger.

Q. 16. If you should find that at a point 20 feet north of the

termination of the tram-road, and about 75 feet east of the bank, that a cottonwood stump there measured between 40 and 45 inches in diameter, how long would you say that had been in attaining its growth at that point?

A. I could not say because I am not a very good judge of timber and the growth of it. I know it takes cottonwood a long time to get up that large. I expect it would be possibly about 35 years, but I could not say for sure, because I am not posted in that business.

751 Q. 17. Is it not a fact that for between ten and twelve years after the cut-off took place, about which you have testified, steamboats came down McKenzie Chute and into the Mississippi River at different stages of water?

A. Yes. As late as ten years ago I have seen them go through there, but it took might- high water.

Q. 18. Is it not a fact, however, that that was an open channel for at least ten years, and was used by steamboats as a channel for at least ten years, after the cut-off, at a medium stage of water?

A. No, I think not.

Q. 19. Is it not a fact that the channel remained open nect to the Tennessee shore for at least ten years after the cut-off?

A. It remained open but it took a high water for the boats to go through there. It has to be a pretty good stage of water. It was considered dangerous for the boats to go through and they did not try it.

Q. 20. It was considered dangerous on account of snags?

A. Yes, and willows. The place was filled up so fast.

Q. 21. Is it not a fact that when you came to Memphis on Sunday, March 19th, 1905, you saw a steamboat bringing a raft of logs through Old River, north of Island 37, which raft and steamboat had come down Barney Chute clear from the Mississippi River, and from the northeast corner of Dean's Island?

A. Yes, I saw the boat with the raft, coming down what is called old river, at the north side of Island 37. That boat must have got that raft, I presume, at what is known as Barney's Chute.

752 Q. 22. The river at its present stage is not outside of its banks at Dean's Island by 10 feet is it?

A. It lacks not over 6 feet. At some places not that much.

Q. 23. At the east bank of Centennial Island, at the present time, where the channel comes through, and on what is known as the Old River chute, and so marked on Martin's map, how far does that bank, at the present time, project above the water?

A. I don't think it projects over at the most, six or eight feet.

Q. 24. Is it not a fact that at all stages of the water above the medium stage, the channel between Island 37 and Centennial, known as McKenzie Chute, was practical for steamboats for at least ten years after the cut-off?

A. I don't know. I don't think it was. They might have gone through there, and did go through, at a good stage of water. The regular packet went through there at certain stages of water.

Q. 25. You are not a river man are you?

A. Yes sir, I was a clerk on the river about ten years, but not up this way.

Q. 26. Now I want to ask you in regard to the point at which you have testified that the river between Centennial Island and Dean's Island, prior to the cut-off, measured a mile and a half. I will ask you to mark on Capt. Suter's map, which was then shown you, the point at which you state the river was a mile and a half wide?

A. I mark the point which I stated was a mile and a half by a black line running from the letters C. to C.

Q. 27. Is it not a fact that there was between the point which you have marked as Dean's Island and shore, and the Tennessee Bank, prior to the Cut-off, a large sand bar formation which
753 was connected with Dean's Island, prior to the cut-off?

A. My recollection is that there was not much of a sand bar, but it was a mud shoal. But you must bear in mind that I am not very familiar with Dean's Island in those days.

Q. 28. You never measured the river or say any one measure it?

A. I don't ever remember being on Dean's Island before the cut-off.

Q. 29. This then, is just a general impression that you have in regard to the width of the river at that time?

A. Yes sir.

Q. 30. And you don't pretend to say that that was the actual width?

A. No, it might have been more and it might have been less.

Re-examination:

Q. 1. The river at that point was a wide river?

A. Yes, very wide.

Q. 2. You were measuring, or rather estimating the actual width of the water?

A. Yes.

Q. 3. At the place where you measured this timber did this tram-road run?

A. The tram-road is east of where I measured, and not as far north.

Q. 4. The raft which Mr. Brown asked you about, was not coming along anywhere in the Old River bed between Dean's Island and Island 37, but you saw it down here at Fogleman's Chute?
754 A. No, we saw it up above Moorehead in Old River, north of Island 37.

755 The next witness, DAVID DEWALT, testified as follows:

Q. 1. Where do you live?

A. In Ripley, Tenn.

Q. 2. How old are you, and how long have you lived in Lauderdale County?

A. I am 59 years old, and I was bown in Lauderdake County, and have lived there all my life, and have been there ever since the war.

Q. 3. During that time, have you lived down in the bottom any time?

A. Yes sir, I lived in the 10th District of Lauderdale County, about two miles and a half from the Mississippi River bottom.

Q. 4. Have you had any experience in noting the growth, and in the sale and handling of cottonwood timber?

A. Yes sir, I have.

Q. 5. Have you ever had any to grow on your places, that you have personally owned?

A. Yes sir. I have some cottonwood timber on a place that I own, of 110 acres, in the Tenth District, and in 1879 or 1880, I moved on this 110 acre tract, where I had avout 10 or 15 acres in pasture, in a branch bottom, which had a good many cottonwoods on it at that time, and at that time, that is, 1880, there were not any of them over six inches through. Now, this last spring, I had some of them cut for saw logs, and on *the* of the largest, a 12 foot log, measured about 33 inches. Had 400 feet in the log, as counted at the mill, and the others on down from 20 inches to 25 inches at the top. Some of them would measure 36 inches or over at the stump. Between 36 and 40 inches.

Q. 6. When you say that you had these logs cut last spring, you mean the spring of 1904?

756 A. Yes sir, I had them cut along in February.

Q. 7. It has been a year ago now?

A. Yes sir.

Q. 8. I will ask you if you have seen this morning four Exhibits of cuts from cottonwood, in the office of Mr. R. G. Brown, and at a carpenter's shop on Jefferson Street?

A. Yes sir, I saw two at the office and two at the carpenter's shop.

Q. 9. Well, was any of the timber which you cut, at the stump, as large as these specimens which he has in his office?

A. Yes sir, some of them larger.

Q. 10. Several of those specimens have irregular circumferences, going in several contours. What would this indicate to you as to where the cut was taken from on the trees?

A. It would indicate that it was cut near the ground, and to get the proper growth of the tree in the circumference around inside the tree, to get the proper growth of a tree it ought to be cut at the ordinary height above the ground, to get the proper growth of the tree by the marks indicating the age of the tree. The nearer the ground they are, the more irregular they are and sometimes conflict with the other, and run together, and don't show the full circle all the way around, when if it is cut at the proper height from the ground, it will show the age of the tree.

Q. 11. You are referring to the annual rings made on the stump?

A. Yes.

Q. 12. Now in reference to cottonwood, is it a soft or hard wood?

A. Soft wood.

Q. 13. Does it grow fast or slow?

A. It grows very rapidly.

Q. 14. As compared with oak and harder wood, how do these rings appear? Are they as distinct upon cottonwood as they are upon trees of harder variety of wood?

A. Soft wood, such as poplar and cottonwood, and other
757 soft timber, is not anything like as reliable in marks of age as hard wood.

Q. 15. In cottonwood and soft trees, of porous growth and rapid growth, do these rings which appear, always represent a year's growth?

A. No sir. Not altogether.

Q. 16. Why is this, if you know?

A. Well, sometimes I think it is from freezes, and from drouth that causes those rings to run together. You may start with a ring that goes around and indicates the age of trees, and that will come back to the same ring.

Q. 17. Would a cottonwood in a year of drouth, or a year in which the growth had been interrupted after it had started, by a freeze, take on a new growth, when a harder wood would not?

A. Yes, I think it would.

Q. 18. These exhibits which appear in evidence in your judgment, did they appear to have grown in a cottonwood thicket or not?

A. No. My opinion is that they grew out near some thicket or on some bar or on some bank the edge of a thicket.

Q. 19. Why do you say this?

A. Because in cutting cotton wood where it grows generally in a cottonwood grove or a cottonwood brake the indications of the growth of the tree is not shown like they are on one that stands out by itself. In cutting cottonwood in a brake, and cutting it at an ordinary height from the ground, these rings are not shown, a great many of them.

Q. 20. You mean the annual rings?

A. Yes sir.

Q. 21. What about whether the tree grows straight?

A. One growing in a brake grows straighter, is not swelled at the ground, or bulges at the roots, like one standing out by itself.

758 Q. 22. Were these trees bulged at the roots, the exhibits which have been brought here, and which you saw in Mr. Brown's office?

A. Yes sir.

Q. 23. How old was the cottonwood saplings which were in that field in 1880?

A. They could not have been over a couple of years old. Two or three years old.

Q. 24. Have you had other experiences in cottonwood except watching the growth in trees on this little tract which you own?

A. Yes sir, I have handled a good deal of cottonwood. Now at the mouth of Coal Creek stands a nice little body oc cottonwood which belongs to Anderson & Tully, and in 1880, there was water over it. Not it had grown up in a cottonwood thicket, and some of

them are large enough to cut into saw logs. In 1880 we had timber where they are standing now. I mean by timber rafts of logs in the river. In the eddy at the mouth of Coal Creek.

Q. 25. You mean since 1880 the water has receded from this place, the land has appeared, and cottonwood has grown large enough for saw logs?

A. Yes sir.

Q. 26. What size do you mean when you say large enough for saw logs?

A. We generally cut cottonwood from 18 to 30 inches and call it pretty good timber.

Q. 27. Have you been in the cottonwood timber business off and on for a good many years?

A. Yes sir, I have been handling cottonwood ever since 1880, every year, until this last year, and this year.

Cross-examination:

Q. 1. What is your business?

A. I follow farming, look after the farm. I survey some.
759 I have been looking after a good deal of timber in the Mississippi bottom for a number of years, for Capt. Joe C. Marley.

Q. 3. You state what in 1879 or 1880 you bought a fifteen acre tract of land on a branch bottom, which had some cottonwood on it, and they were six inches through. Did you measure them at that time?

A. I stated in 1880 I had a farm with a branch bottom, which had a lot of cottonwood on it at that time, that were nothing more than saplings.

Q. 3. Please answer my question, which I repeat. Did you measure them?

A. No sir.

Q. 4. This is just an estimate of yours, or recollection, after 25 years, is it?

A. There were none of them big enough to make rails out of, or to split open and use for rails.

Q. 5. How many trees out of that bottom did you cut when you cut the timber in 1904?

A. Four or five trees I believe.

Q. 6. Is that all?

A. Yes, there are several standing there yet.

Q. 7. You never happened to measure these individual trees when they were saplings, did you?

A. No sir.

Q. 8. You say that one of them measured 33 inches?

A. Yes sir.

Q. 9. Was that the but- cut?

A. Yes sir.

Q. 10. How long was it?

A. 12 feet long.

Q. 11. How many cuts did you get out of that tree?
A. I think there were about three.
Q. 12. What was the size of the second cut?
760 A. I don't remember.
Q. 13. What was the size of the third cut?
A. I don't remember.
Q. 14. How is it that you remember the but- cut and don't recollect any of the others?
A. It was the largest, and it died and the bark had slipped off, of it, and I had it sawed into boxing.
Q. 15. What do the rings that you find in cottonwood indicate?
A. Ordinarily they indicate the year.
Q. 16. You mean the year's growth from each ring?
A. Let me explain. There is a soft ring and a hard one, and that indicates the year's growth. The soft part of it grows through the war-, or sap season of the year, and the hard part of it indicates the winter part. Ordinarily that is the rule of counting the growth of a tree.
Q. 17. I show you here Exhibit 2 to the deposition of W. H. Moddy, and this has been testified to by Mr. Moody, as being a section of a cottonwood sapling. You will notice where the figure one appears that there is a brownish mark in the center of that section?
A. That is the heart of the tree.
Q. 18. Now on each side of that section, marked with the figure 1, appears a thin brown line running with the grain of the wood. What is that?
A. That is an indication of the winter growth of the tree, or the end of the year, on it.
Q. 19. I was just about to ask you if there was such a thing known as the winter growth of a tree. Is it not a fact that trees cease entirely to grow in the winter time?
A. Every winter, at the end of the year, or at the end of the winter season, one of these thin brown marks as you call them, will be on the outside of the tree.
Q. 20. In other words, that is a stain or mark left by the
761 bark on the outside of the year's growth, is it not?
A. Yes sir.
Q. 21. Then there is no such thing as a winter growth of a tree?
A. It is indicated as being a winter growth and a spring growth of a tree. That is, the soldt part looks as if it grew in the summer and the hard part come on through the winter season, and it takes both of these streaks in the growth of the tree to make a year. That is, the soft and the hard.
Q. 22. Is it not a fact that if you find in a tree twenty of those brown lines, such as I show you in the section of Exhibit No. 3, to Mr. Moody's deposition, that each of those brown lines represents one year's growth of a tree?
A. Yes sir, if it — cut at the proper height from the ground.
Q. 23. Do you mean to say that if you cut a cottonwood tree at any height from the ground, so long as it is above the roots that

this section of the tree will not show these annual rings, each of which you say represents one year's growth?

A. It is more reliable to cut it at least three feet from the ground, than it is near the ground. The swell and the bulge around the bottom is not as reliable, as to cut it up at the proper height from the ground.

Q. 24. Still the wood in a cottonwood tree, as the wood in any other tree, grows in layers from the ground to the top branch, don't it?

A. To some extent it does.

Q. 25. Will the stump near to the ground, have any more rings in it than the section cut three feet above the ground?

A. I think so.

Q. 26. How does it get it, if it grows in layers, one layer to the year?

762 A. As I have already stated, in these layers they conflict and run together, and in counting it from the center of the tree out one way, and the center out another way, it will not count as many as it will, if cut at an ordinary height.

Q. 27. Then all that you really mean to say is that the annual rings will show you more distinctly if the tree is cut three feet from the ground than they will if it is cut two feet from the ground?

A. Cutting it at the proper height that is, about three feet from the ground, it will get rid of a lot of little layers which start out like it is a year's growth that runs back into the main ring, which will indicate that it is a year older than it really is.

Q. 28. I will ask you this. If you can count 30 or 40 distinct brown marks such as have been shown you on Exhibit 3 to Mr. Moody's deposition, they will indicate that the tree is at least 30 to 40 years old, does it not?

A. Yes, if it is cut a proper height from the ground.

Q. 29. If you can count these 30 or 40 lines running all the way around a section, is it not positive proof, which no one can deny, that that tree is at least 30 or 40 years old?

A. Ordinarily that is the case.

Q. 30. I will ask you if you paid particular attention to the section of the cottonwood tree in the carpenter's shop on Jefferson Street, which is described in some of the depositions as being section No. 2, and which has the bark around it?

A. I counted the rings around it.

Q. 31. How many rings did you find?

A. I think there were 30 odd.

Q. 32. Are you a careful counter?

A. I looked at them and counted them twice, and there were 37 or 38 of them, and in some of these rings that go around, if you will follow them around, they will run back into one of the larger rings, that don't go all the way around.

763 Q. 33. Is it not a fact that that section No. 2, is almost a perfect circle, being slightly broader, at one diameter than the other?

A. Yes sir.

Q. 34. Is there any indication in that section No. 2, that it was cut improperly close to the roots?

A. I don't know that there was.

Q. 35. Would you not say that that section was cut at a fair place on the tree, to indicate the growth of the tree?

A. Something near it.

Q. 36. Can you tell whether that section was cut two feet, three feet or four feet from the ground?

A. I don't know that I can tell exactly how high it is cut, but in cutting them ordinarily, to get away from the bulge of the roots, and to the round part of the tree, we cut them above the swells from the root.

Q. 37. Now you have made some mention here to these rings not always representing a year's growth, and you have stated that sometimes a freeze or a drouth makes the rings run together. You have also stated that the growth of the tree is made during the spring and summer. Now will you explain how it would be possible for a freeze during the spring or summer, to make these summer growths run together?

A. Do you mean a winter freeze or a spring freeze?

Q. 38. I never heard of a freeze in the summer, but I am asking how a freeze in winter can make the summer growths run together?

A. A great many times a cottonwood is full of sap or water, and it will freeze and swell those little seams in there and expand them, and make them irregular, when they are near the ground.

Q. 39. You don't mean, however, to say that a freeze will make two of these lines where there was one before?

764 A. The water in these soft seams between the growth of a tree freezes sometimes and will make these seems irregular around the tree near the ground. At least that is my experience about them. I have cut into them when they were frozen and found the water frozen in those little soft places between the growth of the trees.

Q. 40. This freezing don't put two circles where there was one before, does it?

A. It makes them irregular sometimes.

Q. 41. Please answer my question. Do these freezes make two rings where there was one before? You can answer that yes or no, please do so.

A. It makes two sometimes, parallel around the tree, and not all the way. As far as the water freezes around the tree, in those little seams. It would indicate as though there were two seams where there ought to be only one.

Q. 42. Do you mean to say that freezing a cottonwood makes a double quantity of those narrow brown lines which are shown in a tree in its normal condition, as indicating each, one year's growth?

A. No- ordinarily so.

Q. 43. You merely assume that it does double them sometimes, because they are irregular?

A. Irregular and the tree frozen.

Q. 44. You have stated that annual rings are not, shown on cot-

tonwood trees that grow in a brake. Are you positive of this statement as you are of any other statement you have made?

A. Ordinarily a cottonwood tree which grows in a brake of yellow cottonwood, does not show them as mush so or anything like it, as the white cottonwood.

Q. 45. Are these cottonwoods that you have been examining a section of, yellow cottonwood or white cottonwood?

A. White cottonwood.

Q. 46. Has anybody made any mention of yellow cottonwood before?

765 A. Not that I know of.

Q. 47. Then you don't mean to state that the annual rings in white cottonwood, which grow in brakes, are not shown?

A. Yes sir, to some extent.

Q. 48. Please explain to what extend white cottonwood, growing in a brake, does not show annual rings as much as white cottonwood growing on a bank?

A. Because in a brake, it seems as though the sun and the weather do not effect it so much as it would by itself. The rings are not near so plain and some of them, after you get away from the ground, are not shown at all.

Q. 49. Do you mean to say that section- cut across the grain of a white cottonwood tree which grew in a cottonwood brake, will not show annual rings at all?

A. Ordinarily they show their growth to some extent. In other words, they don't show it so plain and some of them don't show it plain enough to tell anything about the growth of them.

Q. 50. You say that you have been handling cottonwood since 1898. In what capacity have you been handling it?

A. I have cut and handled it, and floated it, rafter it and brought it to Memphis.

Q. 51. During all of that seven years, did you ever have occasion to count the rings in any of the saw logs?

A. I think the boys and myself counted some of them up on Coal Creek.

Q. 52. Did you count them, or did the boys count them?

A. We were all standing around the stump, and got to talking about it.

Q. 53. Was that a yellow cottonwood or a white cottonwood?

A. A white cottonwood.

Q. 54. Did it grow on a brake or on a bank?

A. On a bank, very nearly by itself.

766 Q. 55. When, if ever did you have occasion to try to count the anuual ridges on a white cottonwood which grew in a brake, and on which occasion you were enable to detect the rings showing the annual growth of the tree?

A. When I was cutting cottonwood on Coal Creek we cut some near the float road, in Long Hole, which did not show the marks anything like as plain as the one we cut up on the Creek. That was in 1899.

Q. 56. Still they showed so that is you tried to find them, you could find them, could you not?

A. To some extent.

Q. 57. Is it not a fact that cottonwood trees which grow in a brake, are more symmetrical, straighter and rounder than cottonwood trees which grow on a bank?

A. Yes sir.

Q. 58. Then, if this is the case, why is it that the brown lines indicating the termination of each year's growth would not be more distinct in these symmetrical trees than in those which are irregular in their formation?

A. The white cottonwood, which stands in a brake close together, does not show it anything like as much as one standing out by itself, and a yellow cottonwood that stands in a brake, it is very hard to tell anything about the growth of it without you cut it down right at the ground.

Re-examination:

Q. 1. Mr. Brown has been asking you a good many questions about whether you ever saw any white cottonwood on which it was very difficult, if not altogether impossible to count the annual rings. I now ask you if about 10 o'clock on this day, March 24th, 1905, you were not in Mr. Brown's Office, and he did not tell you that one of the exhibits which he had brought down, because of its porous growth, it was not difficult if not altogether im-
767 possible to count the annual rings, or make a statement in substance to that effect?

A. Yes sir, that is about what he said.

Recross-examination:

Q. 1. Is it not a fact that when Mr. Brown made that statement to you, he did not tell you that the section referred to had been taken from the top of a stump which had been cut for a good many years, and that owing to the overflows, the stump had become punky?

A. I think that is about what he said. Something to that effect.

768 In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY et als.

Deposition of George W. Martin, Witness for Complainant, Taken by Consent, at Nashville, Tennessee, on March 27th, 1905, Before Elliott M. Buchanan, Notary Public, in the Presence of Attorney-General Charles T. Cates and Albert W. Biggs, for the State; no Counsel Present for Defendants.

Direct examination by Albert W. Biggs:

Q. 1. Dr. Martin, will you state your name, residence and present occupation?

A. George W. Martin; Nashville, Tennessee; Professor of Biology, Vanderbilt University.

Q. 2. Will you also state how long you have been connected with Vanderbilt University, as Professor of Biology?

A. Six years.

Q. 3. Prior to that connection, how were you engaged?

A. Teacher of Biology at the Indianapolis High School, for eight years.

Q. 4. What preparations did you make for your work as a biologist?

A. Well, I specialized on botany at Wabash College, when I was a student; and I took a graduate course of three years at Wabash College, the University of Indiana, and in the Biological Department at Andover, Massachusetts, and also Cornell University.

Q. 5. What degrees, if any, did you receive from these several institutions?

A. I took my Bachelor of Science and Doctor of Philosophy from the University of Indiana.

769 Q. 6. Dr. Martin, in the pursuit of your profession, you have of course paid attention to the growth of trees?

A. More or less, of course, understand me now, I am not a forester. While I have emphasized what is called andrology—that is, forestry—of course in teaching Botany I rehearse these facts every year—I have had a class in botany every year, and I ezphasize that point.

Q. 7. Well, in your work and teaching, it is necessary for you to be acquainted with and teach the growth of plants, both trees and other plants, is it not?

A. Yes sir.

Q. 8. The stem of the tree is how composed?

A. The stem of the tree is structure, is made up of what is called rings, and when these rings are subjected to microscopic test it is found that they are not rings at all, that they simply represent the conditions of cell life, which are modified by the conditions of soil

and climate as to size, color, etc. It is true that a tree—perennial plants in the nature of trees, do not grow at the same rate the year around. They grow spasmodically; that is, they have their periods of work and their periods of rest. Now, there is a line, something in a gross way of demarcation between these periods of rest and periods of activity, and this line of demarcation is called commonly a growth ring. Hence, in normal conditions there may be one continuous period of growth, followed by one continuous period of rest, in which event there would be one so-called "ring" standing for a year's growth; but we find that these so-called periods of growth followed by periods of rest, do not always coincide with plant, especially the tree, stands for the number of years of its age, especially so in all soft-wood growths, such as the tree of heaven, cottonwood, linden, etc.

770 Q. 9. Doctor, you say that these rings represent periods of growth. Will you name some of the cause- which might interrupt the growth of a tree during the spring and summer season, which is the season of its growth, and thereby cause a ring which would not represent an annual growth, and which sometimes forms what is called a "false ring"?

A. The chief cause for producing such phenomina as that is would be drouth. It is also true that these periods of active growth could be diverted or entirely stopped through other agencies, such as any event that would defoliate the tree. For instance, insects, or a severe change in the temperature—like for instance, a frost. Suppose, after the foliate has come out on a plant we have a snow or a frost, causing the leaves *the* drop, thus putting the tree in its hibernating condition, and afterwards the tree starts out as if another spring is on hand. Drouth is the principal cause of the change, though insects, or a sudden change in the temperature may cause it. I may say that these changes are sometimes brought about by soil conditions—say, the tree cannot get a proper amount of food stuffs, and when that occurs it calls a halt, and starts again. But frouths and insects are the chief things causing it.

Q. 10. With further reference to the difference between what usually represents the annual rings and one of those rings which are called "false rings"; relative to the ring extending around the entire circumference of the tree, have you anything to say?

A. I would say if there should be any false ring—probably I had better define a false ring—If the structure of the false ring is scrutinized, it will be found that the cells are of a different shape, color and structure from those made under normal conditionz; and it is also true that when these false rings are made they usually do not extend clear around the circumference of the tree. They only represent so much food stuff which has been made chiefly by those regions of the trees that are most favored with foot stuffs, and such growths usually take place on the side represented by the heaviest protruding limbs.

771 Q. 11. I believe you stated that in soft wood trees false rings, or rings not representing an annual period of growth, were more likely to occur and were more easily detected by the natural

eye, and gave the appearance of a ring on the stump of the tree than in hard wood, did you not?

A. Yes sir.

Q. 12. And that this — caused for what reason?

A. That is due to this fact, that a quick-growth tree will undertake to make a ring much quicker than a hard wood tree will. In other words, a hard wood tree is not so susceptible to these sudden changes as the *w*uick growth trees. In other wo-ds, it is harder to get them to get to work than a soft wood tree. In other words, the soft-wood tree will respond to these conditions quicker than a hard wood tree.

Q. 13. Is the cottonwood a quick-growth, sol-d-wood tree?

A. Yes sir, all the poplars are.

Q. 14. And the cottonwood belongs to the poplar family?

A. Yes sir. Those South Carolina poplars you see in my yard there are soft-wood trees.

Q. 15. In some of the deposition- which have been given in this case it has been stated that the growth of the tree presses these annual rings, or false rings, and that is why the rings appear larger on one side of the tree than they do on the other.

A. That is not true. The pressure in trees is about equal on all sides. The same thing will hold good in trees as in our bodies, and this matter of thicker growth in some places or parts in a cross section, is simply a matter of food supply at the time the ring was made.

Q. 16. These false rings in trees of quick growth may some times extend around the entire circumference of the tree?

A. In other words, the rings are more liable to form in quick growth trees than in hard-wood.

772 Q. 17. You say false rings can easily be detected by examination. You mean with the naked eye?

A. Not so much as with the compound microscope.

Q. 18. And this detection can be more easily made and the difference seen between a false and natural ring, in hard-wood trees than soft-wood trees, can it not, for the reason that a soft-wood tree is more susceptible to periods of growth and inactivity?

A. In other words, if there are false rings in a hard-wood tree, you can tell it better in a hard-wood tree than a soft-wood tree.

Q. 19. Doctor, do you know by reputation, Mr. D. E. Fernow?

A. Yes, sir, I have met the man personally, and I can say that he is now considered the best authority in the United States, and in fact one of the best in the world, along the line of trees and tree growth.

Q. 20. Doctor, do you hold any State position?

A. Yes sir, I am State Etymologist, and have been for four years.

Q. 21. Your duties are what?

A. My duties are to inspect all nurseries and geen houses, and premises where dangerous insects infest and diseases are supposed to thrive, and rid the State of them.

Further this deponent saith not.

After the deposition was written out, the cross-examination of

witness, his signature and all formalties, were waived by Mr. R. G. Brown, of counsel for the defendants.

Witness fee claimed.

ELLIOTT M. BUCHANAN,
Notary Public.

773 *Certified Copy of Record from U. S. Court of Appeals.*

Filed March 30th, 1905.

Lost or mislaid, and after diligent search and inquiry cannot be found.

—— ——, *Clerk.*

774 *Agreement.*

Filed March 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

In this cause it is agreed that E. W. Massey is dead, and that he has been dead for some years.

It is further agreed that his deposition was taken in the case of H. W. Stockley vs. W. A Cissna, in the U. S. District Court for the Eastern Division of Arkansas, and that a copy of that deposition is in the record in the case of H. W. Stockley vs. W. A. Cissna, et al., in the printed transcript of the record in the Circuit Court of Appeals, being Np. 1088, and that the complainant may read said deposition in evidence upon the trial of this cause, the same as though a certified copy had been procured from the Circuit Court of the United States for the Eastern Division of Arkansas, but the defendants reserve the right to exceot to the said deposition for all other causes.

It is further agreed that the complainant, Stat- of Tennessee, and the defendant, should they so desire, may read from the printed transcript of the record in the case of H. W. Stockley v. W. A. Cissna, in the Sixth Circuit, being No. 1088, such entries and grants therein contained, as they may desire, without a certified copy, but the right to except to the same for all other reasons or causes, is reserved.

It is further agreed that the complainant may read, from the said transcript, the deposition of O. K. Joplin, the same as though a certified copy of said deposition was filed, but the right of the defendant to except to the introduction of the said deposition
775 for any and all reasons, and causes is reserved.

EWING & WILLIAMSON, *Solicitors for Cissna.*
R. G. BROWN,
Solicitor for Muncie Pulp Co. and Leo Oppenheimer, Tr.
CARROLL, McKELLAR, BULLINGTON & BIGGS.

776 *Agreement as to Order of Reference.*

Filed March 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

In this cause it is agreed by the parties that in case the court holds that the complainant is entitled to recover the land sued for in this cause, or is the owner of it, then as an incident to the bill, an account may be taken of the timber taken off, or out, by the defendants or either of them, and that the complainant may take its proof showing the amount and value of timber cur or removed from the land by the defendants or either of them, and that the defendants are also given the right to take any proof they may need on said reference.

EWING & WILLIAMSON, *Solicitors for Cissna.*
CARROLL, McKELLAR, BULLINGTON & BIGGS.
CHARLES T. CATES, JR.,
Attorney General for Tennessee.

777 *Affidavit of A. W. Biggs.*

Filed March 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

Affidavit.

I, Albert W. Biggs, make oath that I am one of the solicitors for the complainant in the above styled cause, and have charge — the preparation of this case in so far as the case of the State of Tennessee is concerned, and that since the summer of 1904, I have been endeavoring to secure the deposition of Capt. O. K. Joplin, but have been unable to do so on account of his mental and physical condition.

I further make oath that while he was at St. Joseph's Hospital, I went out to see him, and made frequent inquiries of his wife, and others, relative to his condition, to the end that if at any time he should be able to give a deposition in this case, the same should be taken.

I further state that after he removed from St. Joseph's Hospital to Covington, Tenn., I telephoned his wife, and also wrote to her relative to taking his deposition, but was advised by her that he was not able to give the same, and since his removal to Corona,

have made other efforts to procure the same, but at no time as I am advised, has he been able physically or mentally, to have his deposition taken, and on account of his physical and mental condition, the said deposition has not been taken.

I am further advised by his attending physician, Dr. H. Z. Landis, that he is, and has been for several months, a mental and physical wreck, and that at no time within the last twelve
778 months has he been able, or been in such physical and mental condition to give his deposition intelligently in this case.

ALBERT W. BIGGS.

Subscribed and sworn to before me this 29th. day of March, 1905.

J. NICK THOMAS,
Notary Public.

779 *Agreement as to Proof.*

Filed March 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

That the attached quotations appeared in the River News of the Memphis Avalanche, a daily news-paper, published at Memphis, Tennessee, during the year 1874, the said quotations having been made from the files of said paper at the Cossitt Library. The date of the said quotations appear on each.

It is further agreed that on the date mentioned, to-wit, 1874, the Avalanche was the leading news-paper published in Memphis, Tennessee.

EWING & WILLIAMSON, *Solicitors for Cissna.*
CARROLL, McKELLAR, MULLINGTON & BIGGS, *for State.*
R. G. BROWN, *for Muncie Pulp Co.*

780 Daily Memphis Avalanche.

July 31, 1874.

"The river came to a stand yesterday after a slight rise of several inches. The channel from St. Louis south afford 8 feet. The lower Ohio is improving; a swell out of the Wabash is reported, which helps navigation in the former stream from Evansville down. The upper Mississippi and Missouri are receding slowly, with a fair boat stage. The Illinois is stationary. Ted River is slow, with only 33 inches over Coushata bar—weather clear and warm."

September 1st, 1874.

"The river is here about stationary, the guage indicating 4 feet and 3 inches above extreme low water mark. The channel from

here to Cairo afford 7 feet water with the stick and 9 feet over Ship Island below here. The local packet, A. J. White reports a new channel at the latter place. Boats run to the left of the snag and between the Arkansas shore. White River is declining steadily with scant 3 feet from Jacksonport, and the Arkansas is low and unnavigable."

September 17, 1874.

"The river stands 5 feet above extreme low water mark, with 7½ to 8 feet hence to Cairo, 5 feet through St. Louis, 4 feet up the lower Ohio, and 3 feet scant to Louisville. White is 3 feet scant from Jacksonport down, and Arkansas continues too low for Navigation."

October 10, 1874.

"The river is in fair stage above and below, but from Cairo to St. Louis less than 6 feet is reported, and boats have much trouble."

781

October 11, 1874.

"The river declines slowly, having been the entire week in falling 10 inches, Arkansas is again low, and navigation there is troublesome. White River has a fair packet stage, and the lower Ohio is somewhat better, having a depth of 3 feet or more all the way out."

October 17, 1874.

"The river here declines very slowly, and is 3½ feet above extreme low water, with an 8 foot channel to Cairo and 6 foot to St. Louis. The Ohio is falling with 4 feet from Louisville out."

October 31, 1874.

"The river here is dropping to a very low stage, and hence to Cairo, 8 feet is the best water; White River is down to 30 inches above Augusta, and 33 inches below; Arkansas is 30 inches to Pine Bluff, two feet to Little Rock, one foot above there. The Ohio is down to low water mark. From Cairo to St. Louis but 6 feet is reported, and all rivers above are declining."

November 3, 1874.

"The river here lacks but 3 feet of being down to extreme low water mark. The crossings both above and below are so lumpy that the water is not more than 8 feet deep. Influenced by brish northerly winds and no signs of rain the water is fast drying *drying* up in the streams above, and "dead low" will soon be the report in all rivers. At present Arkansas has 30 inches to Pine Bluff; 20 inches to Little Rock and one foot above there, White River has 2½ below Augusta. Hence to Cairo scant 8 feet is reported, from Cairo to St. Louis 6 feet is the depth, and up the Ohio not more than 30 inches is the last report."

782 November 5, 1874.

"The river here is close to low water mark, and less than 8 feet is reported above and below. White, Arkansas and their tributaries have thinned down to their shoalest stage. The pools, ponds and lagoons are dry as powder houses. Clouds of dust are everywhere, and no signs of rain are indicated."

November 6, 1874.

"Water dead low, weather dry, no signs of rain and dust plentiful, is the brief summary of the situation. Arkansas River has but two feet in Pine Bluff. White River has 28 inches over Little Island. The lower Ohio has 30 inches over forty sandbars, and from St. Louis out but little more than 5 feet is reported. The result is that boats are unable to move on anything like time anywhere except in the local packet trades. Business continues fair. The White from below *g*rought 144 bales cotton and 860 sacks seed. The St. Francis from Helena had 177 bales of cotton and 877 sacks seed. The Maud went south at dark with 1100 bales cotton, lots of sundries and a fine trip of people. The Vicksburg came up after dark and was busy all night loading cotton."

November 7, 1974.

"Dead low, is the reported condition of river channels to all points, and no signs of rain is yet heard of. White river has but 28 inches from Augusta down. Arkansas has about the same from Pine Bluff out. The Mississippi has barely 5 feet from St. Louis South. The lower Ohio has from 20 to 33 inches over shoal bars and from Cairo down 8 feet is reported."

November 8, 1874.

"The river continues very low, and shallow channel- are reported everywhere—the weather is as warn as summer, and business yesterday was light."

783 November 10, 1874.

"The river here is 2½ feet above extreme low water, with about lump channels above and below, and barely 5 feet from Cairo to St. Louis. The Ohio has but 28 inches from Cairo to Louisville. White River has 30 inches on Little Island bar, 50 miles above its mouth*m* and Arkansas has less than 30 inches on Douglas bar, 90 miles from its mouth. Low Water, woods on fire, smoke, haze and fog, makes it baf for boatmen in every trade. Business during past two days has been active."

November 14, 1974.

"The depth of water over Reeves' Bar, 12 miles below here, is less than it is at any point below Cairo, and 7 feet scant is all that can be found at several places. Though to St. Louis there is less

than 5 feet. White River has scant 30 inches. The lower Ohio has about 2 feet, and Arkansas is too low to talk about. The Fannie Tatum left here *late* night before *last* to help the Commonwealth and barge over Reeves' Bar, and then expected to reship the Southern freight she brought from the Ohio, about 120 tons, on that vessel. The St. Luke, from above, sent telegrams that she would arrive at midnight."

November 20, 1874.

"The river has risen over a foot here in all. Heavy rains fell for 12 hours along upper Arkansas, but the general tenor of numerous private telegrams from various points yesterday gave very little hope of a rise that will benefit navigation. White has risen nearly 2 feet at Jacksonport, and over 4 feet is now reported at the mouth. A rise of 3 feet is announced in the Washita at Trenton, and better navigation is expected in all directions—The weather continues raw, cloudy and inclement, the inference being that the rains are over for a time."

784 *Deposition of Dr. H. Z. Landis.*

Filed March 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

The Deposition of Dr. H. Z. Landis, Taken for the State.

Q. 1. Dr. Landis, state where you reside and what is your profession?

A. I reside in the City of Memphis and am a practicing physician, and have been for a good many years.

Q. 2. Do you know Capt. O. K. Joplin, and if so, how long have you know him and how well have you known him?

A. I have known Capt. Joplin for a good many years, quite well. I have been his attending physician for a number of years.

Q. 3. What is his present physical condition?

A. He is confined to his bed, unable to walk, and unable to concentrate his mind on any subject, and has been for a good many months.

Q. 4. Did you see Capt. Joplin in the summer of 1904, on his way to Dawson Springs?

A. Yes.

Q. 5. What was his physical condition?

A. His physical condition was entirely unsatisfactory. He was a very ill man, and I thought with an incurable disease.

Q. 6. Did you attend him when he was at St. Joseph's Hospital, and if so, how long did you attend him there?

A. I did attend him there from August or September until just after Christmas.

Q. 7. At any time within the last twelve months, has
785 Capt. Joplin been in a physical and mental condition, so that he could give his deposition in an important case, intelligently?

A. He has not, I consider him a physical and mental wreck.

H. Z. LANDIS, *M. D.*

Cross-examination and oath waived.

R. G. BROWN,
For Muncie Pulp Co.

786 Filed March 30, 1905.

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE, Plaintiff,
vs.
MUNCIE PULP COMPANY et al., Defendants.

Deposition of James Allen Martin, Taken by Consent in the City of Little Rock, Arkansas, All Formalities Waived, Exceptions Being Reserved Only as to Matters of Competency and Relevancy.

It is agreed by counsel that in the event counsel for the State of Tennessee, the plaintiff herein, shall desire to cross-examine the witness, it may be done either by forwarding interrogatories to the witness to be answered at a subsequent date, or that a subsequent date shall be fixed for the cross-examination of the witness.

The deposition of JAMES A. MARTIN, a witness who having been first duly sworn, deposes as follows, to-wit:

By R. G. Brown, Esq., counsel for Muncie Pulp Co:

Q. 1. Please state your name, age and residence and occupation?

A. My name is James A. Martin, I am seventy-four years old; residence Little Rock, Arkansas, and occupation, Civil Engineer.

Q. 2. Mr. Martin, I will ask you if you made a survey of Dennis Island in Mississippi County, Arkansas, and a certain territory in the Month of February, 1904?

A. I did.

Q. 3. Did you make a plat of the survey then made by you?

A. I did.

Q. 4. Please make the same Exhibit 1 to your deposition.

A. I do so.

787 Q. 5. Mr. Martin, the survey made by you there was of fractional sections 32 and 33, Township 10, North, Range 10 East, and fractional sections 4 and 5, Township 9, North, Range

10 East. I will ask you if you succeeded in locating the township lines and the section lines on these fractional sections at the time this survey was made?

A. Yes sir, I did.

Q. 6. How did you find these section lines?

A. I got a corner at the center of section 33, Township 10 North, Range 10 East, and ran south half a mile. There the ground was covered with sand from the overflows, so I couldn't find that corner and I turned and ran west for half a mile to the township line and found the common corner of sections 32, 33, 4 and 5, and found one of the orifinal bearing trees standing.

Q. 7. Was that common corner of 32, 33, 4 and 5 plainly marked so that you could distinctly see it?

A. Oh yes, one tree was there,—real plain, and I found the old blazes along the line also.

Q. 8. Now, I will ask you Mr. Martin, if you then ran west on the projected township line between Township 9 North and 10 North?

A. I did; and saw there where the original bank of the river was when the original survey was made.

Q. 9. In 1823?

A. Yes sir.

Q. 10. Was that bank plainly marked Mr. Martin?

A. There was indications to show that the river had been there, yes sir.

Q. 11. I will ask you did you or not project that township line further to the west—the one between township- 9 and 10 North, and if so whether you found any indications of a subsequent river bank?

A. Yes sir, at one mile and eighteen chains,—that is nearly a mile and a quarter, I found the bank where the river ran at the time the cut-off was made.

Q. 12. By the cut-off you mean to refer to the Centennial cut-off, do you not?

788 A. Yes sir.

Q. 13. Now, Mr. Martin, I will ask you what was there at that point where you say you located this bank of the river when that Centennial cut-off was made, that indicated that it was over the bank of the river?

A. There was a considerable of a depression and a great deal of difference in the growth of the timber. On the high ground and on the lower ground, showing where the old river was much the newest timber.

Q. 14. Mr. Martin have you marked upon this exhibit to your deposition the line of the bank of the river in 1876?

A. Yes sir, it is marked at 98 chains you see.

Q. 15. This mark,—98 chains from the common corner between sections 32, 33, 4 and 5?

A. Yes sir.

Q. 16. That is a distance of how far from that common corner?

A. A mile and eighteen chains.

Q. 17. Mr. Martin I will ask you what was the size and character of that timber on that part of the tract shown on this plat lying to the east of the line, which you have designated as the river bank in 1876?

A. Well the timber was from eighteen inches to three feet; some of it a little more in diameter. It varies of course in size.

Q. 18. What was the character and size of the timber on the land immediately west of this point you have designated as the river bank of 1876?

A. From ten to eighteen inches in diameter.

Q. 19. Please state whether or not there was a striking dissimilarity in the size of the timber on top of the bank and that in the depression to the west of it?

A. Plenty; enough that anybody would have observed it who would see.

Q. 20. I will ask you Mr. Martin, if you have had any experience as a timber estimator, and if you are acquainted with the growth of timber, the indications of the growth of timber particularly cotton-wood timber?

789 A. I have had experience in that business for twenty-five or thirty years; and I have the reputation, whether I know it or not, of being one of the best in the country.

Q. 21. Did you follow that as a vocation,—estimating timber?

A. Yes sir; I have for years.

Q. 22. How long have you been a Civil Engineer, Mr. Martin?

A. Since 1867. I was a United States Surveyor since 1853, and I have been accustomed to the timber business ever since.

Q. 23. Mr. Martin, I will ask you whether or not the tract that is shown on Exhibit 1, of your deposition lying to the west of the line that you have marked to indicate the river bank in 1876, is level or whether it slopes toward the Tennessee shore?

A. Well, it is lower next to this bank, and then a little ridge also in the sand as you always find in these old river formations. You find that it is always lower next to the banks, but a bar forms and it is higher in the middle than it is at the bank. But the lowest part of that is on the Western Side next to the Tennessee shore,—where the real channel of the old river is.

Q. 24. What is the character of the bank on the Tennessee side of this depression, which was the old bed of the river prior to 1876, as to being a bluff or sloping bank?

A. Considerable of a bluff bank.

Q. 25. Please state if at the time you made this survey in February 1904, if there was water between the Tennessee bank, and the bed of it occupied by that small timber ten and eighteen inches in diameter?

A. You will see at the north end I show a pond like down for a considerable distance, and then there was a narrow slough that had water in it; and I show that there was a river below somewhere.

Q. 26. By that you mean to say that you have marked it so it will show? That was formerly McKenzie Chute?

A. Yes sir. The old river at the south end of that land is entered by a bayou that runs through McKenzie Chute.

790 Q. 27. Now Mr. Martin I will ask you if at the time you made this survey you found any fence surrounding the small timber on what was formerly the old river bed, and if you have indicated the same on your map?

A. Yes sir. I found a wire dence around the part next to the Tennessee side; clear ground. I didn't find any back here to the east of that, but found a wire fence all around the west side clear up as far as I went. I don't know how much farther it was.

Q. 28. At the time you made this survey Mr. Martin, did you find where timber had been cut on what was formerly the bank in 1876, and also some cutting done on the lower ground to the west of that bank?

A. Yes sir.

Q. 29. How have you indicated that on this plat?

A. By a light dotted line that I ran around it.

Q. 30. Did you calculate Mr. Martin how much in acres had been cut over in the lower part?

A. I did not separate it I don't think. I think I just calculated it all together. It is all down here together.

Q. 31. You found then that there had been 385.55 acres cut off altogether including what is in the bottom and what was on the bank then within the tract claimed by the State of Tennessee in this litigation?

A. Yes sir.

Q. 32. Can you make the calculations now Mr. Martin, so as to indicate how much land that is included in this 385.55 acres is in the bottom and how much on top of the bank?

A. I might approximate it. I judge there is about one third in the low and about two-thirds up on the bank. Something near that.

Q. 33. Mr. Martin have you had much or little experience in judging as to the date and formation of lands due to building or accretions in overflowed districts?

791 A. I have had a good deal of experience, and been called on frequently. Had quite a good deal of experience before this.

Q. 34. I will ask you Mr. Martin how much lower you would consider the formation of the land to the west line of the bank of 1876 than the land which lies to the east of that bank?

A. Well taking the distances from the original bank and where the original survey was made, it would be a variety of distances.

Q. 35. I am asking now about the land in the tract as claimed by the State of Tennessee in this litigation,—the difference in the age of the land that lies east of the point you have marked as the bank in 1876 and the bank that lies to the west of what you have marked as the bank of 1876?

A. Well it would run all the way from ten to twenty-five years.

Q. 36. By what you mean to say that the land to the east of the

line you have marked as the river bank in 1876 is from ten to twenty-five years old- than the land lying to the west of it?

A. Yes sir, in that tract of land, because that bank is gradually moving out you know; it has been moving out gradually for years.

Q. 37. Mr. Martin what difference did you find in the elevation of the land to the east of the bank in 1876 and the land to the west of the bank?

A. Well from ten to fifteen feet; some places twenty feet; no- go down next to the sand bar as it is shown here the bank is not so high, it is filled in more down there, but the further you come up this way (indicating) the higher the bank is.

Q. 38. Mr. Martin, what did you find was the distance between the bank in 1876, on the Arkansas side and the Tennessee bank as you found it?

A. Seventy-seven chains; lacks only three chains of being a mile, the general width of the Mississippi River.

Q. 39. Now Mr. Martin what did you find was the distance between the Tennessee bank and the bank in 1876 where you have it located at the extreme northern end of the tract of land claimed by the State of Tennessee in this case?

792 A. 41.25 chains.

Q. 40. That is a little over half a mile is it not?

A. Yes sir.

Q. 41. I will ask you what is the character if the bank on the Arkansas side at that point so far as the general elevation of the land immediately to the west of it?

A. Well it must be about fifteen feet at least higher than that immediately west of it.

Q. 42. Is that a bluff bank or sloping bank at that particular point?

A. It is a little sloping up, but nearly perpendicular. It is quite an upright bank for bottom ground.

Q. 43. Is it clearly and plainly perceptible so that anybody can see it, Mr. Martin?

A. Yes sir, particularly just above the line. You see a little pond marked there; well it makes a right smart little bend away up in there. It is very plain. On the Tennessee side the bank is quite perpendicular; it breaks right down.

Q. 44. Mr. Martin from your experience as a civil engineer, a surveyor, and a timber estimator, please state whether or not there could possibly be any danger of making a mistake as to where the bank in 1876 was located prior to the cut-off at Centennial Island?

A. I don't think you could make any mistake at all. There is no necessity for making any mistake that I could see; the distance, the difference in the size of the timber and the difference in the elevation of the bank would indicate the bank there very plainly.

Q. 45. Mr. Martin I will ask you to take the Exhibit No. 1 to your deposition and lay off in red ink on that map where the center of the bed of the Mississippi River was in 1876, so far as the tract of land claimed by the State of Tennessee in this suit is concerned?

A. I trace the line in pencil on the map as I haven't the facilities for tracing it in red ink as you request.

Q. 46. You are at present confined in your room by illness are you not Mr. Martin?

A. Yes sir, and have been there for over five months.

793 Q. 47. Mr. Martin indicate by the letters "A" and "B" the northern and southern terminations of the line that you state was considered the middle of the river in the old bed in 1876 when the Centennial Cut-off took place?

A. I did so.

Q. 48. Mr. Martin in making this plat as shown in exhibit one to your deposition, please state whether or not you made the survey of John Trigg's one hundred acre tract, and also of the tract claimed by the State of Tennessee in this litigation?

A. I did not survey the John Trigg tract. I just went to the northeast corner of it. There is a large iron post standing at that corner, and all the neighbors around there agreed that that was the northeast corner of the John Trigg tract, and I made *by* survey from that. I surveyed the east end of the John Trigg tract and I surveyed the tract claimed by the State of Tennessee in this suit.

Q. 49. I will ask you whether or not you made this survey of the tract claimed by the State of Tennessee in this suit, if you found the corner and line marked*s* by a previous surveyor, Major Humphreys, in locating this tract?

A. I found there none I don't think, no lines made by him except on the north line,—north side of the tract I found some blazes on trees; that is all I ever found in crossing the job done by him.

Q. 50. The courses and distances shown on this map was started from the northeast corner of the John Triggs one hundred acre tract, and are those as claimed by the State of Tennessee in this litigation, and are correctly located on this map, are they not?

A. Yes sir.

Q. 51. Now Mr. Martin, I will ask you in regard to this tow-head which is located south of the tract claimed by the State of Tennessee herein, whether or not it is of more recent formation than the bed of the river as it existed prior to 1876, or is it a more ancient formation than the bed of the river?

A. It seemed to be a more recent formation; the timber is quite small there.

794 Q. 52. How will the timber run on this tow-head?

A. From six to ten and twelve inches.

Q. 53. You ha*be* spoken of a ridge in or about the center of the old bed of the Mississippi River as located prior to 1876?

A. Yes sir.

Q. 54. How much higher than the balance of the river bed is that ridge way you say?

A. Not more than from four to six feet.

Q. 55. The land sloped both ways from that ridge does it?

A. Yes sir, that is customary.

Q. 56. What is that ridge found in these formations of old river beds, Mr. Martin?

A. Because the channel of the current runs down next to the banks and it throws the debris into the middle and it settles in the middle of the river.

Further deponent sayeth not.

JAMES A. MARTIN.

Certificate.

STATE OF ARKANSAS,
County of Pulaska, ss:

I, E. L. Endicott, a Notary Public duly commissioned sworn and acting, do certify that the foregoing deposition of J. A. Martin was taken before me, as stated in the caption, and signed by him after the same had been read over to him. That I am no kin to counsel or to any of the parties in this litigation; and by direction of counsel for the Muncie Pulp Company, I mailed the same to him in the City of Memphis, Tennessee, without the same having been altered or changed after the same was taken and signed by the witness.

Witness my hand and notarial seal at my office in the City of Little Rock, Arkansas, on this 20th day of December, A. D., 1904.

E. L. ENDICOTT,
Notary Public.

My commission expires July 18, 1905.
Cost paid by Muncie Pulp Company, $5.50.

795 The cross-examination of the witness James Allen Martin, conducted by Albert W. Biggs, Esq., on behalf of the State of Tennessee taken at the residence of said witness at 1203 Wolfe Street, Little Rock, Arkansas, in the case of State of Tennessee vs. Muncie Pulp Company et al., pending in the Chancery Court of Tipton County, Tenn., on January 7th, 1905, in which cause said witness was produced and examined as a witness on behalf of the defendants on the 20th day of December, 1904.

(Cross examination:)

Q. In making this survey, I believe you made it in February of 1904?

A. Yes.

Q. Were you familiar with this country prior to the Centennial Cut-off in 1876?

A. No; I never was there before in my life.

Q. Then, as I understand you, you were never at this place prior to February, 1904?

A. No.

Q. You say "No", Do you mean that you were never there prior to that date?

A. Not at that point, but I have been in that country.

Q. In your answer to Question 6, you say, "I got a corner at the

center of Section 33, Township 10 North Range 10 East, and ran south half a mile". Will you please designate the corner from which you started and letter it "A"?

A. The place has been marked "A" as requested.

Q. Whose corner is that place which you have marked "A"?

A. I have forgotten the name of the man, who lives on the place where who showed it to me. I can't tell you his name now to save my life. But the man who owns the place and lived right there.

Q. He showed you this particular corner?

A. Yes. That was covered so deep with sand that I could find no trace of trees, and I ran thence west to his corner (indicating) and identified that by the bearing trees.

796

Q. As I understand you, you ran south from the point "A" but could find no corner because of the drifted sand?

A. Yes.

Q. You then, however, ran west half a mile and located the corner between Sections 32, 33, 4 and 5?

A. Yes. That's one common corner.

Q. In your deposition, you have marked a line here (indicating) as the boundary of the Mississippi River in 1876?

A. Yes.

Q. Why do you say that was the river bank in 1876?

A. Because of the difference of the growth of the timber, and the elevation of the soil.

Q. Might it have been the river bank at some other period, other than 1876?

A. I think not, because there was no other bank shown anywhere on that side.

Q. I will ask you to state if there was not a bank shown along the original river boundary of Dean's Island in 1823?

A. There is some bank there, but there is considerable difference in the age of the timber upon either side of it.

Q. As I understand you, 32.39 chains from the corner which has been heretofore designated by you, you found the bank of 1823?

A. Yes.

Q. It plainly showed?

A. It don't show as plainly as the other by a good deal, but it shows plain enough to see it, and the difference in the ages of the timber really shows plainer than the other does. This timber on the old island is very old, and that is not so old.

Q. Is there a like or anything west of the bank of 1823?

A. No; there is no lake there. There might be water standing there in wet weather, but there was no water there when I was there.

Q. Was there a lake or depression between that bank of 1823 and the bank at 98 chains, which you say was the bank of 1876?

797

A. No there was no lake, no standing water when I was there, it was dry.

Q. Wasen't there any depression?

A. There was a flat in there, that you frequently find in those places.

Q. What is that flat called?

A. I didn't hear any name for it.

Q. Do you know where Dry Lake is?

A. No I didn't know anything about Dry Lake.

Q. Do you know where Middle Pond is?

A. No. I didn't hear of any Middle Pond. It was a very dry time when I was there. Everything was dry, except some water over there next to the Mississippi-Tennessee side.

Q. Do you know what was the shape of Dean's Island in 1874-5, prior to the Cut-off?

A. No more than what I found from the old banks of the river there. I have shown everything as well as I could.

Q. Then in your judgment, this bank which you found at 98 chains, and which you marked as the 1876 boundary line, was the high bank of the Mississippi River in 1876.

A. That's my judgment.

Q. Do you or not know whether there was a sand bar extending from Dean's Island westward in 1876?

A. Yes I suppose there was. The deepest channel seemed to be at the west side, and would indicate that the bar was on the east side, and the shape of the river would indicate it too.

Q. Is the line you have marked the end of the bar of the river bank in 1876?

A. It was the old river bank.

Q. And the bar extended west from that, in your judgment?

A. Yes, and out perhaps half way between that side and the other, the bar was some higher than it is at either bank. It was some lower on the east side, and it was considerably lower on the west side, where you see the mark "considerable slope".

798 Q. Do you know where Campbell's Lake is?

A. Not by that name I don't. I didn't get the name of any lakes there at all.

Q. How long were you making this survey?

A. I think I was about a week.

Q. Who assisted you?

A. I had my grandson, a young fellow, and they furnished me hands on the place there. I could not tell you their names now.

Q. Who employed you to make this survey?

A. Mr. Brown.

Q. Are you acquainted with the map of the Mississippi River Commission made in 1878?

A. I could not say that I am acquainted with it. I had a little copy of it with me when I was on the survey. I returned it to Mr. Brown.

Q. Are you acquainted with the map of Dean's Island made by then Capt. now Gen. Charles Suter, of the U. S. Engineering Corps in 1874?

A. I don't know whether I ever saw it or not.

Q. At the point marked 80 chains, what was the difference between the timber growing at that point and the timber growing at and closer to the point marked 98 chains.

A. It was mostly all cottonwood. There was more willow down

in there (indicating) and harder wood, Not quite so much cottonwood as there is out next to the bank.

Q. What was the difference in the size of the timber? Was it about the same all along the shore or bank of 1923 to that of 1876?

A. You say "here". You mean that in close to Dean's Island, land was larger than that next to the bank of 1876?

A. Yes. There was a formation making all the time, and the timber is not quite as large as back there. There was some difference.

Q. The timber being larger back towards Dean's Island.

A. Yes. That's perfectly natural.

Q. Then between 1823 and 1876 there must have been several different lines, according to your theory.

799 A. I would not doubt but that every rise would leave a bank line.

Q. Then did you find these several bank lines?

A. No I didn't find any that I could designate as a bank line until I got that last one.

Q. And the only reason you designate this as the bank line of 1876 is because it was the only bank line you found?

A. No, there was a difference in the timber. The timber is all smaller below that line than it is up here. (Indicating) considerably smaller west of it than east of it.

Q. Then west of it for about 20 chains the timber had been cut off when you was there.

A. Yes, but stumps and everything were there.

Q. About what size was the timber that had been cut off west of the bank lines?

A. From 18 to 20 inches.

Q. How long does it take cottonwood trees to grow to be 18 to 20 inches in diameter?

A. That depends on the soil that it grows in. Sometime it will grow it in 8 or 10 years, sometimes it will be 25 to 30 years doing it.

Q. What size were the cottonwood trees east and towards Dean's Island from this bank of 1876?

A. That was from 18 to 36 inches.

Q. How long does it take cottonwood trees to grow from 18 to 36 inches?

A. Just as I said before, it depends upon the soil in which it grows.

Q. That's very rich soil.

A. Yes very rich soil.

Q. Did you ever, in your life, see richer soil than that old river bed?

A. Yes I have seen richer soil.

Q. But seldom.

A. Yes very seldom.

Q. Now in that rich soil, state how long it would take, in
800 your judgment, for a cottonwood tree to grow to be 18 to 30 inches in diameter?

A. As I say, it would take it from 10 to 30 years maybe longer. After they get a certain size, they don't grow nearly so fast. The

greatest growth is when they are young. They grow more rapidly than they do after they get some age on them. All timber does that.

Q. I will ask you if you could not have been mistaken as to the bank of 1876, as you term it, and was not that, and might it not have been, the bank formed in 1878 after the cut-off?

A. I don't think it was, because there was no sign of any other bank there.

Q. Then in your judgment, if this bank, which you say was the bank of 1876, was not formed until 1876, then the Dean's Island bank in 1876 must have been considerably further east.

A. I could not tell you anything about that, because I saw nothing of it; no sign of any bank or anything that would indicate another bank there.

Q. Nothing between the bank of 1823 and the bank which you marked as the bank of 1876?

A. That's the only continuous bank that I found. I could find depressions where there were places that dropped down maybe 50 or 100 yds. but no continuous bank.

Q. Did you make any boring tests?

A. For what purpose?

Q. For the purpose of determining where the river bed was in 1876?

A. No. I suppose all the bar from clear across the whole river would have been just about the same thing. It is all a sand bar.

Q. But you made none?

A. No.

Q. If the U. S. Engineer's map, made in 1874, should show the place where you have marked to be the bank of 1876 to be a flat, sand bar, and the U. S. Government map made in 1878 by the Mississippi River Commission should show the bank from the common corner of Sections 32-3 and Sections 4-5, and these maps
801 were made at the time by the Government Engineers, then, you would think that you are mistaken as to your bank being the bank of 1876, and that it was the bank of 1878; wouldn't you?

A. I don't know why I should be, because I have *go*r two years and a big rise in the river to change the river, and you know *wh*at it does it very frequently in that time.

Q. I mean this; the survey map made by the U. S. engineers ought to be correct.

A. It might have been correct at that time, but it might have changed in the intermediate time.

Q. But their judgment in this matter at that time would be better than yours after the lapse of 30 years from the taking place of the event?

A. I don't think it was any better, if I found the bank at one place and they found it at a different place, because there had been two years since they made their first survey, and two years after that made another one. But there is plenty of time for the river to change for a mile and does it very frequently in that time, and less too.

Q. You don't know of any changes that had occur-ed in the Mississippi River at this exact point. I believe that you say you are not familiar with the river.

A. No. I am not familiar with it. I just say I know it does make changes.

Q. Had it changed its entire course in one night?

A. This particular place? Yes it did. It is likely to do it.

Q. Is there a tow-head south of Dean's Island?

A. Yes there is an island there.

Q. When was that formed?

A. I don't know when it was formed. There is a field upon it now.

Q. Is that older or newer?

A. Newer I judge, from the looks of it, and the size of the timber. I didn't go across on to it any further than in the chute that runs down.

Q. Where did you begin to make your plat of Dean's Island? Did you survey around the old island?

802 A. I surveyed the whole thing.

Q. You didn't survey Dean's Island?

A. No, no more than to begin at the point "A" and run this line south and thence west.

Q. Did you survey the land claimed by the State of Tennessee?

A. Yes it is over here (indicating).

Q. At what point did you begin?

A. At the northeast corner of the John Trigg tract.

Q. How did you run it? From whom did you get the calls?

A. I had the notes of the survey given to me by Mr. Brown.

Q. Have you these notes with you?

A. Yes I have them.

Q. The first line run 61 chains?

A. Yes, from the John Trigg corner to the extreme northeast corner of the tract. Then, I ran around it just by the calls given in the notes.

Q. How did you arrive at the line A-B, which you say was the center of the stream?

A. Mr. Brown had me just put that on there with a pencil when he was over here the other day.

Q. Did the Mississippi River in high water overflow the bank which you have marked as the bank of 1876?

A. Yes.

Q. What was the eastern bank line in high water in 1876?

A. I think there was a little of Dean's Island that was out in 1876, from what they told me, if any at all.

Q. You say that the line you have marked as the bank of 1876 was the bank. Do you mean that was the low or high water bank?

A. The common water bank, when the river was in its banks.

Q. In low water, how far then, did the sand bar extend from that bank westward?

A. I judge from the looks of it, it went more than half way across the river.

Q. Then, how wide was the river at low water mark at this place?

803 A. Between a quarter and a half mile wide. It was a very narrow place. There was a chute that took a great deal of the water and takes it yet.

Q. You mean McKenzie Chute?

A. I believe that's what they call it. I had to ferry it coming out from there.

Q. Don't you know that the Mississippi River Commission gave the width of the Mississippi River at that point in 1876 as a mile and a half?

A. No I don't know anything about that.

Q. If it does give it as a mile and a half then this bank which you have marked, cannot possibly be the bank.

A. If they found a bank in there, it is not there now.

Q. My question is, that the river was a mile and a half wide around Dean's Island, the bank which you have found as the bank must not have been the bank?

A. It certainly could not have been, but I say positively that there is no bank in there now, at the time that I was there.

Q. And that's what you are going on?

A. Yes.

Q. And, not on any knowledge you have of the river in 1876.

A. No. That is a continuous bank all the way clear across the tract.

Q. How far does that bank go?

A. I don't know how much further it goes north.

Q. How much farther does it go south?

A. It goes down until it strikes this chute.

Q. It comes down to Sandy Chute?

A. Yes.

Q. Did you make a survey of Island 37?

A. Which is 37?

Q. Don't you know where Island 37 is?

A. Over in there? (indicating) No, I made no survey of 37.

Q. Do you know what McKenzie Chute separated before the cut-off.

804 A. I did know, but cannot remember now. It was on the maps that I had.

Q. Do you know where Island 36 was in 1876?

A. Ni I could not tell you anything about it.

Q. Do you know where the tow-head of Island 36 was?

A. No.

Q. Was there in 1874 and 1876 a pong or chute south of Dean's Island and between it and the tow head of Island 36?

A. I guess that's Sandy Chute, if I understand you.

Q. Was Island 36 in Tennessee or Arkansas?

A. I don't know. I didn't go there to survey any of those islands. I was sent there to survey that tract of land, and I went and did it, and that's what I was sent there for. I never do what I am not ordered to do.

Q. Was Island 37 in Tennessee or Arkansas?
A. I can't tell you anything about it.
Q. Is Centennial Island in Tennessee or Arkansas?
A. I don't know. My idea is that part of it was in—I won't tell you. I don't know.
Q. Is Dean's Island in Tennessee or Arkansas?
A. It is in Arkansas.
Q. Didn't you go there to ascertain and determine the boundary line between Tennessee and Arkansas?
A. No. I wasen't told any further than the river across that tract of land was concerned. That's all I had to do.
Q. Are you a graduate in engineering?
A. No. I didn't graduate from any school. I graduated in the woods.
Q. Are you a Civil Engineer and Surveyor or just a surveyor?
A. Civil Engineer and surveyor both. I have done a great deal. I have been at it ever since 1853.
Q. Where a sand bar adjoins an island at ordinary stages of the Mississippi River, it covers and inundates the sand bar.
A. The river will. Of course it does.
Q. And, in high water, it will inundate the low lands
805 which are covered with willows growing on the bar next to the bank.
A. Yes.
Q. And still at high water, and yet remaining in its banks, the river will cover the bar closer to the shore which is covered with cottonwoods?
A. Certainly. It does it often.
Q. And yet, the sand bar which is inundated by the river at these stages, is a part of the river bed.
A. It is a sand bar as long as it is a sand bar, until vegetation begins to grow.
Q. Then after vegetation grows upon it, it is a part of the river bed if the water will inundate it and not be out of the banks.
A. If it has got a slough or river on either side of it, and it is inside the banks of the bank of the river, but if it adjoins one bank, it has always been the rule of the Courts, as far as I understand, to run a man's accretion to the edge of the vegetation; that is, not grass and weeds, but timber.
Q. I am not speaking about the accretions, I am speaking about what you mean by the bank of the river. The bank of the river does not mean those little willows and things that are inundated.
A. No. I mean cottonwood and timber of higher growth.
Q. You mean, a bank which is a bank and confines the river between it and its ordinary high water stages.
A. Certainly.
Q. And confines the river until there is an overflow.
A. Yes.
Q. And you think what you have marked as the bank of 1876 was such a bank?

A. I think it was. That's my opinion. If it had not been my opinion, I would never have made the map of it.

(Signature waived.)

806 STATE OF *Tennessee*,
County of Pulaski, ss:

I, Noel Loeb, a Notary Public within and for the county and state aforesaid, duly qualified and acting, do hereby certify that the foregoing deposition of J. A. Martin, on cross-examination was taken before me, as stated in the caption, and signature waived by Albert W. Biggs, Esq., of counsel for the plaintiff; that I am no kin to counsel nor to any of the parties in this litigation; and that by direction of counsel for the plaintiff I mailed the same, together with the examination in chief, as well as the exhibit thereto attached, to Mr. R. G. Brown, counsel for the defendant, at Memphis, Tenn., without the same having been altered or changed by me or any one after the same was taken.

In testimony veritatis, I hereunto set my hand and seal this 7th day of January 1905.

NOEL LOEB,
Notary Public.

My commission expires Jan. 6th, 1906.

Received of Albert W. Biggs, Esq., counsel for plaintiff, the sum of $4.00 to cover costs of taking deposition of witness on cross-examination, and costs of mailing.

NOEL LOEB,
Notary Public.

807 *Deposition of Vince Beard and W. H. Moody.*

Filed March 30, 1905.

13271. R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

The deposition of Vince Beard and W. H. Moody a witness for the defendant, taken at the office of R. G. Brown, this Wednesday March 22, 1905; present R. G. Brown and A. W. Biggs, counsel for the defendant and complainant, respectively; all formalities are waived and exceptions are reserved only for matters of irrelevancy and incompetency.

Direct examination by R. G. Brown, Esq.:

Q. 1. State your name, age, residence and occupation?
A. Vince Beard, thirty-two years old on the 10th day of August

coming, residence Carlisle County, in the State of Kentucky, occupation timberman at Dean Island, Arkansas.

Q. 2. You have been at Dean Island, Arkansas, for how long, Mr. Beard?

A. I have been there two years and three months, I think. About that long.

Q. 3. What has been your business since you have been on Dean's Island?

A. Cutting pulp wood and logs.

Q. 4. You have been in charge of the lumber operations of the Muncie Pulp Company for about the last two and a half years at Dean's Island?

A. Yes sir.

Q. 5. I will ask you if you are familiar with the tract of land belonging to W. A. Cissna on Dean's Island lying between his residence and the Tennessee bank of Centennial Island and Island Thirty-seven?

A. Yes sir, I have been all over it several times. I ought to be. I worked over it for two years.

808 Q. 6. How often would you say you have had occasion to go from the present location of the tram road built to haul out the logs over to the Tennessee shore, since you have been there?

A. Well, I can't say how often I have.

Q. 7. Has it been many times or few?

A. Many times. That is the reasin I said I couldn't say. Nearly every day when I could go over, except two months in the year when there was high water.

Q. 8. Do you think you are thoroughly familiar with the location?

A. Oh yes, certainly.

Q. 9. I show you here, Mr. Beard, a map which is made an exhibit to Mr. J. A. Martin's deposition, and I call your attention to a black line of the map labelled "tram road" running from a point labelled "cord wood shipping" to a point about one-fifth of a mile north of the projection of the township line between townships 10 north and 9 north and I will ask you if that is or not a fair representation of the course of the tram road as laid out on that ground?

A. Yes sir it is.

Q. 10. Now I call your attention to a line on this map marked "Bank of river in 1876 when Centennial cut off was made" and I will ask you whether or not that line corresponds with any ridge or bank that you have observed in going over this ground?

A. Yes sir.

Q. 11. Were you with Mr. Martin when he made this survey?

A. No, I wasen't with him.

Q. 12. You were present at Dean's Island when he made it, though?

A. Yes sir.

Q. 13. I will ask you Mr. Beard what was the character of the timber between this line marked "Bank of 1876" and running east

towards the lowest part of Dean's Chute or Barney Chute, what size, what quality and so on?

A. It is all small from there back over to the Tennessee side.

Q. 14. No, I asked you back to Dean's Chute?

A. I though- you said Centennial Chute.

809 Q. 15. No; I said Dean's Chute or Barney Chute?

A. Oh, that is all large timber there. That is saw log timber.

Q. 16. What would you say was the largest size timber that you found on that tract, of cotton wood?

A. On that side we have has them as high as forty-two inches.

Q. 17. What is the character of the timber between that line marked "Bank of 1876" over towards the Tennessee side, towards Centennial?

A. Oh, it is all small, young cotton wood. The largest trees I have seen over there I guess would go twenty or twenty-two inches something like that.

Q. 18. I will ask you if you recently made an examination riding from that bank of 1876 towards the Tennessee side, for the purpose of observing the size of the timber and if so, please state whereabouts on that place it was?

A. Yes sir, last week some day, I don't know just exactly what day it was, I rode out in there about three quarters if a mile, out to the water (it was going through there) and looked at some timber, me and a brother of mine, and the largest tree we found we figured on it being about twenty two inches and it was about three quarters of a mile, I guess, below the end of the tram.

Q. 19. In other words, about three quarters of a mile north of the end of the tram?

A. Yes sir.

Q. 20. You mean by "below" the way the river runs?

A. Yes sir.

Q. 21. You think that the point you went across at that place according to your best judgment was about three wuarters if a mile north of the end of this tram road?

A. Yes sir, about three quarters of a mile.

Q. 22. I will ask you, Mr. Beard, whether or not this line

810 that is marked on this map here and running down just to the west of the tram road there is or not a distinct bank?

A. Why I would think it was, yes sir.

Q. 23. State whether or not that bank can be seen from the road along side of the tram road?

A. Certainly, yes sir.

Q. 24. What would — say -as the difference in elevation between the land on the east of this place marked "bank" and the land in the Old River Bottom to the west in height?

A. I would suppose about ten or twelve feet along there.

Q. 25. Is it a bluff bank or a sloping bank?

A. It is kind of sloping.

Q. 26. It slopes then, out from the high ground to the low ground?

A. Yes sir.

Q. 27. Mr. Beard I will ask you whether or not, on Saturday, March 18, you went over this tract of land for the purpose of selecting certain stumps and trees at the request of counsel for the Muncie Pulp Company?

A. Last Saturday I was over it; yes sir.

Q. 28. Mr. Beard, I show you here certain sections of trees and stumps which are numbered and I will ask you where you cut the stump marked No. 1.

A. That is about three quarters of a mile (I guess you call it up the tram road) north of the tram road. I stepped it. It is about eighty-three steps from the bank of the chute you are talking about, the No. 1 Stump, I think it is 83, I am positive it was eighty-three steps from the bank of the chute about ¾ of a mile north of the end of the tram road.

Mr. Biggs: Did you say west or east of the chute?

A. I said north of the tram.

Q. 29. West or east of the chute?

A. It was west of the chute west of the bank, yes sir.

811 Q. 30. (Exhibiting map to witness.) This is the north, that is the east and this is west over here. Now, whereabouts was that stump?

A. How did you say?

Q. 31. This is north; that is east and this is west on the map. Now was that on the high ground or the low ground?

A. That was on the high ground but that tram road runs north and south.

Q. 32. That is north there?

A. Well, that is what I say.

Q. 33. It was north of the tram and what direction from the bank?

A. Let's see a minute now. I want to get that map straight.

Q. 34. (Explaining map.) This is north; that is east and that is west?

A. Well; that one three quarters of a mile from the end of the tram was west.

Q. 35. Are you not mistaken in that Mr. Beard; is that not east of the bank? That is north.

A. Wait a minute now.

Q. 36. Was it towards Barney Chute, or towards the Tennessee side?

A. No, no. It wasen't towards the Tennessee side, it was towards the Dean Island chute.

Q. 37. Towards the Dean Island chute?

A. Yes, that is right, that is east of the chute.

Q. 38. East of the chute?

A. East of the bank, but you are or I am turned around one on that tram road the way you have got it there.

Q. 39. There is the tram?

A. It was east of the bank.

Q. 40. East of the bank?

A. Yes sir, about 83 steps.

Q. 41. Where was the section that you marked No. 2 located?

A. That was about half way between the No. 1 and the end of the tram. I don't know how far you would call it.

Q. 42. Was No. 2 a stump or a tree?

A. It was a tree that had grown there. It was a stump
812 after we cut the tree off of it.

Q. 43. Mr. Beard, in regard to that bank there, where did that tree grow how far east of the bank?

A. Right at the bank. The top of it fell over in the chute from the bank when we cut it.

Q. 44. How much higher was the ground where that tree was growing and the ground immediately to the west of the place?

A. I would be safe, I believe, in saying about ten feet, right where that tree was.

Q. 45. Now Mr. Beard, Stump No. 3 whereabouts was it located?

A. Right at the end of the tram?

Q. 46. About how far north of the end of the tram?

A. About twenty steps I think something like that, I don't know as I stepped it, I guess it would be about 20 steps.

Q. 47. And how far east of the bank was it?

A. It wasen't any place hardly, I guess about from 50 to 60 feet, if it was that far, not over 60 feet.

Q. 48. No. 4 whereabouts was it on the line of the bank?

A. I guess that was eighty steps from the bank.

Q. 49. Eighty or eighty-five steps?

A. Yes sir about eighty steps I never stepped it. I never thought about stepping it, but it was about 85 yards I reckon.

Q. 50. And that was east of the bank of the high land?

A. Yes sir.

Q. 51. Stump No. 5, Mr. Beard, where was it located?

A. That was right on the line I guess 120 steps or maybe 130 yards from the bank, and right on the line.

Q. 52. By "the line" you mean the line that was blazed through the woods?

A. That Mr. Martin blazed through there.

Q. 53. That Mr. Martin blazed through the south end of the tract claimed by the State?

813 A. Yes sir, all the line that I know of. I saw him blaze that line.

Q. 54. Is that line blazed perfectly clearly so you can see it?

A. Yes sir.

Q. 55. Can you follow it from one tree to the other, all the way through?

A. Yes sir, you can follow it clear across where he blazed it.

Q. 56. Which one was the oldest of all these five sections here would you say? Which had been cut the longest? I don't mean the age of the tree, I mean the oldest cut? Which one of these five was cut the furthest time back?

A. No. 5 was the oldest one in the cutting.

Q. 57. Now Mr. Beard, have you had much or little experience in determining the age of cotton wood timber?

A. No sir, I never did; I have been working in it a good deal but I never had much experience in watching the age of timber.

Q. 58. Is or is there not marked distinction and difference in the appearance of the timber east of this bank of 1876 and that west of it, towards the Tennessee shore?

A. Yes sir, there is. The bank that they call the 1876 bank. Of course I ain't swearing that that is the bank of 1876 at all.

Q. 59. But that is the bank that is known there as the bank of 1876?

A. Yes sir.

Q. 60. Which timber is the oldest Mr. Beard, that east of the bank of 1876 or that west of it?

A. Of course that east of it is the oldest. It is the largest; it is bound to be the oldest. There aint any large timber west.

Q. 61. There has been some evidence given in this case about depressions or sway called Calpbell's Lake do you know where that is?

A. Yes, sir.

Q. 62. Please state whether or not, there is timber growing all through Campbell's Lake?

814 A. Yes sir, there is timber all round the edge of it. There was one little spot there was water in it all the year, but right at the head of the lake and the foot of the lake I have cut saw log timber; but in the center of the lake there is a pond of water.

Q. 63. Do you know the swag or depression that is called Long Pond?

A. Yes, sir.

Q. 64. State whether or not there is timber growing on Long Pond?

A. Well, there is little bushes around it. There aint anu big timber around it.

Q. 65. Do you know the depression or swag that is called Middle Pond?

A. No sir. I have been to what they claimed as Middle Pond but I can't say—There was just some boys told me that is what they called Middle Pond, but I don't know. I have been to the place they said was Middle Pond but I don't know it.

Cross-examined by Mr. Biggs:

1. I believe you don't claim to be an expert on the growth of cotton wood timber, Mr. Beard?

A. No sir.

2. And your testimony is not to be regarded in the light of an expert when you talk about the age of timber?

A. No sir.

3. You have cut as far north for the Muncie Pulp Company as Campbell's Lake?

A. Yes sir.

4. You have cut around Long Pond?

A. No sir, I never have cut any timber around Long Pond.

5. You don't know where Middle Pond is?

A. No sir.

6. You haven't cut any timber around Middle Pond?

A. I don't know whether I have or not. I don't know
815 where it is at. I have cut the timber around a little place there. I don't know whether it is Long Pond or what it is; I would not say.

7. You say some boys showed you Middle Pond?

A. They were fishing and said that is what they call Middle Pond, and there was an old man by the name of Kenton told me it was not Middle Pond, that it was on a little further west of that place. That is the reason I don't know where it is.

8. Had you cut any timber around the pond which the boys told you was Middle Pond?

A. I had cut a little, yes.

9. Was this Middle Pond (I mean the pond the boys claimed to be Middle Pond) east or west of this bank which you have been talking about?

A. About twenty steps west of the bank. Not over twenty steps, if it was that. I would say though, 20 steps.

10. You spoke awhile ago of one of these trees. No. 1 being cut about 83 steps or yards east of the bank of the chute?

A. Yes sir.

11. Then this bank which you have spoken of in your deposition is the east bank of a slough or chute is it not?

A. Well, it is the only bank there is from the Tennessee shore, and I don't know what you would call it, whether a chute or what, it is the only bank there is from the Tennessee shore over that way.

12. Over towards Dean's Island?

A. Yes sir.

13. Well, is there a slough or a chute there — is there a bank on the west side of it?

A. No sir; just a slope and it gets flat-er all the way towards Tennessee from the time you get off of this bank until you get to Tennessee; lower ground all the way across.

Q. 14. This bank slopes gradually over towards Tennessee?

A. Yes sir.

15. It is not an abrupt bank then?

A. No sir.

816 16. Do you know what is called Dry Lake?

A. No sir.

17. Did you ever hear of Dry Lake?

A. I have heard them speak of it, some of them call it Dry Lake and some of them Bushy Lake.

18. Well, where is Bushy Lake?

A. That is east of this bank.

19. How far east of the bank?

A. Half a mile, the Bushy Lake I am talking about. Some says Dry Lake and some says Bushy Lake.

20. Which direction is Long Lake or Long Pond from this bank east or west?

A. West. I mean this pond that I am calling Long Pond is west. I said I didn't know whether it was Long Lond or not, but what those boys showed me for Long Pond was west.

21. Is Long Pond towards the northern or southern part of this tract of land that is shown on this map?

A. Well, it is on the north end of it.

22. On which end is Dry or Bushy Lake?

A. It is nearabout middle ways I think.

23. And which direction from this is Campbell's Lake?

A. Which do you mean? From Bushy Lake?

24. No, from the end of the tram road?

A. East.

25. Is it north or south of the end of the tram road Campbell's Lake?

A. Well, it is kind of north east.

26. This tram road has been extended north during the year, as you have cut further north, haseen't it?

A. No sir.

27. Your cutting operation has been going north since February hasen't it?

817 28. Have you not extended the tram road any at all?

A. No sir.

29. Why not?

A. Well, we haul the stuff to the tram.

30. Why didn't you build the tram up to where you were cutting?

A. We ran out of timber is one thing.

31. How far from the end of the tram to the northern extremity of where you have been cutting timber?

A. I guess it is a mile or a mile and a quarter. I would say a mile anyhow.

32. Have you cut any timber west of this bank?

A. Yes sir.

33. How far west of this bank have you been cutting?

A. About a quarter of a mile.

34. Has that cutting extended along north as you have gone?

A. No sir.

35. At what place did you quit cutting on the west side of the bank?

A. We quit between a quarter and a half below the end of the tram north.

36. When did you quit cutting on the west side of the road?

A. Now, I can't say without going back?

37. About when?

A. It was some time last summer, but I'll be dogged if I can tell. It was before August though, we quit cutting over there.

38. You did cut over there though, up until about August of 1904?

A. No, it was before that, but I can't say—If I had my wood

books here I could tell just when we quit but I can't say and won't say without them.

39. Does this bank which you have spoken of maintain itself the same height all along from the northern to the southern part?

A. Just about all the way along, yes sir.

40. How far north does it begin?

818 A. The bank?

41. Yes?

A. About a mile or a little over.

42. A mile or a little over what?

A. Of the tram. That is what I am speaking of.

43. Have you cut further north than this bank extends?

A. On which side?

44. On either side.

A. No sir.

45. Does this bank extend as far north as Campbell's Lake?

A. Oh yes.

46. Does it extend north as Campbell's Lake?

A. Which?

47. The bank you have been talking about?

A. No, sir. Well, let me see. I have got to get that bank, how it does run. Well, I would think the bank runs northwest of the Campbell Lake.

48. Then it extends beyond Campbell's Lake?

A. Yes sir.

49. And you have cut as far north as the bank extends?

A. I have cut about a mile or a little over, north, and the bank is just about ten or fifteen steps below where I have cut. I can't say exactly it may be twenty steps.

50. How far north does this bank extend?

A. You mean from the end of the tram?

51. Well, I mean how far does it run?

A. I guess it is a mile and a half or a mile and three-quarters the way it runs, from one bank to the other, a mile and three-quarters.

52. You mean this bank which you speak of is a mile and three quarters long?

A. Yes sir.

53. Where is the southern end?

819 A. I don't know what they call that chute now. It commences right at a chute, but I don't know what they call that chute over there. If I could think of the chute I would tell you. But I don't know what they call the chute; and it runs to Dean's Chute.

54. Is it Sandy Chute?

A. Sandy Chute.

55. This bank begins then at Sandy Chute and runs north to Deans Chute?

A. Yes sir.

56. And it joins Deans Chute north of Campbell chute?

A. Yes sir.

57. In making the selection of these cotton woods, I believe you

say you selected the largest trees that you and Mr. Brown could find?

A. We found them, yes, sir we got the largest there was along the bank. There was larger trees, though, than that out maybe a quarter of a mile east of the bank, but that was the largest along the bank. But from the bank over to Deans Chute I can find trees larger than those.

58. You can?

A. Yes sir.

59. Now where did you get the largest one of these specimens from?

A. I haven't measured. I don't know which is the largest. If you call No. 2 the largest we got it about a quarter of a mile north of the tram road, right on the bank of the chute.

60. Was this a growing tree?

A. Yes sir.

61. How far is it from this bank where — cut this tree to the chute on the east side of Centennial Island?

A. That is three-quarters of a mile. You mean from the bank over to Dean Chute?

62. I mean from the bank over to the chute opposite Centennial Island?

820 A. Not far from it. Right along there about half the distance.

64. Where did you get the log which you have marked No. 1 from?

A. I got that I guess three quarters of a mile north of the tram, about eighty tree steps from the bank of the chute, east of the bank.

65. Were all of these specimens cut east of the bank?

A. Yes sir.

66. None of them were cut west of the bank?

A. No sir.

67. You say you cut No. 5 along a line which you saw Mr. Martin blaze?

A. I seen him blaze it across.

68. That is all you know about that line is *is* that Mr. Martin blazed it?

A. He run across there with a chain and blazed out a line. That is all I know about it, yes sir.

69. How far was No. 5 from this bank?

A. I guess that was 150 yards, I never stepped it.

70. Was that east or west of the tram road?

A. That was west of the tram.

71. And east of the bank?

A. And east of the bank, yes sir.

72. It was cut between the tram and the bank?

A. Yes sir.

73. And you are positive about that?

A. Yes sir.

74. Then it is put on this map as being east of the tram road that is a mistake?

565

A. Well no. It is west of the tram there No. 5.
75. West of the tram?
A. Yes sir.
76. The rest of them were east of the tram and of the bank?
A. Ought to have been east.
821 77. Have you your books with you so as you can show how much timber has been cut since January 1904?
A. No sir.
78. Are you keeping record of that?
A. I never had nothing to do with that until the last month, Gibson has it. I have got it for the last two months, I have got them at home so I can tell.
79. You didn't help to make this map?
A. No sir.
80. You didn't have anything to do with perpetrating this?
A. No sir.
81. Then Mr. Beard, this dotted line which appears on this map, and which I am now tracing with my finger, does not now correctly represent the territory of cut timber at the present time?
A. No sir.
82. And you say you are positive that this ridge is the only ridge or bank between the chute on the Tennessee side and Dean Chute?
A. Yes sir. Now there is a little pond where I suppose that the water was dug out. That is the only thing there is between Centennial Chute and this bank. It might be about a quarter of a mile long. It looks like, if you were ever in the bottom where high water digs out. Now there is a little bank around that pond and that us the only one.
83. And that pond is west of this bank?
A. Yes sir.
84. How far?
A. About a half a mile.
85. And how far is that pond east of Centennial Chute?
A. Well, it is between a half and three quarters. Somewhere along there.

822 Re-examined by Mr. Brown:

1. Mr. Beard you were assistant under Robert Gibson in cutting this timber in January 1904, were you not?
A. Yes sir.
2. Do you recollect whether or not, since January 1904 there has been any cutting to the west of this bank of 1876?
A. There has not been any at all since then.
3. You cut entirely east of the bank of 1876 since January 1904?
A. Well, now, I want to ask you one question. That was about the time they notified us to stop wasn't it?
A. Yes?
A. Well, we never cut any more timber after that I don't know

what day or month it was, but after that I never cut none west of this bank at all, after they notified us to stop cutting.

5. Since that time, then, you have cut north of the tram road, and east of this bank of 1876 entirely?

A. North of the tram and east of the bank.

Asd further *despond*ent saith not.

Deposition of W. H. MOODY, being first duly sworn testified as follows:

Direct examination by Mr. Brown:

Q. State your name, age, residence and occupation?

A. W. H. Moody, age, fifty-five years; residence, Memphis; Occupation, Civil Engineer.

Q. Mr. Moody, how long have you been an engineer?

A. Since I left college, at nineteen years old, but I have been actively employed in it almost all that time, say thirty-six years.

823 Q. During that time, Mr. Moody, where have you been principally located doing business?

A. In Mississippi.

Q. Is that in the alluvial formation?

A. Yes sir; for eighteen years I was County Surveyor of De Soto County. That County lies partly in the Mississippi bottom.

Q. Have you had occasion during that time while engaged in your business as Surveyor and Civil Engineer to note and become familiar with the growth of timbers in the alluvial formation adjacent to the Mississippi River?

A. Yes sir, I have had to post myself as to the growth of the various kinds of trees, in order to perform the duties of the position properly.

Q. Explain what *that* was necessary?

A. The Government Survey in the Chickasaw Cession was made in 1834. After that time, various County Surveyors—well in that survey the Government Surveyors were required to mark the trees at the section corners, and quarter section corners around the sections. After that time various county surveyors marked trees also. We were required to follow the government survey and in order to find it, to identify the government survey we had to frequently cut into trees and cut the annual rings, to know whether or not the mar*ls* in the trees were made by the government surveyor or some surveyor since that time.

Q. And in following your business as a surveyor you had to become acquainted with the growth of different kinds of trees and the appearance of the trees indicating their growth from year to year?

A. I did.

Q. I will ask you, Mr. Moody, whether or not amongst these trees which you became familiar with, you became familiar with the growth of cotton wood trees?

A. Yes sir.

824 Q. Please state how the annual growth of the cotton wood tree can be determined.

A. By what is called annual rings. The formation of each year's growth between the bark and the old wood what we call the annual ring, and one of those rings in formed each year, and we can tell how old a tree is, or how long ago a mark was made in the tree by counting those years growths in the tree called annual rings.

Q. Please state Mr. Moody whether or not in cotton wood these annual rings are distinct, and can be counted as a tree in say thirty or forty years old.

A. They are distinct as in their growths on account of the compression, the running of the rings together somewhat. But still they can be counted with a considerable degree of accuracy.

Q. I will ask you Mr. Moody if you have examined four sections from cottonwood trees two of them, in the office of R. G. Brown where your deposition is being taken, the specimens being numbered three and five and two others numbered one and two in a carpenter shop on Jefferson Street for the purpose of discovering the age of these sections?

A. Yes sir, that was the purpose of my examination.

NOTE.—It is agreed that the specimens numbered 1 and 2 are the specimens referred to by those numbers in the depositions of Vince Beard.

Q. Will you please state Mr Moody, how many annual rings you found in Section No. 1?

A. After the block was dressed off and vernished, after No. 1 was dressed off and varnished I counted very easily fifty-one distinct annual rings.

Q. How many annual rings did you count on Specimen No. 2?

A. Fifty.

Q. How many annual rings do you find of Specimen No. 3?

A. I found forty-eight toward the sap, the outside a little indistinct, and there possibly may be a few more there, but these trees can't be less than forty-eight years old.

825 Q. How many annual rings did you find in Specimen No. 5.

A. I counted the same number, forty-eight.

Q. Mr. Moody after alluvial land is formed by the Mississippi Rive- by deposits does the cottonwood grow the first year?

A. No sir.

Q. How many years after the land is formed is it before any vegetation comes upon it as a general thing, if you know it?

A. The willow sprouts up generally after the second overflow. I mean by the second overflow counting the first overflow which left an eddy on the spot, and then the second overflow deposited enough sand there, and enough little soil mixed with it to support the growth of willows.

Q. How long after the willows sprout upon these alluvial lands is it before cottonwood puts in its appearance?

A. That depends on how dry the lands become after the high water recedes. If it becomes tolerably dry lands the cottonwood take from five to fifteen years. But if it does not become fairly dry land, the willows hold it always, and continue to grow.

Q. In other words the willow is a swamp plant, and the cottonwood is more of a dry land plant?

A. The willow is a swamp plant and the cottonwood wants to grow on a dry surface where the roots can reach plenty of water under the surface. In other words, its growth is near streams.

Q. Mr. Moody, I will ask you whether you have cut certain specimens of cottonwood off of the bar in front of Memphis indicating the growth of cottonwood on that bar, and if so, please make them Exhibits 1, 2 and 3 to your depositions?

A. Yes sir, I have. No. 1 I marked on this first one indicates the first year's growth; No. 2 and 3 cut from the same bush indicate three years' growth. No. 2 shows the end and the lateral formations, I suppose you would call it; lateral sections.

826 Q. I notice on No. 1 here that it is a switch with a pithy center, and on No. 2 and 3, I see light brown lines between the white wood, please state what those light brown lines you have indicated by figures 1, 2 and 3 on the exhibits show?

A. The light brown lines show the outside margin of each year's growth the one next to the bark now showing a brown, the bark itself.

Q. Now I *suw*, after it grows and *sttains* to a size suitable for a saw log does it also show these light brown lines and if so, how?

A. They show these rings always. Sometimes they are not light brown; sometimes they are various colors, you understand; but these annual rings are generally shown more distinctly in older trees than in the sapling two or three years old.

Q. Mr. Moody, I will ask you what you would say was the age of the trees from which the sections 1; 2; and 3 and 5 were cut?

A. I don't believe any of these trees are less than fifty years old. On numbers 3 and 5 some of the rings have been so compressed together by the pressure of the growth, that you can't count all of the rin*ds*, but in Nos. 1 and 2 the varnish brought out each annual ring I think very distinctly, and I made No. 1 fifty years old, and No. 2 fifty years old. So I don't think any of those trees can be less than fifty years old.

Q. What would that indicate to be the age of the soil on which these trees grew. That is, how long ago was that soil formed, and in condition to support vegetable growth?

A. I would say that this soil could not be less than fifty-five years old.

827 Cross-examined by Mr. Biggs:

Q. Mr. Moody, since your examination was closed, you have just remarked that in your judgment these trees are seventy-five years old?

A. No sir, I didn't say that. I said that while I remarked that this land could not be less than fifty-five years old, in my judgment it is possible for it to be older than that. The land itself, understand not the trees; because it is poddible for the land to have stood there twenty-five years before the cottonwood took it. It depends on how high and dry it became.

Q. Do you know to what species of trees the cottonwood belongs?

A. Oh, I have got the technical name written down here, but in this country we never say anything but cottonwood.

Q. Well, it don't belong to the willow family then?

A. No sir.

Q. You are positive about that?

A. Well it is, if you call the whole of the family a genus. This is a species. This does not belong to the willow species, but to the general genus that we designate as cottonwood or willows.

Q. Is cottonwood of a slow or fast growth?

A. It is considered the fastest of any tree that grows in the central part of North America, isen't it, that you have any knowledge of?

—. ——.

A. No sir.

Q. Well, isent it a fact that in the aris countried of the west, in

A. I think the catalpa is considered of faster growth.

Q. Well, isen't it a fact that in the aris countried of th ewest, in cities like Denver and other places, that the cottonwood is planted because of the fact that it grows faster than any other trees?

A. I don't know sir, I am not familiar with the Western Country.

Q. Well doesn't it grow faster than any tree in the bottom that is used for timber purposes, and isen't that your understand-

828 ing?

A. Of the trees which generally grow in our alluvial land here, the cottonwood is considered among the fastest growth trees.

Q. About how much does it grow a year?

A. Well, it depends altogether — the circumstances.

Q. Well, what are the circumstances?

A. Well, the soil; the ability of the roots of the tree to reach water; moisture always, and then the thickness of the growth of the trees, the nearness of the trees to each other.

Q. Well, does it grow faster in rich alluvial bottom lands that it does in sandy poor formation?

A. Yes sir, anything you know grows faster in rich land than it does in land without soil; or with poor soil.

Q. If it has rich spil and an abundance of water, how much will a cottonwood tree grow per annum?

A. Frequently as much as a half an inch in diameter per annum.

Q. You say it sometimes grows as much as an inch or more in diameter?

A. Yes sir, about an inch in diameter, sometimes it grows that much; rarely more than that.

Q. Doesn't it sometimes grow two inches in diameter, an inch on each side, under favorable conditions?

A. I never noticed such growth as that, except in cases where the tree was wounder on one side, for instance, if it was cut off; I have know a growth of two inches at that place. Now opposite that, on the other side, the growth would be normal, about a half an inch a year, under favorable circumstances. That half inch — year means the annual growth understand; counting that on both sides would make an inch.

Q. What is your present occupation?

A. Surveying land.

Q. Where is your office?

A. #371 Madison Street; my office is at my residence, new number.

Q. Who are you employed by, if anyone?

829 A. I am not employed regularly by anybody. I survey for anybody who wants me.

Q. You have never been in the timber business, have you?

A. No sir; well to a small extent; I have run saw mills some around in the country, but I have never made it a regular business.

Q. Your business has been surveying land?

A. Yes sir.

Q. Are you a graduate civil engineer?

A. I left school College five months before my graduation. I went through that part of the course.

Q. Where did you go to school?

A. Andrew College, Trenton, Tennessee. There is no college there now. After Dr. Moor's death the school went down.

Q. Where you reared in Gibson County?

A. I was born and raised in De Soto County, Miss.

Q. On Exhibit No. 3, I see you have drawn a line from the center of the tree out to the most extreme contour, which I see makes the rings that you have placed the years of the growth of the tree, is that correct?

A. Those figures are not correct. No sir, I didn't draw the lines, and the figures are not correct. Since putting on that varnish there I see several rings brought out that I counted as one; I can county forty-eight on that now, and I believe the county there is forty-six is it not?

Q. I will ask you to draw a line from the center to a point which I indicate and to drive a tack in each annual ring, as you call it?

A. Wait just a moment, I want to say something before that line is drawn. You have indicated a point in the tree, indicating the shortest radius from the center of the outside where the annual rings have been so compressed together that a great many of the rings can't been seen and counted.

Q. Well, that may be true, but you have also drawn one

830 from the center to the most extreme point, and for that reason I ask you to make your count and drive the tacks.

Witness: Can you send that thing down and get some more varnish to bring out the annual rings?

Mr. Brown: Yes, I suppose so. I suppose you want that donw afterwards, you don't want to see it now?

Mr. Biggs: I want to see it as I go along.

NOTE.—The witness here called for varnish to bring out or emphasize the annual rings.

Witness: In answer to that last question just state that I did not draw these lines from the center, but they were drawn and the numbers were placed on them by Mr. Brown before I saw the blocks.

Q. This tree Exhibit No. 3, which you say has forty eight annual rings, which you say you can find, and others that have probably been lost by compression, or otherwise a very vigorous grower anyhow was it?

A. The last twenty or thirty years of its growth would indicate that it was not a vigorous tree.

Q. If it had been a vigorous tree it would have been a larger tree than it is now?

A. Yes sir.

Q. How is that in regard to No. 5 is that a vigorous tree, or not?

A. That is a larger section, but the general appearance of the stump would indicate that it was not a very vigorous grower.

Q. How old was No. 5?

A. As I stated, I counted forty-eight annual rings, I think No. 5 can't be less than fifty years old, unless there are some of the rings that I can't see.

Q. You think No. 5 would not grow on a barren sand bar?

A. No sir; nothing would grow on a barren sand bar, unless it was small vegetation, a grass, or something of that sort.

831 That word barren put that down there in my answer. Be certain to get that in. Nothing would grow on a barren sand bar, except certain kinds of grass.

Q. Then before this tree would begin to grow on a sand bar it would first have to be covered with a mud deposit, wouldn't it?

A. Yes sir. But that mud deposit could be put there during one high water you understand.

Q. And then in about five years after the mud deposit you would look for cotton wood to begin to grow?

A. Five to about fifteen years; yes sir.

Q. Then these trees, from which blocks Nos. 3 and 5 were cut, must have been grown on land which was from fifty to seventy years old?

A. They must have grown on land not less than fifty five years old. The upward limit can't be fixed. But I would say that they must have grown on land not less than fifty-five years old.

Q. Then these trees could not have grown on what was in 1874 a naked barren sand and gravel bar?

A. The annual rings indicate that that would be impossible; for these trees to have grown on a spot which was not land in 1874.

Q. Well, it would have to have been in 1850 would it, 1849 or 1850 to have produced either one of these trees?

A. It would have had to have been in 1850 to produce these trees.

Q. That is the best possible condition which they could have grown?

A. As I stated, I don't think these trees could have grown on land less than fifty-five years old. Now these annual rings are considered an infallable indication of the age of the trees; each year's growth forming a ring, and that is the only means we have of determining the age of a tree, is by the annual ring, and I believe it is the universal way of ascertaining the age of a tree, and the only way; except, of course, by personal knowledge. You could easily
832 ascertain the age of a tree by personal knowledge of a man who saw it grow.

Q. Well, if a man should say that the place from which these trees were cut was in 1874 in the fall of the year a barren sand bar, what would be your conclusion?

A. Well, I have put in there that there was no trees or vegetation of any kind on it; it was a sand bar like you find in the Mississippi River?

A. I would say that these trees did not grow on such a spot as that.

Q. And that would be your judgment?

A. That would be my judgment; yes sir; judging from the age of trees as indicated by the annual rings.

Q. Will you also on No. 5 along the line which I have drawn, drive a tack in each annual ring, as you call them?

A. I will do so.

The further cross-examination of W. H. Moody by Mr. Biggs, for the State:

Q. Mr. Moody, you have driven the tacks into the exhibits at the annual rings, as requested on yesterday, have you?

A. Yes sir. I followed the lines as indicated by you, from the center to the outside, except where the rings were so nearly together that the tacks could not be drive*n* there on account of the size of the head of the tacks. I moved to one side on the same annual ring, to where the rings were larger and continued the tacks on out to the outside of the tree. On No. 5, are two points where the annual rings were too near for the size of the tacks. I put the tacks out to one side showing an annual ring between the tacks on the long line of tacks.

A. I believe you said yesterday that the lines were compressed together because of the growth of the tree, did you not?

833 A. I said that, but possibly I used the wrong word. A few of these blocks seem to have been cut near the ground, on the tree, and there are certain parts of them, near the ground which the roots do not reach directly, but the sap which causes the growth has to be conveyed laterally to that part of the stump. At this point where the growth is from lateral ducts from the main root, the tree does not grow as fast as directly by the main root. This causes the large ridges and the large depressions in the circumference of the stump. Higher up the tree, these generally disappear. At the point of the greatest depressions in the stump, less sap reaches and the annual growth is much less. I used the wrong word yester-

day in using the word "compressed." There is some compression in the growth of the tree, but not enough to cause such irregularity in the circumference of the stump.

Q. Now after you get above the swell from the roots, which I term the irregularity of the growth near the ground, the circumference of the tree is regular; and it is what is the smallest circumference where these swells appear? In other words after passing the swells the trunk becomes symmetrical and grows up with a circumference leaving off the swells of the roots, do they not?

A. About these irregularities or swells as Mr. Biggs calls them, the body of the tree becomes a more perfect circle. The growth from there up is more symmetrical but the circumference gradually gets smaller as they go up. It is not the same, as Mr. Biggs's question suggests.

Q. I understand that and did not intend to convey the meaning that the circumference remains the same, but my question is that at no place after leaving the swells of the roots is the circumference larger than it is at the ground excluding the swells due to the roots?

834 A. The circumference of a tree at the ground is larger than above those swells of which Mr. Biggs speaks, and then generally tapers much more rapidly from the ground to where the swells stop. We will say the top of the stump when the tree is cut down than from there to the top of the tree.

Q. The Mississippi bottom and indeed the whole Mississippi Valley including West Tennessee is subject during 25 or 30 years to periods of summer growth is it not?

A. We have dry spells during the summer of more or less duration. Sometimes they are not long enough to be called drouths in the popular acceptation of the term, but at other times it becomes very dry.

Q. I hand you a book, entitled A Primer of Forrestry, it being Bulletin No. 24 of the Division of Forrestry of the United States Department of Agriculture, and issued under the authority of the Secretary of Agriculture and ask you to read beginning at the title "Annual rings" on page 22 through that paragraph down to the next subject entitled "Heart wood and sap wood," on page 23.

A. I read as follows: "It is correct to speak of these rings of growth as "annual rings" for as long as the tree is growing healthily a ring is formed each year. It is true that two false rings may appear in one year, but they are generally so much thinner than the rings on each side that it is not hard to detect them. Very often they do not extend entirely around the tree, as a true ring always does if the tree is sound. Whenever the growth of the tree is interrupted and begins again during the same season, such a false ring is formed. This happens when the foliage is destroyed by caterpillars and grows in the same season, or when — a very severe drought in early summer for a time, and in similar cases."

835 Q. I here hand you House Document Vol. 71, of the 55th Congress, and third session, 1898, 1899. Forrestry Investigations No. 181 from 1877 to 1898, prepared by Mr. B. F. Fernow,

formerly the Chief of the Division of Forrestry of the U. S. Department of Agriculture being a report of the Department issued under the authority od the Secretary of Agriculture and transmitted to Congress and ask you to read on page 273, the second paragraph?

A. I read as follows: "This annual ring formation is the rule in all countries which have distinct seasons of summer and winter and temporary cessation of growth. Only exceptionally a tree may fail to make its growth through the whole length, on account of loss of foliage and other causes, and occasionally when its growth has been disturbed during the season a "secondary" ring, resembling the annual ring and distinguishable only by the expert may appear and mar the record."

Q. I herewith hand you Vol. 22 of the Pop-lar Science Monthly being the years 1882 and 1883 and ask you to read the articles on the annual growth of trees at page- 204, 206 and 2-6, the said articles being by A. L. Childs, M. D.?

A. I read as follows:

Annual Growth of Trees.

By A. L. Childs, M. D.

Appelton's Popular Science Monthly, Vol. 22, 1882-3, p. 204.

Are the concentric rings of a tree a reliable record of its age in years? Such has been the conception—in fact, the undisputed knowledge—of the world, for all time past. I have no recollection of ever having seen or heard the authority of this record disputed till Desire Charney, in his "Ruins of Central America" said, when speaking of the ruins as proved by such a record: "Unfortunately for the argument, it is altogether fallacious and proves nothing.

836 I have put the evidence to a test. On examining a slice of wood of a shrub that I knew as a fact only eighteen months old, I found that it had eighteen concentric rings. I thought it was an anom-ly but, in order to convince myself, I experimented upon trees of all kinds and sizes, and invariably found the like result produced in very nearly likr ptoportions?"

M. Charney's statement was, in my estimation, rather loose, and lacking in the proof of his absolute kniwledge if the age of the trees examined; and again, so far as applicable to the case, was only so in a tropical claimate, where the conditions were entirely different from these surrounding us in a higher latitude, and altogether raised but little doubt on the subject.

In April 1871, I planted a quantity of seed of the common red apple (Acer rubrum). In transplanting in 1873, they were placed too near each other, and it has become necessary to cut out a part of them. While cutting, I noticed that the concentric rings were very distinct, and it reminded me of M. Charney's statement. I took sections from the butt end of each tree (four of them) and dressed the ends of — at an angle of some 35 degrees with the line

of the body, thus largely increasing the exposure of each ring, and then counted them.

The situation, exposure and condition of these four trees were, so far as I could see, identical. I had personal and positive knowledge that they had each twelve years' growth upon them and I could count on each of the different sections from thirty five to forty concentric rings. True, I could select twelve more distinct ones between which fainter and narrower, or sub-rings, appeared. Nine of these apparently annual rings on one section were peculiarly distinct; much more than any of the sub-rings; yet; of the remaining it was difficult to decide which were annual and which were not.

837 The thickness of these annual rings varied from two and one half millimetrees to twenty eight. The measure of course gave more than double the real thickness; but was preferable to a right angle measure, as it gave better facilities for exactness, and yet preserved the proportion between the several rings unchanged.

Now, to ascertain what relation or connection there might be between the meteorology of the several seasons and the growth made during the same, I selected from my meteorological records the maximum, minimum a*b*d mean temperature, and the rain fall, of the six growing months of spring and summer of each of the twelve years of growth. These extracts I have tabulated, and have also appended to each season the thickness of the ring formed as measured on the oblique cut previously described.

An examination of this *y*able shows a general relation of cause and effect between high temperature and large rain fall, and greater growth. But it falls very far short of proving a general law of "so much heat and so much water during the growing season, to produce so much wood". For example compare the years 1875 and 1878. The temperature of 1878 for the season is better than four degrees in excess of the season of 1875 and the rain fall only a little over four inches less; and yet the growth of 1875 is seven times what it was in 1878. This almost unparalleled growth of 1875—that is, as compared with the other years—can not be explained by the above general law. But I think the May and June record of that year throws light upon it. We see there a maximum heat in May of 96 degrees (higher than I have ever known it in an observation and record of twenty five years) and a mean temperature of the whole month, also unequaled, of 71 degrees, and this great heat continued throughout the month of June, and no cold spells after

838 the hea*r* set in *in* sufficient to check the growth. Then, in connection with this heat; the ground was well saturated with water when this heated term began (May 6) by 1.62 inch of rain on the 4th. From this on, to the 26th of June, 15 inches more or rain *d*ell, so apportioned over the time as to keep the ground saturated. This synchronous excess of heat and water evidently produced the abnormal growth. And probably as this matter is further studie*s*, it will be found that these agents, rightly proportioned, operating synchronously; produce these thicker rings; while as one or the other is in excess, or absent, the growth is

checked, and thus has time to condense and harden, and form these sub-rings; and the more frequent these alterations, the greater the number of the——

Q. I also hand you Vol. 24 of the Pop-lar Science Monthly and ask you to read the article on the age of trees by A. S. Baldwin, M. D. appearing on pages 554 and 555?

A. I read as follows:

The Age of Trees.

MESSRS. EDITORS: Having been a regular reader of "The Pop-lar Science Monthly" from its commencement, I have, of course noticed various articles having reference to the value of the concentric rings determining the age of trees which from time to time have appeared in its columns, the last of which, in your August issue, and induces me to give you the result of my observations upon this subject. I have had my attention directed to it during a residence of over forty years in Florida, during which my views as to the value of the rings in determining the age of trees have undergone a change, For the first few years my efforts were directed towards securing a grayeful shade for the streets of the City of Jacksonville, and for this purpose the water oak was selected on account of its beauty, symmetry of form and rapid growth. And now the
839 application of "Forrest City" applied to it by visitors, is in no sense inappropriate, for many of the older trees have attained a size which in the State of New York, whence I came, would have required a hundred years to reach. Strangers from the north are apt to overestimate the age of our trees, and the number of rings presented appears to confirm in many instances the correctness of their estimate. When first called upon to account for the discrepancy shown by the rings, and the known age of the tree, I was perplexed and at a loss to find a satisfactory solution of the problem. But, having from my first arrival here kept a careful record of the weather an analysis of my tables a comparison with the record made by Nature of her infalliable tablets in the trees furnished me the key to it.

Here, as well as the North, the cold winter puts a stop to vegetable growth, and in all exigenous trees a concentric ring will be formed, embracing all woody matter deposited since the *proceeding* stop to its growth; but here in this climate causes are in operation that frequently produce as complete a stop to vegetable growth as does the cold winter.

Our spring begins in February, when growth commences a new deposit between the bark and wood, but often (not always) there comes so severe a drouth late in spring and early summer as to produce as full and complete a stop to vegetable growth as does the cold of winter; immediately after comes on our rainy season generally about the middle or last of June, producing a rapid and luxuriant growth, which continues until winter again puts a stop to it. Our rainy seasons, however, do not consist of deluges of rain that overflood the country, but of daily showers occur-ing in the early part of the afternoon, lasting an hour or two, leaving the sky bright and

clear, the air cool for the rest of the twenty four hours, comfortable to man, and favorable to luxuriant vegetable growth. The
840 rainy seasons, when regular, continue day after day, for about sixty days, but often there is an interval of clear sunshiny weather, for about a fortnight between the rainy periods, which carries the rainy season into the fall months. Upon examination of the tree it will be found that, when those severe *g*roughts have put a stop to vegetable growth a concentric ring well defined has been produced, and the growth which has occured during the rainy season and until winter's cold had formed another and perhaps thicker ring, making two rings in one year. But the phenomina of such a year are not necessarily repeated each year, for considerable variation occurs.

What physiological meaning is attached to these rings?

They simply mark the amount of growth of woody matter deposited day by day between the periods when a stop to vegetable growth has prevented a daily deposit and produced a line of demarkation, whether from drought of summer or cold of winter.

For some two or three years before his lamented death, Professor Jefferies Wyman was exploring the mounds of Florida. It was my privilege to enjoy his acquaintance and learn his views on matters of science in which we were both interested. I have heard him express his belief that he had reached an approximate age of some of the mounds which he had explored, by the indications which the trees growing upon them had furnished. It so happened that we were one time walking down town together and passed a lot where preparations for building a dwelling house were going on, and a tree stood upon the proposed site was being cut down. He remarked that it was a sacrilege to cut down so noble a tree; he would have changed the site of the house and let the tree remain as a shade, "for," said he, "it would take a hundred years to produce such another tree." In that, I told him that he was mistaken,
841 as I knew the age of that tree, and it was not thirty years old. "Impossible!" said he, and proposed, as the tree had been felled and lay on the ground, to go over and count the rings, to which I assented, and looked on while the professor undertook the task. I soon saw that he was under considerable perplexity. He said he found it no easy matter, as some of the rings were so indistinct that he was unable to decide whether they were single or double, "but," said he, "I can make our thirty or more, but how many more I will not venture to say." I carefully examined the rings, and saw what I had seen before. I have no doubt that at least forty rings could have been identified by a close and critic*l*e examination. I reiterated my statements — to the real age of the tree, for thirty years before I had seen corn growing on this spot. I told him the tree which he had examined presented a true record of the weather, so far as drouth and rainfall were concerned, since it had been a tree, and invited him to call at my office and examine the records which I kept during the same period, and he would find a confirmation of what I had stated. "This theory," says he, "is new to me, but it is plausible, and the facts here presented seem to

substantiate it." His death after he returned North that year, put a stop to further scientific investigations in Florida on his part, but the reasons then given have induced many others to change their views as to the value of concentric rings in determining the age of trees. In a climate like that of Florida they are certainly
842 *are* not to be depended on; how it may be in a more Northern latitude I will not undertake to assert or to deny, but it seems to me probable that any arrest of growth, from climatic or other causes, will be indicated by some peculiarity in the formation of the concentric rings of the tree; and it may in some instances present two rings instead of one to mark an entire year's growth.

Very respectively,

A. S. BALDWIN, M. D.

Jacksonville, Fla., September 27, 1883.

843 Q. 10. I hand you Vol. 46 of the Nation, being the issue of January 12th, 1888, and ask you to read on page 29, the article contributed by Mr. R. E. Fernow, the then Chief of the Forrestry Division of the United States Department of Agriculture?

A. I read as follows:

To the Editor of The Nation.

SIR: The discussion on the question of the age of Sequoias has brought up the question of the truthful record of age as indicated by so-called annual rings. While the former question is one of curiosity, the latter is one of decidedly practical importance, as its answer may effect the property rights of any citizen who is unfortunate enough to have to rely for the boundary lines of his lands claims on the blazes with which a backwoods surveyor has marked the course of the survey lines. For, as is well known, the courts have had often to decide the property of a survey, and therefore title to land, solely upon the evidence of a surveyor's overgrown mark, made a certain definite number of years ago, the "annual rings" deciding the time of survey.

It is then, of great importance to the community that the subject should not be lightly or, without very sufficient basis, authoritatively discussed; it is desirable that, without overwhelming evidence, the belief in the accepted theory should not be disturbed. This accepted theory claims that wherever the seasons are determind by decided changes of temperature, and consequent rest followed by reawakened vegetation, such changes are marked by the formation of annual rings—that is to say, the cell elements constituting the wood formed in the first few weeks of awakening activity in the spring differ in form and appearance from those formed later in the season. That the same effect in a smaller degree may be expected from other alternating checks and resus-itation of vegetative activity, is but natural; such climatic disturbances as droughts
844 followed by rainy seasons, or even the defoliation from some cause early in the season, with consequent recovery of

foliage, will produce a similar appearance in the arrangements of cell elements to that which characterized the annual ring.

The counting of an excessive number of rings during a given number of years, which is reported from the fitful climate in Nebrsaka, is, therefore, not surprising. But it also reveals probably, a prejudice against the accepted theory, or a lobe for new discoveries and a lack of sharp observation on the part of the reporter; or else, the less distinct appearance of the intermediary rings and their characteristic discontinuity, if followed around the section would have been noticed. Having myself had occasion, for the purpose of forrest—scientific investigation to count the rings of many hundred sections of trees, I may be presumed to know something of the difficulty sometimes experienced in determining the annual as distinct from secondary rings. Yet so far, no evidence has come before me which would shake my belief in the accepted theory upon which the whole scientific system of German forrestry is practically based.

To all-y my doubts, the Forrestry Division of the Department of Agriculture is collecting material upon which to decide this very important question and seek- the co-operation of all those who are in position to forward sections of trees with well authenticated record. It may be of interest also to state that as trees of positively known age are probably rarely cut, and as the height at which they are cut may leave from two to five years' growth untouched, and thus leave to discrepancies, other records must also be made use of. For instance, a short time ago I read from a section of a hickory tree sent in, its life history, which was afterwards confirmed by inquiry, the rings revealed that nineteen years before it was cut, having grown in the dense shade of the forest, and overgrowing neighbor had been removed, but in three years' time another neighbor had taken possession of the empty space above and set back the
845 hickory; the season of 1897 was marked as unfavorable, and in 1875 a sudden change of conditions—found to be the clearing of a field, by which the tree was placed in full enjoyment of light—was unmistakably indicated.

Hoping that these statements will prove of sufficient interest to be presented to your readers, and they may engage their co-operation in supplying evidence for or against the theory of annual rings, I am, very respectively,

B. E. FERNOW,
Chief of Forestry Division.

Washington, D. C., December, 29th, 1887.

846 Cross-examination by R. G. Brown:

Q. I. Mr. Moody, in the first document handed you by Mr. Biggs, viz: A Primer of Forestry, I notice this language:—"It is correct to speak of these rings of growth as annual rings" for as long as the tree is growing healthily a ring is formed each year. It is true that two false rings may appear in one year, but they are generally so much thinner than the rings on each side that it is not hard to detect them." I will ask you whether or not you found

any of these thin false rings in the sections of trees which you have examined, and about which you have testified?

A. No sir. I believe that in trees the age of these, it is impossible to notice any line formed from any cause during the growing season within an annual ring. I mean by this that the time is so short during the growing season, if the growth is interrupted, that any distinguishing mark or line found within the ring showing two stages of growth in one year, would have entirely disappeared before the tree got to be 50 years old, or near that old.

Q. 2. I understand you to say by this, that if in the earlier stages of the growth of a tree of the age of these there had been an interrupted growth in a certain year, that after the tree attains to 50 years of age, the evidence of this interrupted growth would disappear?

A. I think so. I mean by that, if formed in the earlier years of the growth of the tree, when these little separating marks are so plainly distinct, that before the tree grew to be as old as these, they would disappear or you could not distinguish them, and in the rings' later growth I don't believe that any distinguishable mark would appear at all in the tree.

847 Q. 3. In a small tree, if the leaves were destroyed by caterpillars, or the growth of the tree was interrupted by drouth, is it or is it not a fact that the result of this interruption of growth would be much more preceptible, than in a tree that had attained a growth of twenty years?

A. I think so, yes sir.

Q. 4. Is it not also a fact that after a tree has attained an age of 20 or 25 years that the annual rings indicating the growth, are narrower than they are in the earlier stages of the growth of a tree?

A. This is generally the case. In explanation of these last two answers, I will say that if the growth of a very young tree is interrupted by a drouth, then that young tree dries out more thoroughly than a larger tree would, and this small lines between the annual rings would be more pronounced, because the wood had dried more thoroughly. In an older tree, they would not dry out so much, the sap or the forming wood, would not become dry enough to leave a distinguishing mark between two growths of the same year. We will suppose a month's drought in the summer time. The sap is coming up all the time, and continues to rise, even during the drough-, to some extent, and the tree is less likely to dry out enough to show this slight distinguishing mark that it is when it had been early fall until spring to dry and form the sap wood.

Q. 5. You have been asked to read paragraph 2 or page 273 of House Documents, Vol. 71. I will ask you to read also the previous two sections of that same work?

A. I read as follows: "The first wood cells which the cambium forms in the spring are usually or always of a more open structure, then-walled, and with a large opening of "lumen" comparable to a blown up paper bag; so large, in fact, sometime is the "lumen" that the width of the cells can be seen on a cross section with the naked eye, as, for instance, in oak, ash, elm, the so-called pored" are this

open wood formed in spring. The cells which are formed later in summer have mostly thick walls, are closely crowded and compressed, and show a very small opening or "lumen", being
848 comparable, perhaps to a very thick, wooden box. They appear in the cross section not only denser but of a deeper color, and on account of their crowded, compressed condition and thicker walls. Since at the beginning of the nect season again thin-walled cells with wide openings or lumina are formed, this differenve in the appearance of "spring wood" and "summer wood" enables us to distinguish the layer of wood formed each year. This "annual ring" is more conspicuous in some kinds than in others. In this so-called "ring porous" woods, like oak, ash, elm, the rings are easily distinguishable by the open spring wood; in the conifers, especially pines, by the dark summer wood; while in maple, birch, tulip, etc., only a thin line of flattened, hence darker and regularly aligned, summer cells, often hardly recognizable, distinguishes the rings from each other. Cutting through a tree, therefore, we cannot only ascertain its age by counting its annual layers in the cross section, but also determine how much wood is formed each year. We can, in fact, retrace the history of its growth, the vicissitudes through which it has passed, by the record preserved in its ring growth.

To ascertain the age of a tree correctly, however, we must cut so near to the ground as to include the growth of the first year's little plantlet. Any section higher up *a*hows as many years too few as it took the tree to reach that height."

Q. 6. I notice that this wo-k*s* states that this annual ring is more conspicuous in some kind than in other-, and I will ask you whether or not the annual rings in cottonwood are conspicuous or inconspicuous?.

849 A. I consider them conspicuous in cottonwood. In the section cut from the green tree, being section No. 2, the mar*l*s are very conspicuous, this section being cut from a living tree.

Q. 7. I will ask you if it was possible for you, in driving the tacks marking these annual rings in this section No. 2, to have counted any false rings, due to interrrupted growth?

A. I think if they had been there I could have seen them, but each annual ring in this section seems to be distinct. Unusually plain.

Q. 8. You are then satisfied that the rings that you have counted on this section No. 2, represents the true rings, and correctly gives the age of the tree?

A. Yes sir, I think each ring, as represented by my tack, shows one year's growth of that tree.

Q. 9. I show you here a volume on Agricultural Chemistry, by Davy and Shier, published in 1846, and I will ask you whether he authors of this volume are recognized as standard authority on the matter of plant growth?

A. I could not say as to that, but in discussing the authors there they give references to the known standard authorities.

Q. 10. Does the text of the book agree with the authorities they quote?

A. Yes sir, as far as I am informed, and with the authorities on the subject.

Q. 11. I read to you from pages 31 and 35, as follows:—"Every year a new ring of wood is formed on the exterior of the former years. There are likewise numerous series of concentric layers which are usually called the spurious grain, and their number denotes the age of the trees." I will ask you whether these statements made by Sir Humphrey Davy and John Shierm Fordyce Lecturer of Agriculture in University of Aberdeen, are recognized as the true doctrine in regard to plant growth, by all authorities.

850 A. Yes sir. The facts stated by them in discussing the subject are recognized by everybody as the true facts. I find that their statement that an annual ring is formed each year, and these annual rings indicate the age of the trees, to be true from my own personal knowledge. I have cut into hundreds of trees, marked by the surveyors in making the U. S. Government surveys, to ascertain if they were the trees marked by the U. S. Government surveyors, and have found the number of annual rings to agree with the number of years which had elapsed up to the time the tree was cut into from the time the survey was made. I never recognized any false rings caused by two growths in the same year, in any of these trees, and Land Surveyors all recognize these rings as annual rings, each ring showing one year's full growth, in deciding whether the trees were marked by Government Surveyors or by some surveyors since that time.

Recross-examination:

Q. 1. The marks made by the surveyors are unusually put between 4 and 5 feet above the ground, and above the contours of the roots of the swell caused therefrom?

851 A. The marks are unusually put about 4 feet from the ground and on some of these the marks are put either on the swell of the root or in the depression spoken of first. As, for instance, a cypress, you could not get above the swell.

852 *Deposition of Lieutenant Colonel Smith S. Leach for W. A. Cissna.*

Filed March 30th, 1905.

Direct examination by Mr. Ewing:

Q. 1. I will ask you to state your name, and residence and present occupation?

A. My name is Smith S. Leach; my residence is Washington, D. C.; my present occupation is Military Engineer.

Q. 2. There has been exhibited in this case various maps, and

notably the map of Colonel Charles R. Suter, of 1874. Have you any personal knowledge of that work?

A. None at all.

Q. 3. The next maps in evidence are maps apparently published under the direction of the Mississippi Commission, and I will ask you if you had anything to do with the surveys from which these maps were reduced?

A. I had executive and administrative charge of these surveys, of the plotting of the notes, and preparation and reduction of the maps.

853 Q. 4. You were first Lieutenant, Corps of Engineers, and Decretary in charge of the survey from the Mississippi River Commission maps of 1882, and so forth, were reduced?

A. Yes.

Q. 5. I will ask you to make Exhibit A to your testimony the authorized printed memorandum or document which constitutes the authorities from which the Mississippi River Commission maps were made, together with the details governing and controlling those maps?

A. I recognize that sheet as the sheet described in the question and make it an exhibit as noted.

Q. 6. Is this an official document—an official document of the War Department of the United States, and issued under its supervision?

Q. It is.

Q. 7. Have you a map published by the Mississippi River Commission in 1882, and marked Sheet Number 7, before you?

A. I have.

Q. 8. That map is apparently somewhat different from other maps marked Number 7, and I shall ask you, so that the Court may understand, what the position of this map now before you is to other and later maps marked Sheet Number 7?

A. This Sheet Number 7 is of the original edition, first edition of 1882. It represents, on a scale of one inch to one mile a literal reduction or reproduction of the original manuscript maps of the survey made in 1880, on a scale of 1/10,000 or approximately six inches to the mile. Other sheets marked Number 7, and having the date of 1891, are of a second edition of this series of charts and differ from the first edition just described in having account taken of changes in the form of the river bed during the interval of ten years due to caving of banks and deposits of sand and sediment. The edition of 1882, first edition, is a faithful

854 representation of the original charts. The second edition of 1891 does not represent the Original charts except in so far as the river had made no changes during the ten years.

Q. 9. Will you make the original chart of map Exhibit B to your testimony?

A. I recognized the sheet as Sheet Number 7 of the original edition of 1882, and so make it.

Q. 10. Is that sheet an original and official publication of the War Department?

A. It is.

Q. 11. I notice that the survey was made in February and March 1880, of that territory contiguous to Dean's Island. Now, what was done when all these surveys were made—and of that part that the Mississippi River Commission had not had surveyed, but which had been done by the Lake Survey,—that was done with all these surveys in order to have them reduced to map form?

A. When the condition of the river prevented further field work the parties were disbanded and all the engineers, comp-ters, and other technical men were assembled in the office of the Commission at St. Louis, and engaged in plotting the notes on paper, making the necessary computations, and other intermediate operations necessary there to, and producing what were called detailed maps in manuscript on the 10,000 scale. These maps were too large for publication, and it was desired to publish a series of naps sufficiently simple in design, and appearance and small enough in compass to be of practical use to pilots on the river. To this end a reduction was made from the 10,000 scale to one inch to the mile scale. The sheets which I have identified as exhibits are sheets of this reduced series. The reduction was made and the manuscript maps on the inch to the mile scale were drawn by Mr. Edward Molitor. The plates were made and the maps printed by Julius Bien & Co., of New York. Proofs were read and carefully tested before the sheets were run off. There are inherent in the m-thod trifling inaccurracies due to distortion of photographic lenses, and shrinkage of
855 paper which has been moistened for printing. Such inaccuracies on these sheets would not vary the apparent width of the river at any point by an amount which could be distinguished by the eye.

Q. 12. What experience in point of time have you had in engineer work?

A. I have been a commissioned officer of the Engineers thirty years next July,—the first of July, next, thirty years.

Q. 13. How long have you known Mr. Edward Molitor and his work?

A. I have known Mr. Molitor and his work for twenty-seven years.

Q. 14. What you say as to his capacity, accuracy and skill as draftsman?

A. At the time that I had him with me on this work he was in his prime, and the best artist in that line that I have ever known, and I believe without a superior in the world.

Q. 15. The signs and marks on sheet Number 7 are to be read and interpreted by the paper marked "Authorities" on which appear the explanatory language conventional sign?

A. Yes.

Q. 16. On the chute immediately south of Dean's Island, and just above the tow-head appearing on Sheet 7, there seems to have been what, on the bank of that chute, was, in 1880, a farm under cultivation, does there not?

A. A couple of fields anyway,—two small fields.

Q. 17. Did those fields on the bank of the chute just north of the tow-head show that they were in cultivation or fields capable of cultivation?

856 A. They were; I should say that at the time the surveyors went over there, which was in February and March, 1880, they found grass in the side of that semicircular area which has the corresponding sign, and that on the other half of that area, on the other side, they found cotton plants or cotton stumps.

Correct.

GEO. W. COX, JR., *Stenographer.*

Washington, D. C., February 16, 1905.

857 STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY.

March 9th.

Present:

A. W. Briggs for Complainant.
Caruthers Ewing for W. A. Cissna.

The Deposition of W. W. West for the Defendant.

Filed March 30, 1905.

Direct examination by Mr. Ewing:

Q. 1. State your name, age and residence?
A. W. W. West, Dean's Island, Mississippi County, Arkansas.
Q. 2. What is your connection with W. A. Cissna?
A. None only I am the manager of Dean's Island.
Q. 3. How long have you been living on or about Dean's Island?
A. Since 1895.
Q. 4. Are you thoroughly familiar with the condition of the land and river line up there and the timber?
A. Yes sir, thoroughly.
Q. 5. To what extent do you know the condition of the land and of the timber and what is the extent of your acquaintance with Dean's Island and of the property known as Centennial Cut Off of the Dean's Island side, are you over it much?
A. I am over it all the time, a half dozen times a week.

858 Q. 6. In this case the inquiry is addressed to the river bed of 1876 up near the house and on the land that is about level with the house going South East, is there any bank there?
A. From the dwelling house?
Q. 7. Yes?
A. Not near the house, quite a good ways from the house going west on the '23 bank.
Q. 8. Do you mean the Arkansas bank of the river of 1823?

A. Arkansas side.

Q. 9. Why do you call it the bank of 1823—how did you know that?

A. I know from the timbers, from the '23 bank east the timbers are sycamore, say; back east.

Q. 10. Sycamore is how much in diameter?

A. Six feet in diameter. From the '23 bank going west to the '76 bank they are smaller, and then from the '76 bank across to the Tennessee side a half mile of land, why they are smaller still.

Q. 11. Is there a bank which runs around Dean's Island proper and then another level place and then another bank?

A. Another bank 76 first and 23 bank.

Q. 12. This bank of 23 on the Dean's Island side is very heavy timber, is it?

A. Yes sir.

Q. 13. What is the state of the fields, are they in cultivation?

A. Quite a good deal of it is, eight hundred or a thousand acres.

Q. 14. How high is that bank, how is it represented on the land and ground?

859 A. It is from 2, 3, 4, 5, 6, 7 feet high, it varies but it is a decided bank.

Q. 15. From that point out to what you call the bank of 1876 the timber is what size?

A. From twenty-four to twenty-six inches.

Q. 16. Then there is this bank *od* 1876?

A. To this bank of 1876 and from the 76 across to the Tennessee bank west the timber- are from 12 to 24 inches.

Q. 18. This bank of 76 is how high and how does it show up there on the land?

A. It is a mere bank from Towhead chute to Dean's Chute. It is higher in some places than in others.

Q. 19. Do you remember the stake which is called the Simon Huddleston corner from which the Humphrey and Bailey surveys were made?

A. Yes sir.

Q. 20. How is that corner marked?

A. With a stake, right on the bank of Tow-head Chute?

Q. 21. Well, how far is that stake from the bank of 1876 as the bank appears then to have been from observation of the land?

A. Several hundred yards.

Q. 22. Which direction is this Sam Huddleston corner from the bank of '76?

A. Why it is west.

Q. 23. Is it as much as a quarter of a mile?

A. I don't think it is.

Q. 24. Do you remember the line that was run by Maj. Humphreys which he said was the center of the river of 1823?

860 A. Yes sir the same one where he was running it.

Q. 25. Who was with you when you saw it?

A. Mr. Cissna, and yourself and Mr. Joplin and Mr. Stockley.

Q. 26. How close was that line that he was running to the bank of 1823?

A. He was right on the 1823 bank.

Q. 27. On the Tennessee or Arkansas side?

A. Arkansas side.

Q. 28. How far was he on the Arkansas side from the Arkansas bank of 1876 as appears from the landmarks?

A. Do you mean how far east he was from the 76 bank?

Q. 29. Yes.

A. More than a half mile.

Q. 30. Do you remember whether as Mr. Cissna and I rode up his attention was called to the fact that he was within fifteen or twenty yards of a bank which understood to be the bank of '23?

A. Yes sir, I think you asked him that question yourself.

Q. 31. I will ask you if at the point of that Maj. Humphreys and and all of us me and where we got off our horses, if there was not a bank there as high as eight feet?

A. Yes sir, every bit of it.

Cross-examination by Mr. Biggs:

Q. 1. Mr. West, you are not a Civil Engineer?

A. No sir.

Q. 2. You have never yourself run out the survey made by the United States Land Office of 1823 of Dean's Island, have you?

861 A. No sir.

Q. 3. Do you call a certain elevation which you say is from two to four feet high the bank of 1823? If you have never run out these surveys, they are merely a conjecture upon your part that it is the bank of 1823, isen't it?

A. How is that?

Q. 4. I say if you have never run out the survey of 1823 this elevation od land which you call the bank of 1823, it is a mere conjecture and supposition on your part?

A. Most anybody would go through there would know it was the bank of 1823 because right on the bill the bank of 23 the timber is there five and six feet in diameter.

Q. 5. I mean to say this, you call it the bank of 1823 because it is an elevation and because east and north of that bank the timber is larger than it is South and West of it?

A. Yes sir.

Q. 6. You don't know whether it is the bank of '23 or '76?

A. Everybody in that country says it is.

Q. 7. I am asking you now Mr. West of your own personal knowledge? All you know is that there is an elevation there as you have said and that the timber on one side of it is larger than the timber on the other?

A. Big, heavy timber, the land looks like it, and just west of the bank then the timber begins to get smaller toward the '76 bank.

Q. 8. But that bank may have been formed there after 1823 may it not?

A. Well, everybody in that country says it.

Q. 9. I am not asking you what people say. I am asking
862 you if that is not a fact that that bank might have been formed there after 1823?

A. It might have been 23 or 24, I didn't see it when it made the change, but that is the bank alright.

Q. 10. You did not see the bank of 23 and 23 and you haven't run out the lines of 1823?

A. No sir.

Q. 11. And the only thing you go by is what people say?

A. And the bank being there and the timber as I told you.

Q. 12. You don't know anybody who saw the bank of 1823?

A. Yes.

Q. Give his name?

A. Old man Jake Groves and Osborn.

Q. 14. Do you know how old Mr. Groves is?

A. He is a man 80 years old I think.

Q. 14. How old is Mr. Osborn?

A. 75 or 80 years old.

Q. 15. Neither of them are men of extraordinary brilliance?

A. I don't know about that.

Q. 16. You don'- know about them showing in their youth any unusual precisity?

A. I do not,

Q. 17. Do you know when they moved to Dean's Island?

A. No sir, I do not. Mr. Osborn has been living there all of his life, and Mr. Groves was until the last two or three years.

Q. 18. Mr. West, you say that after you passed this elevation which you call the bank of 1823 you go how far from the point of this second bank which you call the bank of 1876?

863 A. In some places from the 23 bank to the 76 it is a half or three quarters of a mile.

Q. 19. Do you know where the line which separates section 32 and 33 from section 4 and 5 on Dean's Island runs?

A. No sir, Taking all points.

Q. 20. You say you know where the Sam Huddleston northeast corner is?

A. I know where that stake is.

Q. 21. Do you know where the north line of the 1050 acre tract claimed by the State of Tennessee is?

A. It has been surveyed and blazed through.

Q. 22. Do you know where McKenzie Chute ran in 1876?

A. The old bed is there, yes sir.

Q. 23. Well, at a point east of the head of McKenzie Chute how far does the bank of 1876 run from the bank of 1823?

A. Tennessee side or Arkansas side?

Q. 24. Arkansas bank of 76 from the Arkansas bank of 23 taking a point opposite?

A. Head of McKenzie Chute. The west bank crosses to the Arkansas bank.

Q. 25. If you had drawn a line from the head of McKenzie Chute

on the Tennessee shore across to the Arkansas bank of 1823 and taking the Arkansas bank of 1823 just to identify a point, now from that point East along a line which you would draw, how far is it from the Arkansas bank of 23 to the Arkansas bank of 76?

A. Between that it is less than a half mile across there to the 76 bank and it is a half or three quarters of a mile to the 23 bank.

Q. 26. It is less than a half mile from this point which is
864 the head of McKenzie Chute on Tennessee side to what you call the bank of 1876?

A. Yes sir.

Q. 27. And it is a half or three-quarters of a mile from this bank of 76 on the west to the Arkansas bank of 23 on the east?

A. East.

Q. 28. You know where Middle Pond is?

A. What is Middle Pond, Long Lake?

Q. 29. I think Middle Pond is the same as Dry Lake?

A. Long Lake that is the same.

Q. 30. Are there not four lakes, Campbell's Lake, Middle Lake, Long Lake and Powel's Lake?

A. Yes sir.

Q. 31. Are you acquainted with that they call Middle Pond by that name?

A. I reckon it is the same thing as Dry Lake or Long Lake, I reckon it is all the same.

Q. 32. Just west of the bank of 76 there is a repression what at certain stages of the water becomes pond, isn't there?

A. More south-west of the 23 bank.

Q. 33. Than west of the 76 bank?

A. Yes sir.

Q. 34. But there is a place west of the 76 bank?

A. I don't think so. Might be some little swag in there, not where the water stands a length of time.

Q. 35. Then your idea is that the west bank of 1823 Arkansas bank of 1823 lies immediately east of Long Lake or Dry Lake, is that right?

A. The Arkansas bank of '23 is east of Long Lake.

Q. 36. And Long Lake is immediately west of the bank of 1823?

865 A. Yes sir.

Q. 37. And is the depression immediately west of that bank which you say fills with water at certain stages?

A. Of the 76 Long Lake as I call it it is right against the 76 bank, Arkansas side.

Q. 38. What is the name of the lake right against the '23 bank?

A. No lake is there.

Q. 39. Didn't you say there was a few minutes ago?

A. I said there was a swag in there.

Q. 40. Didn't you say a few minutes ago that just west of the bank of 23, there is a greater depression and more water than there was just west of the bank of '76?

A. There is a swag west of the '23 bank. When we rode up to

where Mr. Humphreys was surveying that day they were right in that swag there.

Q. 41. Which one of those swags were they in?

A. The one right against the '23 bank.

Q. 42. How far was it from that point of Barnay's Chute or Dean's Chute?

A. Three quarters of a mile, something like that. I don't know the distance. Might be more, might be less.

Q. 43. But what would be your judgment?

A. Something like that.

Q. 44. Well, going back to a question which I asked you a while ago, as I understand you the swag immediately west of the Arkansas bank of '23 is a greater swag and contains more water than the swag which is immediately west of the Arkansas bank of 76, is that correct, and isen't that just what you have testified?

866 A. It may appear that way because there is a bank there seven or eight feet high?

Q. 45. Where?

A. Right at this swag.

Q. 46. Which swag?

A. The one just west of the 23 bank.

Q. 47. Which is the highest bank the one of 23 or 76?

A. You can find places where the '23 bank is 5, 6, 7, 8, feet high and also the '76 bank the same way.

Q. 48. Well this swag just west of the bank of 23, has it a bank on its west side?

A. No sir.

Q. 49. How does it hold water then?

A. I say it is a swag, I didn't mean it was any bank. It is almost level from there out to the 76 bank.

Q. 50. Is there a bank on the west side of Dry Lake or Long Lake?

A. There is a bank on both sides.

Q. 51. Do you know where Campbell's Lake is?

A. Yes sir.

Q. 52. Is Campbell's Lake east or west of the bank of 1823 I mean the Arkansas side of Dean's Island?

A. Campbell's Lake is west of the Dean's Island bank and east of the Tennessee bank.

Q. 53. Is it west of the Dean's Island bank of '23?

A. Yes sir.

Q. 54. Isen't Campbell's Lake the depression immediately west of the bank of '23?

A. No sir.

Q. 55. How far is it from Campbell's Lake to the bank of '23 going due east?

867 A. Less than half a mile.

Q. 56. 76 or 23?

A. 23 bank a mile and a quarter.

Q. 57. I mean the Dean's Island 23 bank?

A. That is what I am talking about.

Q. 58. Where is Powell's Lake?

A. Right against the 76 bank.

Q. 59. How far is it from Powell's Lake to Dry Lake?

A. Long Lake?

Q. 60. Yes, or Long Lake?

A. Long Lake or Dry Lake is northeast of Powell's Lake and it must be one half or three quarters of a mile, something like that.

Q. 61. How far is it from Dry Lake or Long Lake to Campbell's Lake?

A. Half a mile.

Q. 62. Now then I believe you said it was three quarters of a mile from Campbell's Lake to the bank of 23, the Dean's Island didn't you?

A. Three quarters of a mile, it may not be that far and may be further.

Q. 63. Taking it to be three quarters of a mile from the bank of 23 to Campbell's Lake and one half mile from Campbell's Lake to Long Lake that is a mile and a quarter and then three quarters of a mile from there to Powell's Lake, that would make two miles from the bank of Powell's Lake to the bank of 23, is that correct?

A. If Long Lake was exactly East of Powell's Lake it would be a half mile less, but it is northeast, making it three quarters of a mile diagonally.

868 Q. 64. You say you are acquainted with the north-east corner of the Simon Huddleston grant?

A. Where it was surveyed out there, yes sir.

Q. 65. How far is it from that corner of the bank of 1823?

A. Which corner?

Q. 66. Simon Huddleston's northeast corner, the stake?

A. The northeast corner, that is the corner down towards Dean's Chute?

Q. 67. I am talking about the place where you are acquainted with at Tow Head Chute? To the bank of '23?

A. Two or three hundred yards to the bank of '76 and a half or three quarters of a mile from that bank of '23.

Q. 68. Now tell me how far it is from that bank to the bank of '23?

A. From the stake to the bank of '23?

Q. 69. Yes?

A. I have just said a half or three quarters of a mile.

Q. 70. There is a great deal of difference in a half and three quarters of a mile, can't you be more definite?

A. Not unless I would measure it.

Q. 71. Then you have never made these measurements?

A. No sir.

Q. 73. But are simply speaking from your observations?

A. That is all. I have been the distance a great many times.

Q. 73. And yet that is the best estimate you can give?

A. Yes sir.

Q. 74. Then this pond which you call Tow Head Chute, does the

bank of 1876 as you call it run into that pond or run through
869 the pond?

A. What pond?

Q. 75. Tow Head Chute?

A. It runs across Dean's Island East and West and the stake is setting on the bank of Tow Head Chute right in two or three hundred yards of the '76 bank.

Q. 76. When the '76 bank gets to Tow Head Chute does it disappear?

A. Tow Head Chute might be the bank of '76 river there.

Q. 77. I know it might be but is there any sign that it is?

A. There is a bank there. I suppose it is.

Q. 78. Then *your* is that where Tow Head Chute now is was the river bank in '76?

A. There is where the stake is.

Q. 79. What is the difference in the appearance of Tow Head Chute to the stake and then west?

A. Difference in the bank east and west. I don't know that there is so much. Right along there a little further east of that stake where the 76 bank comes along right on to Tow Head Chute.

Q. 80. What is the difference of vegetation on Tow Head Chute east to the stake and then west to the stake?

A. On that bank supposed to be the bank of '76, the timbers are larger than those in the bed of the '76 river.

Q. 81. Now isen't it a fact that down there on that chute the timber is much smaller than it is further north?

A. In the '76 river it is smaller, from the '76 river, that is from the '76 bank to the '23 bank.

Q. 82. What I mean now is, don't the timber dec-ease in size and get smaller around Sandy Chute or Tow Head Chute?

870 A. Tow Head or Sandy Chute is in the 76 River, the lower end of it.

Q. 83. Do you think the upper is in the river of 76?

A. I think the bank up east of the stake is the 76 bank.

Q. 84. Why don't you think the bank west of the stake is the bank of 76?

A. Because that it right in the channel of the 76 river.

Q. 85. How do you know it is in the 76 river?

A. From the banks and the timber.

Q. 86. What is the difference between the banks of the Tow Head Chute east of the stake and the bank west of it?

A. I don't know that there is any great difference in it.

Q. 87. Do you know how far it is from this stake which you have been talking about to the nearest point in Dean's Chutte?

A. From the stake on Tow Head Chute to Dean's Chute?

A. 88. Yes sir?

A. I don't know that I could tell you exactly.

Q. 89. Approximate it.

A. From Tow Head Chute to Dean's Chute is between a mile and three quarters of a mile, and two miles.

Q. 90. More than two miles?

A. More than one mile.
Q. 91. Which would you say?
A. I don't know whether it is more or less.
Q. 92. Is it about two miles?
A. More or less, yes.
Q. 93. Now tell me again where it was that Maj. Humphreys was measuring the day that you and Mr. Ewing and Mr. Cissna came up on him?
A. Right against the 23 bank on the Arkansas side.
871 Q. 94. What did Maj. Humphreys say that was?
A. He told Mr. Ewing that it was the bank of the 23 river.
Q. 95. Then there was no difference between *that* Maj. Humphreys claimed then and what you now claim?
A. Well, he said it was the 23 bank and so do I.
Q. 96. Your testimony was taken in the case of Stockley vs. Cissna when it was on trial in the Court?
A. I did.
Q. 97. I believe that you say that you are not an expert timber man.
A. That is what I said.

Redirect examination by Mr. Ewing:

Q. 1. You were asked about what Maj. Humphreys said, I will ask you what took place between Maj. Humphreys and me, if ia was not about this that when we rode up *O* asked him what he was doing over there against the bank of 23, and he repeated I am running a line, and I said "Why didn't you get up on top of the bank," and if that was about all that passed?
A. Yes sir.

Mr. Biggs: I except to that question as leading in the extreme.

Q. 2. You spoke of the swag of the bank of 23 that was the point where we run across Maj. Humphreys?
A. That was right where he was.
Q. 3. This is a low place in the ground with heavy timber all through it, wasn't it?
872 A. Yes sir.
Q. 4. And there is nothing like a lake there, is there?
A. No sir.
Q. 5. The swag is just a depression in which water accumulates?
A. Yes sir.
Q. 6. I will ask you if you are familiar with the timber cutting that has gone on on Dean's Island since Mr. Cissna acquired it?
A. Yes sir.
Q. 7. Has there ever been any timber cut that was on the inside of the river bed according to the way you placed the bank of 1876?
A. None cut west of the 76 bank, no sir. Not a stick of wood has been cut west of the bank of 1876, as I have placed the bank and as I understand it.
And further *despondent* saieth not.

873 The next witness, W. A. CISSNA, being duly sworn, deposed as follows:

Direct examination by Mr. Ewing:

Prior to the taking of this deposition it is agreed that W. A. Cissna owns Dean's Island by proper conveyances which describe the property he owns as Section- 32, 33, 4 and 5, that is to say, Dean's Island and the accretions thereto, it being admitted that Mr. Cissna's title ends so far as Dean's Island is concerned with the line of the State of Arkansas, and that he claims no land which lies in the State of Tennessee.

Q. 1. State your name, age, residence?
A. W. A. Cissna, Chicago, Ill., 57 years old.
Q. 2. How long have you owned Dean's Island?
A. Since January 1898.
Q. 3. How much have you been on that property up there and how often?
A. When I first bought the property I made visits of three, four and five days at a time, and usually about 60 days apart, and the last two or three years I have been there as long as two months at a time.
Q. 4. You are familiar with the topographical conditions an- the land and timber generally up on Dean's Island vicinity?
A. I am.
Q. 5. I will ask you if from Dean's Island proper in a west- and southwesterly direction any bank or depression appears?
874 A. Yes sir.
Q. 6. What is that generally known in that community to be and to represent as a land mark?
A. The bank of 1823.
Q. 7. After that and going in still a westwardly and southwestwardly direction are there any other changes in the land and land marks?
A. There is.
Q. 8. What is that?
A. It is known as the bank of 1876.
Q. 9. Is it generally and commonly known and spoken of by the people up there as such?
A. I think it is.
Q. 10. What is the condition now of the timber and the land with regard to age, that is east of what you spoke of as the bank of 23?
A. Very large cottonwood and syeamore and fairly good sized elm, etc.
Q. 11. From that bank of 23, as you designate it, to what you designate as the bank of 1876, what are the timber conditions?
A. Somewhat smaller.
Q. 12. Between those points, that is the bank of 23 and 76 on which side is the larger of that timber?
A. Near the bank of 1823.
Q. 13. About what size is it along the bank of 1823?

A. You mean up east of the bank of 1823?
Q. 14. West of the bank?
A. 30 inches.
875 Q. 15. Then going on to what you call the bank of 76 how does the size range in that direction?
A. Somewhat smaller.
Q. 16. You mean it gets smaller as it goes towards the bank of 1876?
A. Yes sir.
Q. 17. After you go across on down what you nominate as the bank of 76, what are the timber conditions?
A. Smaller in size.
Q. 18. How far is it from the bank of 1823 to the bank of 1876?
A. I suppose it is something like a quarter of a mile or a half mile.
Q. 19. Is the distance the same or does it vary in incercling the south and southwest part of the Island?
A. It varies.
Q. 20. Has there been any timber cut off of any land which is off of the west or south or southwest of the bank od 1876?
A. No sir.
Q. 21. Are you familiar with what timber has been cut and from whence it has been taken?
A. Yes sir, perfectly so.
Q. 22. Do you know where Sandy Chute is?
A. Excuse me, Sandy Chute is what they call Tow Head Chute, nobody ever calls it that.
Q. 23. By what name is Sandy Chute usually known?
A. Tow Head Chute.
Q. 24. Where is the stake from which Maj. Humphreys run his survey and from which Bailey operated known as the
876 Simon Huddleston corner with reference to this Chute?
A. Immediately upon the bank of the Chute.
Q. 25. Do you know a place up there called Middle Pond, did you ever hear any such name applied to any depression?
A. Not until today.
Q. 26. Is there to the west of Dean's Island a depression or pond. I mean on the west side of Dean's Island?
A. Far west or immediately west?
Q. 27. Any where over there?
A. There is a depression we call Long Lake.
Q. 28. West of what bank?
A. West of 76 bank.
Q. 29. That is what you call Long Lake?
A. Yes sir.
Q. 30. Is that the name by which it is generally known?
A. That is what it has always been told to me to be by the citizens and other residents of the place.
Q. 31. How far from the Ark. bank of 76 is that Long Lake?
A. A short distance.

Q. 32. I wish you would stand exactly where that place is, how long and when does it have water in it, and what is it?

A. In the summer time it goes nearly dry, in places just a hole, short distance possibly not over half a block long and in the winter time when we have heavy rains it gets larger. It is filled now with water, perfectly clear rain water.

Q. 33. In the summer it is just a barren sandy place, with a little puddle in it?

A. Yes sir.

877 Q. 34. Long Lake is a long sandy depression and is barren of vegetation?

A. Yes sir.

Q. 35. Now between the bank of 76 and the bank of 23 there is a depression?

A. Slightly.

Q. 36. Do you remember the point at which we met Maj. Humphreys?

A. Yes.

Q. 37. Is there or not a depression there?

A. There is.

Q. 38. To what extent is that a depression with regard to whether it is covered or not with large timber, and vegetation?

A. It is covered with large timber.

Q. 39. There is no pond or lake there is there in the sense of being a place in which trees do not grow?

A. No sir.

Q. 40. Was Maj. Humphreys running a line along there as a center of the river of 1823?

A. I believe he was.

Q. 41. To what extent are those banks of 1823 and 1876 noticeable?

A. They are decided banks in places and others not so decided and more gradual.

Q. 42. Mr. Biggs asked if there is a Tennessee bank of '23 in correspondence with the Arkansas bank of '23 in correspondence with the Arkansas bank you know over there?

A. The only Tennessee bank I know if it high bank over on 37 and Centennial Islands.

Q. 43. How wide is it and how far is it from Dean's Island bank of 1876 as you understand it to the high bank of the Tennes-

878 see side that is along Centennial Island 37?

A. I would judge one half.

Q. 44. This Chute which separates Dean's Island from the Arkansas shore is known as Barnay and McGavock or Deans Chute, is it not?

A. Yes sir.

Q. 45. Where is Campbell's Lake?

A. Campbell's Lake is on the west side of Dean's Island.

Q. 46. Is that east or west of the bank of 1876?

A. It is northeast.

Q. 47. What is the extent of that lake?

A. It is ¾ of a mile long possibly, and I would judge 150 or 200 feet wide.

Q. 48. Does it carry water all the year?

A. Yes sir.

Q. 49. Do you know where McKenzie Chute is or where the bed was?

A. I know where it was pointed out to be, yes sir.

Q. 50. Can you or not remember seeing the depression between the bank of 1876 and the bank of '37 at this time?

A. Yes sir, you can.

Q. 51. Have you or not seen the depression or place where the river runs through McKenzie Chute between the two Tennessee banks there?

A. Yes sir.

Q. 52. Which of those chutes McKenzie or the one around 37 are more fully grown up with timber and vegetation?

A. The one around 37.

Q. 53. Have you been all over the Island recently?

A. Yes sir.

879 Q. 54. Have you seen where they were cutting?

A. Yes sir, and wood.

Q. 55. What timber or wood is there in the old river bed of the river of '76 as you understand it between the two banks that is marketable?

A. It is small saplings of cotton wood and willows.

Q. 56. Is there any timber in the bed of the old river that is as you understand what the old river was that would be profitable for marketing?

A. Nothing in the way of what is known as saw timber.

Q. 57. What is the average run of the size of the timber in this old bed of the river of '76?

A. I should think from six inches to eighteen.

Q. 58. That applies to cottonwood?

A. Yes sir.

Q. 59. Is there or not a dense undergrowth of willows through there?

A. There is near Powell's Lake.

Q. 60. Is there any sand in that place at intervals?

A. No sir.

Cross-examination by Mr. Biggs:

Q. 1. You were never on that property until 1898?

A. I was all over it in 1896.

Q. 2. Are you an experienced timber man?

A. No sir.

Q. 3. What is your line of business?

880 A. Wholesale clothing business.

Q. 4. Have you been in that business for many years?

A. Since 1866.

Q. 5. You are conducting that line of business in Chicago?

A. No sir.

Q. 6. What is your present occupation?
A. Farming.
Q. 7. On Dean's Island?
A. Yes and elsewhere.
Q. 8. Have you managers and overseers at your various farms?
A. I have.
Q. 9. You are a retired merchant and capitalist?
A. I sold out of the mercantile business.
Q. 10. And you are a capitalist, you won't say it yourself, but that is the truth about it, isn't it?
A. Yes, sir.
Q. 11. Now you speak of the bank of 1823, does that bank extend all around the original Dean's Island as you understand it?
A. It extends from Dean's Chute as I understand it, way up east on the Island.
Q. 12. Beginning at the north point of the bank of 1823 where it intersects Dean's Chute, it runs south and east from that point is southeast?
A. From Dean's Chute?
Q. 13. Yes sir.
A. South east or in a southeasterly direction.
Q. 14. Now then is Campbell's Lake east or west from
881 this bank of 1823?
A. Campbell's Lake is northeast of the bank of 1823.
Q. 15. And between the bank of 23 and Dean's Chute?
Q. Yes sir.
Q. 16. How far is it from the bank of 23 to Campbell's Lake?
A. From the bank of 23 to Campbell's Lake I would think was nearly a mile.
Q. 17. How far is it from Campbell's Lake to Dean's Island?
A. It is possibly one block to the other, it isen't over two city blocks.
Q. 18. How many feet or yards? Two or three hundred yards?
A. I would think it was possibly 150 feet across there. A narrow field.
Q. 19. Barnay Chute extends down around Pecan Point from a place known as Pecan Point landing in a southwesterly direction and then turns northwest?
A. Not the way I understand it.
Q. 20. Taking the extreme south point which Barnay Chute reaches and drawing a line directly west from that point *is* Campbell's Lake lies north or south of that line which?
A. North of that line.
Q. 21. How far is it from the bank of 1823 to the bank of 1876?
A. I think it is a quarter of a mile. Where Dean's Chute, where the bank of 1876 and the bank of 1823 right at Dean's Chute or across?
882 Q. 22. About and opposite to Campbell's Lake, it is about a quarter of a mile as I understand it from the bank of 23 to the bank of 76?

A. West from Campbell's Lake going up there where Campbell's Lake is right west of there.

Q. 23. How far is it from the bank of 23 to the bank of 76?

A. I should judge one eighth of a mile there.

Q. 24. How far is it at that point from the bank of 76 to Long Lake?

A. Short distance.

Q. 25. About how far?

A. Probably three or four hundred feet.

Q. 26. How far is it at the same point from Long Lake to Campbell's Lake?

A. I would think a half mile or three eighths.

Q. 27. You say you know of no such place as Middle Pond or Middle Lake?

A. No sir.

Q. 28. Now going from a point directly west of the most southern extremity to Dean's or Barney's Chute and drawing a line along west from this most southern point of Barney Chute and measuring along that imaginary line, how far is it from Barnay Chute to the bank of 1823 measuring westwardly?

A. A short distance.

Q. 29. Going west? From the southern extremity of Barnay Chute going west to the bank of 23?

A. The bank of 23 is east of Barnay Chute.

Q. 30. Well going then from Barnay Chute over to Centennial Island, how far is it from the southern extremity of Barnay
883 Chute to the bank of 23?

A. I don't understand the question? I don't look at it that way. I can't give you an answer to that question.

Q. 31. I will try to make myself more plain, Mr. Cissna. As I understand Barnay Chute it reaches a south point and then turns Northwest, is that correct?

A. Starting at Pecan Point and following up Dean's Chute it runs southwest, there is a decided bend in the chute.

Q. 32. Now from the point of the bend in the chute going west towards Centennial Island, how far is it from that bend on Barnay Chute to the bank of 1823?

A. Now I understand what you want, I would judge it was, from the bend in Dean's Chute, would be a mile and a half.

Q. 33. How far at that point is the bank of 23 from the bank of 1876 as you understand these marks?

A. Possibly a quarter of a mile.

Q. 34. How far is it from the mark of 76 at that point of Dry and Long Lake?

A. Short distance.

Q. 35. About how far?

A. 300 or 400 yards.

Q. 36. How far from *Lake* Lake over to Centennial Island?

A. Probably ⅜ of a mile. I answered thinking you had in mind 37, Centennial Island is three quarters of a mile.

Q. 37. Since you have corrected your answer you mean to say it is three quarters of a mile from Long Lake to the Centennial Island bank?

884 A. The upper end and going directl- west to Centennial Island.

Q. 38. Now if you should start at this Barnay Chute, the bend of it as we understand that point going directly south how far to *do go to* the bank of 23?

A. I don't know where that would bring you directly south.

Q. 39. As I understand you there is no vegetation at all in Long or Dry Lake, no trees growing there?

A. No sir.

Q. 40. But in this other depression there are *th*rees?

A. Yes sir.

Redirect examination by Mr. Ewing:

Q. 1. In giving the distance as three quarters of a mile from the head of Long Lake to Centennial Island, would that distance be straight across the river or would it be catacornered?

A. Catacornered, southwest, decidedly so.

Recross-examination by Mr. Biggs:

Q. 1. In the case of Stockley vs. Cissna which was tried in the Circuit Court of the United States some years ago, you testified did you not?

885 A. I did.

Q. 2. And your testimony is in a volume of the printed record beginning at page 323 and through other pages therein?

A. I think so.

Q. 3. Mr. Ewing asked you is you would go, when you made your determination of the distance from the head of the Dry Lake to Centennial Island, you were measuring catacornered across the river, in what direction were you measuring?

A. Southwest.

Q. 4. You were measuring in the same direction that Barnay Chute flows after it come to the bend?

A. No sir, if you did you would never reach Centennial Island.

Q. 5. Where would you reach if you would measure in that direction?

A. Island 37.

Q. 6. Well, now, I asked you to measure across that river directly west to Centennial Island from Dry or Long Lake and state the distance, now I asked you to determine that distance?

A. From Long Lake to Centennial Island?

Q. 7. Yes?

A. You have to go in a southwesterly direction to reach Centennial Island, 37 lies directly west of Long Lake.

Q. 8. Well, at the most southern point of Long Lake measuring directly west you come to what place on the Tennessee side?

A. Island 37.

Q. 9. How far is it from that point to Dry Lake to Island 37?

886 A. Three-eighths or a half a mile.

Q. 10. At what place do you strike Island 37? What farm?

A. I understand the farm belongs to Mr. Stockley, Davidson.

Q. 11. Is that the Trigg place?

A. I don't know the Trigg place.

Q. 12. How far is that from McKenzie Chute? The place you reach Island 37, measuring directly west?

A. Just above it.

Q. 13. Then you strike the most southern point of island 37 measuring in that direction?

A. Not the most southern point, no sir.

Q. 14. How far is it from this southern point or bend to Barney Chute or Centennial Island?

A. The western boundary of Dean's Island from Sandy Chute up to old river according to Mr. Calhoun's survey was about three miles.

Q. 15. Well, I don't know Mr. Calhoun or when he made his survey but what I want from you in your very best knowledge or judgment of the distance from the bend of Barnay Chute going west to Centennial Island?

A. If you would go on a direct line I should think it would be 3 miles.

And further respondent saith not.

887 *Deposition of C. B. Bailey.*

Filed March 30th, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

The Deposition of C. B. BAILEY, Taken by Consent for the Defendant, Forms and Formalities Waived and Exceptions Reserved for Incompetency of Testimony.

Direct examination by Mr. Ewing.

1. State your name and residence?

A. C. B. Bailey, Wynne, Ark.

2. What is your age?

A. 31.

3. What is your business?

A. Engineer and Surveying.

4. Have you as an engineer and surveyor made surveys of Dean's Island and the contiguous territory for Mr. W. A. Cissna?

A. Yes sir.

5. Have you ever been over the Dean's Island territory fully and carefully?

A. Yes, sir.

888 6. Are you familiar with its topography?

A. Yes sir.

7. Have you examined the United States Land Office survey?

A. Yes sir.

8. Is the document I now hand you a reduction of the map to smaller size?

A. Yes sir.

9. Will you make it Exhibit 1 to your deposition?

A. I do.

10. Have you la-d out (laid out) and run the lines involved in this controversy, which is described in the bill as commencing at the Simon Huddleston Corner?

A. Yes sir.

11. Have you prepared an examplification showing by dotted lines tracts No. 1 and 2 where the land would lie as of 1823 with reference to the United States land Office survey of that year?

A. Yes sir.

12. Will you make that Exhibit No. 2 to your deposition?

A. Yes sir.

13. Have you examined the survey of Maj. Chas. Suter of the United States Army map of 1874?

A. Yes sir.

14. Is the paper I now hand you a reduction of that map?

A. Yes sir.

15. Will you make it Exhibit 3 to your testimony?

A. Yes sir.

16. Will you draw the land controversy with reference to the map of 1874 as above shown you in order to show how the calls of the land controversy would have run as of that date?

889 A. Yes sir.

17. Will you make such examplification No. 4 to your deposition?

A. Yes sir.

18. Have you examined the Mississippi River map of 1883?

A. Yes sir.

19. Will you make it Exhibit 5 to your deposition?

A. I will.

20. Is the paper I now hand you a reduction of that map?

A. Yes sir.

21. Have you laid out the line of controversy according to the calls and as of date of 1883 & 4 with reference to the said Mississippi River Commission Map?

A. Yes sir.

22. Will you make that examplification as Exhibit No. 6 to your deposition?

A. I will.

23. Have you examined the map of J. H. Humphrey's survey of November, 1901?

A. Yes sir.

24. Is the paper I now hand you a reduction of that map?

A. Yes sir.

25. Will you make it Exhibit 7 to your deposition?

A. Yes sir.

26. Did you make a map of Dean's Island No. 37 and part of the Centennial Island of the year 1901?

A. Yes sir.

27. Is the paper I now hand you a reduction of that map?

A. Yes sir.

890 28. Will you make that Exhibit 8 to your deposition?

A. I will.

29. Have you drawn a map showing — the land in controversy would lay according to the river and land lines of the year 1901?

A. Yes sir.

30. Will you make it Exhibit 9 to your deposition?

A. Yes sir.

31. I first call your attention to an exhibit to the deposition of Davis Dean which appears to be a map, and he has marked thereon a red line which he said was the river bank of Dean's Island at a medium stage of the river in 1876 please state by your scale of the map how far that red line is from the bank of Dean's Island in 1823 appearing upon the government survey?

A. 1 1/16 mile.

32. I will ask you whether from the map of 1874 the line he has indicated could have possibly been the river bank of Dean's Island at a medium stage of the water in 1876? and if not, please state how you reach your conclusion?

A. I am unable to state.

33. You have compared it with your map of 1874 on which the land in controversy has been marked by you whether this red line the east boundary of the land in controversy could have been the right bank in 1874?

A. I don't believe it could.

34. According to the map of 1874 and that is the Suter map, was the Arkansas bank of the Mississippi River then the eastern line of the land in controversy?

A. No sir.

891 35. How wide does Maj. Humphrey's map make the land in controversy at the medium point of the land just below section line 32?

A. 5/16 of a mile.

36. He makes the land in controversy five sixteenths of a mile?

A. Yes sir.

37. Now how far does the war map of '74 show the Arkansas bank of the river was from the west side of the tract at the same time?

A. A half mile.

38. If you- red line on exhibit to Mr. Dean's deposition was the right bank of 1876, that is the Arkansas bank of 1876, how far would that point be from the west boundary of the land in controversy?

A. Practically a half mile.

39. Do I understand that it would be a half mile from the red line to the western boundary of the land now in controversy?

A. Yes sir.

40. Now how far would it be from the eastern boundary of the tract in controversy at practically the same point to the western boundary of the tract in controversy according to the map made exhibit 4 to your testimony?

A. Practically one mile.

892 41. When you compare the map of 1823 with the map of 1874 so as to get the point of reference of the Arkansas bank at the end of each of these two years, was there any material change from 1823 to 1874?

A. There was.

42. To what extent did the Arkansas Bank of 1823 encroach toward the Tennessee side up to the year 1874, according to the Suter map?

A. One and a quarter miles.

43. Exactly what is that one and a quarter mile's distance?

A. I measured from west along it would be the south line of section 32, it would be about one mile and one quarter.

44. What would be the distance if measured southwest from the intersection from the fixed point designated from the intersection of section- 32 & 33?

A. Southwest about one and one sixteenth miles.

45. Now what would be the extent of the enlargement of the Dean's Island from 1823 to 1874 in the direction a little south of west and immediately between the two points you have already indicated?

A. One and three sixteenth miles.

46. I will ask you if according to Maj. Humphrey's map, the east boundary of the land in controversy is about the center of the river as it existed in 1823?

A. I think it is.

47. Does it appear from this map?

A. Yes sir.

48. Please state what map of 1823 *was* drawn by Maj. Humphreys shows to be the width of the river on a line measuring west from the line of section 32?

893 A. Then the old river would be three and one quarter miles here?

A. No, between one and a quarter and one and a fifth.

50. Now what is the width of the river measuring south west from 32 and 33 of Maj. Humphreys' map in 1823 adopting only the same course from the intersection of section- 32 and 33 and was heretofore adopted by you in location of the Arkansas bank in 1876?

A. Half way between southwest and west.

51. What would be the width of the river at that point?

A. One and two fifth miles.

52. Now what was the width of the river at the point directly between the two points just mentioned?

A. Practically the same.

53. Now what was the distance from the corner of section- 32 and 33 of the Arkansas bank of 1823, according to the government map?

A. Three sixteenths of a mile.

54. What was the distance from said corner directly south to river bank?

A. You will have to ask some of these questions over as I have gotten the scale confused, that is I have the sixteenths confused with the eighths.

55. Now I will go back to the matter as it is important, and ask the question in this form. What is the distance between the Arkansas bank of Dean's Island in 1874 measuring as though section line 32 was extended due west?

A. One and a quarter miles.

894 56. Was the distance from the Arkansas bank of 1823 to the Arkansas bank of 1876 measured in a southwesterly direction?

A. Three fourths of a mile.

57. Now what is the distance from the bank of 1823 to the bank of 1826 (and I refer to Ark. banks) at a point directly between the points already indicated?

A. One mile.

58. Now I want you to take Maj. Humphrey's map and say what is the width of the river of 1823 at that point, continuing section line 32 which you have just used in finding out the Arkansas bank?

A. About one and a fifth miles.

59. Now what is the width of the river in 1823 according to Maj. Humphrey's map of 1823, from the point where you just stated the difference of the bank was three quarters of a mile and that is from the river bank of 23 where the line drawn from the intersection of 32 and 33 would touch the ruver?

A. One and one eighth miles.

60. Now what would be the width of the river at a point exactly between those already given?

A. Practically one and one eighth miles.

61. What is the width of the river in 1874 according to the war map of Suter?

Mr. Ewing: Upon the understanding that the scale of the Suter map is a mile to an inch.

Mr. McSpadden: That is a correct statement.

895 61. First, I will ask as to the width immediately north of the turn made by McKenzie Chute?

A. One half mile.

62. What is the width of the river immediately south of McKenzie Chute?

A. About seven sixteenths of a mile.

63. What is the width of the river at the lower end of Dean's Island and that is at the furtherest extension of Dean's Island?

A. About seven sixteenths of a mile.

64. How many chains are in a mile?
A. 80.
65. How wide is the widest point of the river according to the war map of 1874 which touches Dean's Usland anywhere west of the bend of the river beyond the Island?
A. Just above the north of McKenzie Chute is one half mile.
66. In making your survey, you made out what you say is the Arkansas bank of the river 76. From what did you get the idea that that was true?
A. From my own observation and conversation with others.
67. Was it gotten from any running of lines in your survey?
A. Yes sir.
68. What did you observe that pressed that on your mind?
A. At places the perceptible bank and the difference in the growth of the timber.
69. Was there any difference in the soil?
896 A. I can't say.
70. Does the land you have made as the Arkansas bank of 1876 represent the line of demarkation in the growth of timber?
A. Yes sir.

Cross-examination by A. W. Biggs:

1. You are a graduated Civil Engineer?
A. No sir.
2. How long have you been engaged in the Civil Engineering business?
A. Fourteen years.
3. How old are you?
A. 31 nearly.
4. Where do you live?
A. At Wynne, Ark.
5. On Map, Exhibit No. 8, to your deposition you undertook to show the section and land lines of Deans Island as they existed at the time of the government survey in 1823, did you actually survey on the ground of this section and arrang- lines?
A. There are no lines shown, I did however run the lines between sections 33 and 34 from the corner- of 27 and 28 and 33 and 34.
897 6. Who pointed out to you the corner that you have just mentioned?
A. Mr. West.
7. Who is Mr. West?
A. He was Mr. Cissna's plantation foreman.
8. Did you find any monument marking the corner between 33 and 34?
A. I did not.
9. What did you find at that place?
A. It was cleared ground, and I simply set a corner for the corner of 33 and 34 on the township lines.
10. Did you find any monument or map at the common corner of 33, 32, 5 and 4?

A. I did not.

11. You designated on that map the right bank in 1823 by dotted lines that is intended to represent the bank of Deans Island in 1823, is it not?

A. It does.

12. Did you survey or run the bank on the ground?

A. I did not.

13. What other surveying did you do that was represented on the map?

A. I ran the right bank of the Mississippi River from near the head of Deans Island to Centennial Island the east side of Centennial Island and the east side of Island 37 and from that to McKenzie Chute also the interlines shown.

14. What interlines? What has been called by Mr. Ewing the locus in quo?

898 A. Also interlines being part of the lines of the locus in quo to the boundary of Towhead Chute and to the swag.

15. The swag is marked on this map, isen't it?

A. Yes sir.

16. You did not then run all of the boundary lines — the tract marked H. W. Stockley claim No. one and H. W. Stockley claim No. 2 did you?

A. I did not. I simply connected to certain corners, and then plotted it from that connection.

7. Whose map did you use in making that connection, Maj. Humphreys?

A. I used the description given in the Stockley vs. Cissna suit.

18. When did you survey this Mr. Bailey?

A. I believe in November 1901.

19. You marked here a dotted line above which was written the words, right bank, below which 1876, that signifies what?

A. The right bank of the river at that time of the Centennial cut off.

20. How did you ascertain this right bank of the river?

A. From concersation with others, and my own observation.

21. How does that line correspond with the dotted line which appears upon Exhibir No. 4 as the right bank edge of sand bar of Deans Island in 1874?

A. Practically.

22. Did you survey the line which I have just asked about in which is shown Exhibit No. 8?

A. I tied on to it several different places.

899 23. At what places?

A. I could not state just now.

24. The line which appears as the right bank of Deans Island on Exhibit No. 4 was taken by you from the map of the survey of Maj. Chas. Suter, a reduction of what appears as Exhibit No. 3 to your deposition and it marks the line drawn around the edge of what is marked gravel on that map, does it now?

A. Yes sir.

25. Did you have the notes of the Land Office of the United States in 1823 to guide you in running lines of Deans Island?

A. I did.

26. What was the variation of the needle at the time that survey was made?

A. I could not say.

27. What was the variation of the needle at the time you made the survey?

A. Practically five degrees.

Redirect examination by Mr. Ewing:

1. You were asked about how you made the survey on Deans Island with regard to the section corners, please state whether the corner represented on Exhibit 8 of your deposition corresponds with the section corners as set on the government map of 1823?

A. They do.

2. You were asked as to whether you actually run the line of the bank of 1923, and I will ask you now whether the bank of 1823 as marked upon your maps and especially Exhibit 8 to your deposition, corresponds with the line as appears on the Government survey of 1823?

900 A. It does.

3. You were asked as to the method of your survey in regard to the actual running of the chain around all lines of the locus in quo, and you stated that you connected the corners, please state what you mean by that?

A. I connected my survey with what is known as the north-east corner of the Huddleston tract, also what is known as the north-east corner of the Jno. Trigg one hundred acre tract. From these two points I plotted on my map what was known as the Stockley claims No. 1 and No. 2, from their bearing and distance as given on the circular in the Stockley vs. Cissna suit.

4. You were asked as to how you reached the right bank of 1876, please state whether the line you have marked as the right bank of 76 substantially and particularly corresponds with the location of the right bank of the river as appears upon the war map, known as the Suter map of 1874?

A. It does.

5. You took as the bank of 75, the place where on the Suter map the dotted lines leave off, and the river as indicated by a white place begins?

A. Yes sir.

Recross-examination by Mr. Biggs:

1. Who pointed out to you the northeast corner of the Huddleston tract?

A. It was a colored man, I didn't learn his name.

2. Who pointed out to you the northeast corner of the Trigg tract?

A. Mr. Kenton.

901 Redirect examination by *Mr.* Mr. Ewing:

1. Was the northeast corner of the Huddleston tract adopted by you the same point and corner adopted by Maj. Humphreys making his survey?

A. It was.

2. Have you examined the map of Maj. Humphreys with a view to ascertaining whether so far as the survey lines are concerned, there is an- particular agreement between them?

A. There is an exact agreement.

Recross-examination by Mr. Biggs:

1. You are the same C. B. Bailey whose deposition was taken in the case of H. W. Stockley vs. W. A. Cissna in the Circuit Court of the United States, Memphis, Tennessee?

A. I am, but in the printed record my name was erroneous- given as C. C. Bailey.

902 *Deposition of Chas. R. Suter.*

Filed Mch. 30, 1905.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

HELD AT 39 WHITEHALL STREET,
NEW YORK CITY, THURSDAY, Feb. 23, 1905—1 p. m.

Present:

Albert W. Biggs, Esq.; Gen. Chas. T. Cates, Jr., for the State of Tennessee.

Caruthers Ewing, Esq., for W. A. Cissna.

Deposition of Col. Chas. R. Suter.

By Mr. Ewing:

Q. Please state your name, age, occupation and residence?

A. Col. Chas. R. Suter, Corps of Engineers, New York.

Q. How long have you been connected with the Engineer department of the United States?

A. Ever since 1862.

Q. Since when?

A. 1862.

Q. What were your connections with the Mississippi River surveys at a point along the neighborhoos of Dean's Island?

A. The first thing in the way of a survey was in 1874. I was assigned to the examination of what was called the Transportation routes of the seaboard and the part assigned to me was the Missis-

sippi River from Cairo to the Gulf. In the summer of 1874,
903 the summer and fall of that year a certain sum of money was given me to make an examination and a party was put on a steamboat to the government and instructed where to make a reconnais-ence. The funds did not allow of an actual survey and that was the best we could do. The idea was to get some idea of the condition of the River and the portions of it needing improvements. That party was organized in the latter part of the summer of 1874. I have not any data at hand what would give the exact date, but near as I can recollect I think they started in August. They went down the river from Cairo to Vicksburg and then returned and subsequently, went over the same ground again extending the examination as far as New Orleans. This particular part of the River which you allude to was passed over four times, twice down stream and twice up stream. The methods followed were some-what crude but were the best we could do. The party being in as I said in a steamboat the course of the boat was taken by a compass. The distance was determined by the speed of the boat which had been accurately gauged before the party started. The widths of the river were of course estimated, but where it was possible for it to stop for any length of time to get instructions ashore and triangulations and get the widths it was done. That was used as a check and there were other points that enabled some kind of a check on the width. The greatest difficulty was in the length which of course the speed of the boat varying with the current and all that rendered it somewhat uncertain. The best that could be done was to take points about say, thirty or forty or fifty miles where anything could be recognized as a town that was shown on the state maps. It enabled the difference in the longitude and latitude to be determined approximately and the lengths were
904 determined by this reconnais-ence. If the distances varied they were shortened up all along the lines according to the judgment of he who had made the actual observations. There is one thing of course to be bourne in mind in a case of this kind that is examination was not made with any idea of determining actually anything by metes and bounds. That was not the idea at all. It was to get a sketch at any rate, something showing what the river sooked like and a general idea of its shape, direction and location of the Channel, and show points like that.

Q. Going to the first map which is in evidence I find, it is a survey of 1823 which is sectionized, and in this case some importance is attached to the fact of where the section lines touched the river. Do you know anything of surveys of that sort with regard to how accurate they would be as indicating the Arkansas side of the River.

A. Well, I had a considerable experience in tracing out that very question. The land surveys that were made under the direction of the government, were concerned entirely with the land. As far as anything like the bank lines of the river, it was a secondary matter and the greatest possible discrepancies have always occur-ed where we attempted to use these maps, even surveys of the adjacent

townships would differ tremendously in locations, and I think in a good many cases the explanation is a very simple one, and that is as we all know there are large portions of the land adjacent to the Mississippi River that are closed when the river is high. You take it at low water the lines would not coincide at all. That work was done by contract in that early day and they just simple took contracts for so much a square mile and they stopped whenever they came to water. But we do not know and there is no means of telling what stage it was made in where they made them, so that
905 anything like a definition, of the river bank, if it was on a growing point, for instance, that is, where there is a long shelving bank, you could not determine it within a mile from the land surveys, where the real bank was. That I know from comparisons that I made at various times.

Q. The section lines on the Dean's Island map, taken in this case as being the limit, of the Ark, shore, and measurements are made and calculations and maps drawn for that fixed point and if I understand you the question of whether, Dean's Island was smallest, it is shown on that section, that is whether the section lines indicate the size of the land, accurately or not is one of uncertainty, but it would in any event depend upon the survey at the time it was made whether the water was up, or at a medium stage, or at low water. I think that would be a very probably conclusion. I could not assert that positively, because that was a long time ago. A great many changes have taken place since then but in a case like that Sean's Island then as it is now was on a point and where the water line was no man can tell.

Q. You make a report of your doings in the matter to the war department, did you not?

A. Yes, sir.

Q. That has been published in the official documents of the Government?

A. Yes, sir.

Q. You made a supplimental report in which you took the river widths at two periods one at 1821, and one at 1874. Does this 1821 River width you used for comparative purposes, have anything to do with the land survey?

A. Nothing at all.

906 Q. State about that.

A. In 1821, it seems there was a reconnais-ance made somewhat similar to that of 1874. It was made by some officials of the topographical enginers, Capt. Poissant. That map was filed at the engineers department every one had forgotten about it, but those officials floated down the river from Pittsburgh. They took the Ohio River and the Mississippi. They floated down in flat boats and made a sketch of the river pretty much as was done in the survey of mine in 1874. We had no means od comparing the widths so far as the land office maps were concerned. If even we had them, I don't remember whether we did or not, but this reconnoisance business was used to compare with the one I made in 1874, and those widths that Mr. Ewing alludes to were taken from the map.

Q. In a report made by you as majors of engineers and taken.

Mr. Biggs: Are you going to file those reports?
Mr. Ewing: Yes, sir.

(Question continued:) June 7th, 1878, I notice you made a statement that the measurements deal with the high water widths.

A. Yes, sir.

Mr. Biggs: Give the page.
Mr. Ewing: Page 844.

Q. So that the measurements of the widths of the river given as at the apex of the Dean's Island, bend at 5,000 feet in 1821 and 7,600 feet in 1874, and they deal with the width of the river at high water stage.

A. Yes, sir.

Q. Will you make that report together with your original report, Exhibit "A" and "B" of your deposition?

907 A. I will do so.

Q. There is a good deal of map drawing and tracing about where was the center of the river, in 1876, just before the cut off. I will ask you if you have taken your survey and maps drawn from that and indicate what in your judgment, from your knowledge of conditions, and your survey, was the middle of the river at low water periods, and also what was the middle of the river at high water period.

A. They are indicated in that tracing that you have in your hand.

Q. Will you make that tracing Exhibit "C." Your tracing.

A. I do so.

Q. I will ask you to look at a map which is exhibited with a deposition of Capt. Le Vasseur. It is a survey made by J. H. Humphreys, and he has indicated as the western boundary of the land including a line as the center of the river of 1876. I will ask you if the line indicated on the map which I show you could have been the center of the river in 1876?

A. If I understand the map fix where, that is, Mr. Ewing.

A. Right here?

A. I don't think they are given for the simple reason it is taken half way between this land, which is Island No. 37, and the land over there which is supposed to be the outside of Dean's Island, but as I understand is the land office map of 1823. The present size of Dean's Island, or the size of it was at the time that my reconnais-ance was made was very much larger than that.

Q. The scale is about a quarter of an inch to the mile.

A. I would like to call attention to this Barnay Chute. But it is very plain from the recent surveys, that the shape has not

908 changed very materially. It was out of the influences of the river. And there is shown here a very marked and sharp bend which you will see in every map made. Taking for instance this map made in 1874, there is that bend in there that is fully two miles from the bend of the chute at the time that survey was

made. It is about a mile and a half from the edge of this sand bar at the time. So it is perfectly impossible that that line could represent the middle of the river in 1876. It may and probably did represent it in 1823, which was the time this map was supposed to be made.

Q. From 1823 to 1874, had Dean's Island grown so that in 1874 for nearly two miles from the bend in the chute there toward the west there was heavy timber, to this point (indicating)?

A. This map of 1874 shows that pretty conclusively because whatever the condition inside may have been the timber that was along the bank of the river was plainly in view and that shows heavy timber. This outside here shows where you see it is lighter that means less timber. But right here (indicating) at the .fott o*g* the island that means heavy timber.

Q. Now Exhibit 3 of the deposition of Capt. Le Vasseur is a copy of the reconnais-ance made by you.

A. Yes, sir, it is undoubtedly a large copy.

Q. And on Exhibit 4, which is the survey of 1879 and 1880, Capt. Le Vasseur has marked between points 3 & 4 what in his judgment was the center of the river in 1876. I will ask you if that could have been the center of the river at that time?

A. According to the best judgment that I can give on it I should say that was about the shore line of Dean's Island.

Q. The shore line fringed by heav*t* timber?

909 A. Yes sir.

Mr. Biggs: Let him explain.

Q. What do you mean by a shore line?

A. In 1876 this end—the west end—of Dean's Island you will see is a pretty well defined bank, and that I should judge is very nearly what is shown by that mark 3 and 4.

Q. That the line he marks as the center of the river a- a fact in 1874 was the shore line, on the edge of which was heavy timber?

A. Yes sir. There is a larger scale. That was the west end of the island in 1874. Assuming that the head of Centennial Island is correctly represented on the map No. 4.

Mr. Biggs: For your benefit may I say that the Map No. 4 is not a correct copy of the map of 1879 and 1880, so far as Dean's Island is concerned and so far as certain other measurements are made. That map of Dean's Island the map of 1879 and 1880 which is Exhibit No. 4, is substantially and was intended to be a copy of a map which I see on a book on your table "Published by the Mississippi River Commission of 1887," as you will see that the trouble with the Exhibit No. 4, which was made by a young man, in the employ of the office, that the meridian and longitude and latitude are not correctly placed or rather Dean's Island is not correctly placed. Therefore any comparison you make would not be correct. But I direct your attention to Nos. 8, 9 and 10.

Q. In view of the statement that this map is inaccurate——

Mr. Biggs: Let me show you.

Mr. Ewing: I know where it is.

Mr. ——: The map on which No. 4 is a copy is attached as Exhibit No. 7.

910 Q. I will ask you to please state what the map I now hand you is.

A. This was the first map, made by the Mississippi River Commission. The survey was made in 1880. I can tell by referring to the atlas.

Q. I will ask you if this paper here represents the authoritative and official facts on the basis of which the map was drawn?

General Cates: We will mark it Exhibit No. ——.

Mr. Ewing: Just wait a minute.

Q. Will you please make the map of 1882 and the authorities and data used in making that map Exhibit D. E. to your map?

A. Yes sir.

Q. Are these two papers published by the War Department of the United States, the printed matter and the other a map?

A. Yes sir.

Q. Now the survey on which this map Exhibit "D" of your testimony was made in 1880. I will ask if in your opinion there were any material changes in the bank lines in a point beyond the cut off of 1876. I mean the point immediately west of the Island?

A. The changes, that was four years after the cut off. Any changes that occur-ed beyond the landing, and we know there were a good many, were in the direction of filling out the old channel of the river that is more fully on a subsequent map, that I have seen here which I think was made in 1884, in which the topog-

911 raphy was extended and more details given you. You will find if you look at it that this filling up had progressed very rapidly, but whatever changed took place I would feel perfectly certain would be in the direction of filling up the bank lines.

Mr. Ewing: I would like to ask Mr. Biggs, if there are any more maps here made by kids.

Mr. Biggs: Not that I know of unless there are some that you introduced.

Q. The map chart No. 18, based upon a survey in 1879, and 1880.

A. The actual survey the topography, was made in 1883 and 1884.

(Question continued:) Has certain lines on it blue and yellow and some other color and it is undertaken on that map, to lay out in green lines the conditions of the shore lines in 1823 and then ti fix the middle of the river; and I will ask you whether the blue lines drawn between green lines here indicate the middle of the river in 1876.

A. No. The same answer which I gave you awhile ago. It is evidently copied from the same map. Here is that little stub on Dean's Island.

Q. On Exhibit No. 8, to Capt. Le Vasseur, there appears a red

dotted line which he marks as the middle of the bed prior to the cut off. I will ask you whether from your knowledge of the situation and your examination of the maps of the various surveys, if that line could represetn the middle of the river as it existed about 1876 just preceeding the cut off.

Mr. Biggs: That does not show the map of 1874 at all.
Mr. Ewing: No.

912 A. The only thing that I have to guide me in a case like that would be the condition of the head of the Island No. 37, and if this is taken from that map of 1884, I think we can institute some kind of a comparison there. The river at the time of the survey of 1874, I think was about a half of a mile wide. Now let us see. That would be the river according to that square mile, from the west shore line. It is what we call the head of Island No. 37.

Mr. Biggs: What do you call the head up there (indicating)?
The Witness: Yes sir.
Mr. Ewing: All here is the head of it.
Mr. Biggs: I know.
The Witness: I am speaking of it the way a pilot would speak of it. This portion up here (indicating) I take it for granted has not been changed materially.

Q. From a point where the river starts down as what — known as McKensie's Chute, in a northerly direction where the old river used to run would call the head of Island No. 37.
A. Yes sir.
Q. Now will you please — statements as will give the basis, of your belief that the line drawn, at the middle of the river could not have that line in 1876?
A. I can only judge by a comparison of the widths, as shown in 1874, which I presume are reasonable accurate, and the form of which is given here because if this was the middle of the bed this is the shortest distance right here (indicating). This is about a half a mile or double the distance.
Q. Explain your answer a little more clearly so that we may understand it.

913 A. The distance from the shore line of Island 37, at the head of Island 37, measure- at the nearest point according to the scale 1,450 feet. This would make 2,800 feet for the distance between the banks and that is not so very far out.
Q. That is the starting point.
A. Yes sir. Now take it down at the head of the old chute, what we call the chute of 37, you have it marked here as McKenzie's Chute, that is 4,600 feet. That would be the width there, very nearly two miles.

Mr. Biggs: Let me make a suggestion. Will you say Col. that you are measuring from Exhibit No. 8, as to the shore line of 1884.
The Witness: Yes sir.

Mr. Biggs: Not 1874?
Mr. Ewing: I understand.
The Witness: What I am giving now, are the widths of the water way.
Mr. Biggs: That shows the shore line.
The Witness: It is on this map that I am looking at, the map of 1884, I am assuming the shore line is correct. That you see gives us the width of the river at that point 4,600 feet, that is about three quarters of a mile *sl* the whole would have been nearly a mile and a half, and that is shown here on this map 1874, taking it not to the bar but to the island itself.

Q. The river was about ⅝ of a mile wide in 1874 at that point.
A. Yes sir.
Q. What is west of Dean Island and immediately west of the head of Island No. 37?
914 A. Yes sir.
Q. The way he puts -t *is* middle of the river would have to have been a mile and a half, or about that to have made this the center.
A. Yes sir.
Q. You have based your measurements and statements on the head of Island No. 37, as it appears marked in green which I understand to be the shore line of 1884. I will now ask you to take the fixed points and measure from the other side and measure the intersection of, 90—03, to Barnay's Chute, to the center of the river as Mr. Le Vasseur puts it an- state how far it is.
A. I will take the lower bank of the chute where it intersects 90—03. That is 4,800 very nearly 4,900 feet.
Q. The center of the river as laid down by Capr. Le Vasseur is 4,900 feet due west, of the intersection of 90—03, with the southern bank of Barnay's chute, is that correct?
A. That is right.
Q. Will you measure from the same point on Exhibit "D" of your testimony and say how far it is from the intersection of 90—03, with the south bank of Barnay's Chute due west to the edge of the heavy timber, how many feet?
A. That is practically a mile. It is little less than a mile.
Q. So from the same point on Exhibit "D," in the same direction to a point shown on the map, to have been in 1874 heavy timber would be a little less than a mile.
A. Yes sir. That distance that you had me measure there was.
Q. Yes, I understand, what I was getting at was.
A. As I understand your question you want to compare
915 this with the distance given on this map, the Mississippi River Commission for that same point, the intersection of that chute 90—03, to the edge -f the heavy timber.
A. It is almost identical.
Q. The purpose is to compare and find out what business the river has got running in the woods and I want you to state whether

or not Mr. La Vasseur has correctly marked it. The line that he marks at that point was not in heavy timber.

A. It must have been in some kind of timber, it looks as if it were.

Q. What do the signs used in the map making business indicate was that heavy or light?

A. The indications are that it was very heavy timber. Of course these trees are willows that were growin*f* up on that bar that was formed after the cut off but that line which seems to be pretty well defined would *like* (look) as if the timber was heavier than this.

Q. The point you have indicated was within that which the map marks as heavy timber, and still beyond that and before it gets to open water is first a lighter growth of timber and then a sand bar.

A. Yes sir, but that is after the cut off. Now taking this large scale map which is I take it, the same scale w*w*e were looking at—that 4,900—that is where that comes on this map.

Q. You mean that 49-foot measure due west from the intersection of 90—03, and the south shore of Barnay's chute would reach to approximately 90—04, longitude?

A. Yes sir.

916 Q. That is on the map of 1884?

A. Yes sir.

Mr. Biggs: Chart 18.

The Witness: And that I take it is the heavy timber shown — the small scale map.

Q. The same distance on the Mississippi River Commission map would bring you to a place that the map shows to have been heavy timber and which the contour lines would indicate was higher ground.

A. That is right.

Q. There is some pretty gorgeous coloring along in here. He undertakes to lay out in a yellow line your survey of 1874 on this map. Have you examined with a view to seeing whether it is accurately done or not?

A. That particular portion which we are examin-ng is a little outside of this actual survey, which I think is somewhat doubtful. That is there are pretty good reasons for thinking that the head of this Island No. 37, was not changed much, if any at the time of the first survey.

Q. Wait one minute please. You have made references to the head of Island No. 37, and we have maps of 1874 and 1879, survey of 1880 and the later map of 1884 and it may be important to know whether the head of Island No. 37, have materially altered during the time please give the reasons that you have for assuming that there was no material change at that point.

A. The reason I did so is this. If you examine this map you will see that there is a little levee marked on there. It runs off into space there and down here. It is quite evident to my mind

917 that there was a little levee put up there before the cut off, after the cut off there would — have been any use of it, be-

cause the immediate effect of that was to lower the water several feet in that neighborhood. I think therefore that, that *that* little protection levee must have undoubtedly been built before the cut off and whether it was there in 1874 or not I don't know. There is nothing shown on may map—but they do show cultivated ground around the head of that Island. You see there is a house shown there with open ground, which is undoubtedly cultivated. Now I think that that little protection levee was right along the bank. You see at that time even before the cut off this old bend of Island 37 was dead water practically. The main channel of the river was down at McKenzie Chute, and th- size of these bars *are* there is less than a quarter of a mile. Everything indicated that this whole bend was filling up. And therefore that little protection levee was probably just put down there to protect that man's ground being flooded with water.

Q. The figure in the center of water indicated on the map are supposed to represent what the person making the survey thought was the middle of the river, was it not?

A. No; those are measured from the channel line.

Q. What do you mean by the channel line.

A. The line the boat following at the time this survey was made.

Q. The expression "higher water" or higher stage of water has been used and you have undertaken to show the center of the river at high water as well as low. What do you mean by a higher water stage, the middle of the channel?

A. That would mean when the river is still within its banks.

918 Q. The Tennessee bank along there was a high and caving bank, was it not?

A. Yes sir.

Q. The Arkansas Dean's Island bank appears to have been a sloping bank.

A. Yes sir. That was forming.

Q. The line which you have marked as the middle of the channel at high water, if I understand it, is supposed to be the center point between the Tennessee shore and the Dean's Island shore.

A. You mean the high or low water?

Q. The high water.

A. The high water what was apparently a well defined bank and the shore of Dean's Island.

Q. Did the point from the point of which your measurements run indicate that the Arkansas shore, which you adopted was the edge of the heavy timber?

A. No I should hardly think it was. That measurement if I should remember right was made right across here (indicating). Right across the apex of the Island.

Q. Was that to the Dean's Island bank and within and including in a tow head in the sand bar and the willow growth?

A. Yes sir, to the shore of the main island, not to the tow head.

Q. The low water. What would you mean by the low water?

A. The water used there was the actual water way of the river,

(from)
that is the distance form the Tennessee Bank to the sand bar on the Arkansas side.

Q. In other words, it was the width of the water itself?

A. At that time, yes.

919 Q. In giving the midde of the high water line, you have included in the river not only the water that was there but a large amount.

Mr. Biggs: Let him state.

Mr. Ewing: I want to state it this way.

Q. (continuing) included not only the water as shown but the sand bar and tow head between the low water and Dean's Island bank.

A. I answered that a moment ago. I said it was the main island. That is it passed right over tow heads and bars.

Q. Now Col. Suter, will you please state how much distance was included by you in the measurement of the high water stage, which was a sand bar and a tow head.

A. You wish me to indicate where it was?

Q. Now state where it was.

A. I think we made the distance from that report, 7600 feet. That is a mile and a half.

—. How much sand bar and tow head is included within the river proper according to the way, you have fixed the center of the river at high water?

A. That depends upon where you take it.

Q. At the point you took the apex of the island.

A. At the actual width of the water way, at that time, was about three eights of a mile.

Q. Then, there was about one mile of sand bar, and tow head included by you in the river?

A. Fully that; a little more, if anything.

Gen. Cates: What are you measuring on a map which is not in record?

920 Mr. Ewing: I have introduced the map.

Mr. Biggs: I do not think we can get one of these at all. I have tried everywhere I know. I applied yesterday, or the day before yesterday, to the War Department and the Chief Clerk instituted a search, but without result.

Q. I will ask you is the paper I now hand you is a copy of the map from which you have been testifying?

A. This is a tracing from the map.

Q. Will you please make a comparison by placing one over the other and state whether it is an accurate copy as to all lines and colorings?

(The witness complies with above request).

A. As nearly as I can judge it is a tracing.

Q. Can you tell any substantial difference between the original

which you have in a holder before you, and the one which I have just handed you, even as to the markings?

A. That would take a pretty long time.

Q. Couldn't you use a magnifying glass?

A. I could tell the particular portions which you are interested in.

Q. That is what I am talking about.

A. I think it is accurate. I think it is an accurate copy.

Q. Please make that exhibit "F" to your deposition.

A. Yes sir.

Q. Mr. Le Vasseur has drawn a map exhibit as No. 9, with his deposition and on that map he has placed the center of the channel, prior to the cut off, about the red lines. That is to say at a time just preceeding the cut off of 1876. Will you please state
921 whether that could have been the center of the river of the channel of 1876?

A. Of course he has taken the map of 1874 and enlarged it. This portion in here (indicating) shows that.

That is evidently the enlargement of the map of 1874.

Q. The question is if that could have been the middle of the river in 1876?

A. That would be an almost impossible thing to say.

Q. Would you be able to say it as well as Captain Le Vasseur?

A. The only reason I should doubt it is if this map represents accurately, the enlargement of the map of 1874, it should be further to the west. It is obvious that it is not half way between those lines.

Q. Capt. Le Vasseur was not there and was not engaged in the survey but he has marked some very delicate brown lines. Will you please examine the map of 1874, and state whether in your opinion the willows where has the word inundation, would have overflowed except in the case of a flood?

A. I think that what he has done as near as I can make it out is to take this line that is here shown here of heavy timber and he has indicated it by this line here (indicating) the black line checked with the brown. He may have had some information not given here. But taking the map as it stands I should say this line was more nearly the line of heavy timber.

Q. On the map of 1874, Capt. Le Vasseur has drawn as willows subject to inundation a point, where the very dark shuts off into lighter, is that correct—is that what the line indicates?

A. No I am wrong about that. You see this little pond here behind the tow head, he follows along that so that this in the
922 previous deposition, was taken as the main shore of that island. He shows that substantially as a quarter of a mile from right here across there (indicating).

Q. The distance from the lowest point in the bend of Barnay's chute, to the land which he indicates as the land of willows subject to inundation, measured normally would be a quarter of a mile.

A. Yes sir.

Q. The same distance from the same point, that is to say, a quarter of a mile, on the map of 1874, would be to what point?

A. The corresponding line is about three quarters of a mile.

Q. Taking the map, of 1874, which you have before — and taking this multi colored arrangement is that a correct representation so far as those lands are concerned?

A. No, it is not. I do not know how he got it.

Q. Taking the lower bend of Barnay's Chute, will you measure to where the heavy timber and the map of 1874 ends and measure a corresponding distance on Capt. Le Vasseur's map?

A. The distance from the bend of the chute to the heavy timber is just half a mile.

Q. And a half mile measured on Capt. Le Vasseur's map would go to where?

A. To the tow head.

Q. And directly across the pond?

A. Yes sir.

Q. There is a pond between the tow head and the island?

A. Yes sir.

—. Will you please measure west, northwestwardly from the lowest point from Barnay's Chute as far on Dean's Island as the
923 heavy timber goes.

A. Two and a quarter miles.

Q. Will you measure a corresponding distance from a corresponding point on Capt. Le Vasseur's map, and indicate to what it would go?

A. Assuming that it is the same point which is as near as we can get it, it shows just two miles.

Q. What I am getting at is, will you answer two and a quarter miles. Where would the corresponding difference be.

A. It is a little hard to fix the starting point, but taking it at the lowest point at the letter "N."

Q. You have made the measurement and it would go on the outside of and be on the point which Capt. Le Vasseur has marked "Willows and heavy timber," would it not?

A. Yes sir.

Q. Will you indicate by a little round spot on Capt. Le Vasseur's map where the corresponding distance from a corresponding point would go using the heavy timber lines of the map of 1874, as a basis?

A. Yes sir.

Q. Will you please measure in a westerly direction from the lowest point on the Barnay's chute, on the map of 1874 to the point where the heavy timber, apparently ends going towards the middle of the head of Island No. 37.

A. You mean on Dean's Island?

Q. Yes, from this point here (indicating) going to where the heavy timber ceases.

—. The farthest point is up here (indicating) at the foot of the chute.

924 Q. I mean towards the head of Island No. 37, I want to know the distance from that point to that?

A. That is one a- three-quarter miles.

Q. Will you please measure as near as it is possible from a corresponding point on Capt. Le Vasseur's map No. 9?

A. I am somewhat uncertain about the direction. I have made the measurements.

Q. The measurements indicate and show that there is heavy timber in 1874, on Dean's Island which on Capt. Le Vasseur's map would be the point head of the island No. 37, on the opposite shore, does it not.

A. Yes sir.

Q. From these measurements and a comparison of the maps would you say that Dean's Island has grown westwardly to such an extent that heavy timber was growing as far over to the west as Capt. Le Vasseur has marked the point or head of Island No. 37?

A. No that is impossible. Of course the map is wrong. He has got the chute too far west.

Q. From the measurements and examination you would say that he — inaccurate, as to Barnay's Chute?

A. Yes sir, so as it is an introduction of the map of 1874.

Q. If it is wrong in any essential particular it is not valuable as a guide to that?

A. I don't know how he could have made that.

Q. The question I would ask is do you think these lines are correctly laid down on the map?

A. No sir.

Adjourned to Friday, Feb. 24, 1905, at 12 M.

925

STATE OF TENNESSEE
vs.
MUNCIE PULP Co. et al.

Resumed Friday, Feb. "$, 1905, at 12 M.

Present: Same as before.

Cross-examination by Albert W. Biggs, Esq., and Gen. Chas. T. Cates, Jr.

By Mr. Biggs:

Q. Col. Suter, I procured from the War Department a blue print of the original map made by you, a blue print consisting of two sheets, first the explanatory sheet and second a blue print sheet, #7. I ask you to file these as Exhibit 1 and 2 to your deposition.

A. I do so.

Q. I will ask you if you have marked on Exhibit 2 the lines which you had pleaced on Exhibit "C" to your deposition—that—is, the low water middle channel of the river, the high water middle channel?

A. I will do so.

Q. I also ask you if you have marked with a green line of demarkation on Dean's Island between the heavy timber and the small cottonwood, and willows as it was at that date?

A. It is marked as well as could be determined.

Q. And over that line you have written the words "Line of
926 Small and Large Timber?

A. That is correct.

Q. I now ask you if you have also marked on that same map, the midway point between the same Tennessee Bank and that Line of demarkation which produced the large and small growth of the timber on Dean's Island?

A. That is the green line inside of the red one which was the one marked on the other sheet.

Q. And it identified by the words "Middle Line from Timber."

A. Yes sir.

Q. According to the topographical signs indicating the growth of the timber from this Exhibit 2, it would appear that the timber growing on the tow head south of Dean's Island and the timber growing outside of the line of demarcation between the small and the large timber growing on Dean's Island proper, as appears on the map of 1874, is about the same character of growth is it not?

A. So far as I can judge from the topographical signs they are the same.

Q. Between the line marking the growth of timber and the sand bar which extends out and beyond that growth around to the south and west of Dean's Island, there appears a white mark which would serve to show the boundary between where there was timber and where there was no timber, is that correct?

A. That is what it is intended for.

Q. Immediately south of this line, and between that line and the towhead there, appears an open blue space, that indicates water, does it not?

A. Yes sir.

927 Q. And at the time of the year that this survey was made it was more of a pond was it not?

A. It might be called a pond. It was closed at both ends that was just simply the deepest portions between the tow head and Deans Island.

Q. In your report which accompanied these maps, to the War Department, I notice that you state in high water and ordinary stages of water between the tow head and the island where, chutes which were frequently used by boats ascending the stream.

A. Yes sir.

Q. Now from your observation, was there such a chute between the tow head and Deans Island?

A. I have no doubt of it. I have no doubt that that little chute that was indicated here, was used by boats at certain stages.

Q. But at certain stages of the water boats would run between the tow head, and Deans Island to the best of your knowledge?

A. Yes sir, up stream boats. They would not use it down stream but they would use it going up.

Q. The character of the bank on the south of the timber—I mean the growth of small timber—and the character of the bank—along the front of the tow head was about the same was it not?

A. In all probability. I could not answer that definitely because

I do not recollect, but I should imagine there was not much difference.

Q. This map, Exhibit 2, has on it some information relative to the banks which is not given upon the re-print of the map, a copy of which is filed with your deposition, as Exhibit "F" and
928 that is shown by the little arrows pointing to the banks?

A. Yes sir.

Q. Now according to the information sheet, which is filed as Exhibit One with your deposition, these little arrows, are used to indicate, where you supposed was the cutting, or caving banks, is that true?

A. That is what probably was intended, I don't recollect very definitely about that, but they simply indicate, as near as I can recollect, the banks either that were actually caving, or that might have at a higher stage, but that they were actually caving, I think, is not because the stage of water was too low.

Q. Now these banks along the Mississippi River, I mean the perpendicular banks, to distinguish them from the sloping banks, were the formation of a body composed of clay with an understream of sand. That is the report of your observation and that fact *id* stated in your report?

A. I think it is probable they were. It is a very common formation of sand and clay. The banks of the river are generally that unless they happen to be pure sand.

Q. And the caving of the banks usually occur after high water stage—the sand underneath of the superstrata of clay.

A. That is one of the many contingencies. It is not universal by any means.

Q. The current forcing itself against the bank also accelerated the caving?

A. That is where the caving took place.

Q. These arrows which appear on this map around the concaving shore, opposite Deans Island, on the Tennessee side.

929 A. Yes sir.

Q. That would indicate a caving bank on the Tennessee bank at that point, would it not?

A. Yes sir.

Q. These arrows also appear on the Tennessee shore on the concaving shore opposite Brandywine Shore, do they not?

A. Yes sir.

Q. The circle of the concave shore opposite Brandywine bar is smaller than that opposite Deans Island, is it not?

A. Yes a little.

Q. And the current would go against the sharper curve with much greater velocity and power than it would against a concave?

A. Yes sir, that would be the usual rule.

Q. And you term it in your report, the scouring power of the river would be greater around the Brandywine bar than it was across around the Deans Island bar.

A. That is what I should expect.

Q. Where you along this portion of the river after the cut off?

A. Yes sir, about two years afterwards—in 1878—or a year and a half more nearly.

Q. As I understand the cut off went through where, the band then filled as showb between the river around Brandywine and bar and around Deans Island.

A. Yes sir, right across the narrow neck.

Q. You were examined yesterday relative to the Government survey made under the department of land office which sectionized Deans Island, and the then territory of Arkansas?

A. Yes sir.

930 Q. You stated that your observation had been that in some instances these surveys had not been accurately made, or rather that the surveyor had simply run to the water's edge wherever the water at that time might be.

A. Yes sir.

Q. You have had no occasion to examine into the correctness of this particular survey, of the land office at Deans Island point?

A. No sir, I never had any occasion to do so.

Q. Then you, of course Col., don't want to be understood as stating that the survey of Deans Island under the direction of the land office was incorrect?

A. No, I would not venture to say that because I don't know.

Mr. Biggs: I just wanted to see you right on the record.

Q. Now, Mr. Ewing was examining you when the adjournment took place yesterday, relative to certain measurements. I hand you Exhibit "D" to your deposition and also Exhibit 2, and ask you if the point marked "B," in red ink on these two maps approximately represents as near as it can be put the most southerly point of the McGavock's or Dean's or Barnay's chute, whichever name may be applied to it.

A. Yes sir, I should say it did.

Q. Now then on Exhibit 2, there is drawn a red line from this point B to a point marked A which is drawn in a northwesterly direction to the end of the timberland then extended acorss to a point D on Island No. 3y.

A. Yes sir.

Q. I will ask you if the line drawn on Exhibit "D" from point B to the point G, would about correspond with that line?

A. As far as I can judge from the meridian, I should say that it did.

931 Q. There appears on Exhibit 2 a dotted red line, from this point B, to a point F, which is about the center of the head of Island 37, not counting in the sand bar which was forming to the north of it. Does that about correspond with the line, drawn from B to A, on Exhibit D?

A. Yes sir, that seems to correspond about as closely as one can.

Q. And then from the point B, on Exhibit 2, a red line is drawn to the south east corner of Island 37, and a similar line is drawn

on Exhibit "D," from the point B to the point C, which is the south east corner of Island 37?

A. Yes sir, that corresponds.

Q. Then there is also drawn on Exhibit "D," a line parallel with the 35—27 parallel, from the point B to a point D, which is the extreme western edge, of the sand bar on Deans Island. Is that correct?

A. Yes sir.

Q. Now, Col. Suter, will you measure on Exhibit 2, the distance from the point B, to the point A?

A. That is one mile and seven-eighths, a scant mile and seven-eighths, little scant of a mile and seven-eighths.

Q. Will you measure now a mile and seven-eighths scant on the line from B to B?

Mr. Ewing: That would not be a corresponding place.

Q. I want from B measured towards G a mile and seven-eighths.

Mr. Ewing: What is the scale?

The Witness: The same scale.

A. Yes sir.

932 Q. Have you made a red dot at that place?

A. Yes sir.

Q. That place is on the extreme western edge of the sand bar around Deans Island, as shown by the government map of 1878, isn't it?

A. Yes sir.

Q. Will you now measure a distance on the map of 1878, which is Exhibit "D" from the point B to the point A, which is on the extreme eastern bank of Island 37.

A. It is almost identically the same.

Q. Practically the same?

A. It is just about the same.

Q. Then from the southern point of McGavock's chute, the distance measured on the map Exhibit 2, which carried you to the point A, which is on the extreme western shore, of Deans Island, not including sand bar, would carry you on the map Exhibit D, to the eastern main bank of Island 37, would it not?

A. Measured on this other line, yes.

Q. And measured on a line drawn at about the same angle would carry you to the extreme western edge of the sand bar around Deans Island, would it not?

A. On the later survey, yes sir.

Q. That is what I mean.

A. Yes sir.

Q. Will you measure the distance from the point B, on Map 2, to the point E on said map, being the extreme southeastern corner, of the main shore, of Island 37, not including the sand bar, and state what that distance is?

933 A. It is a little over two miles.

Q. Will you measure the distance of Exhibit D, two miles

from point B, in the same direction and indicate it, and indicate it by a point marked H, in red?

A. I do so as requested.

Q. That goes over on Island 37, more than a quarter of a mile, does it not?

A. About a quarter of a mile.

Q. Will you measure the distance on Exhibit D, from the point D, to the extreme edge of the sand bar, on a line parallel with 35—27, and state what that distance is?

A. That is one mile and five eighths.

Q. Will you measure the same distance one mile and five eighths in the same direction from point B on Exhibit 2, and state whether that point is on Exhibit 2?

A. About that mark—about on the line which I have marked at that particular spot, as the middle of the channel of the river, at high water, and is beyond the extreme western sand bar on Deans Island, as shown on that map. The line on which I made these measurements is line B—G.

Q. Again referring to the line of demarcation between the heavy timber and the willows and cotton woods which appear upon Exhibit 2, as I understand you this line was not undertaken, to be accurately surveyed.

A. Oh no.

Q. Now Col., I am going to ask you to do some measuring for me on these other maos, I believe this measurement you made yesterday that is on Exhibit 9, measuring at the shore line, at the apex of Deans Island, and measuring on Exhibit 2 across from the apex of Deans Island, to the white line separating the water south
934 of Deans Island, from the Growth of Timber, these distances correspond, being as I now recollect, 7,600 feet on both maps.

A. That is my recollection.

Q. I now ask you to measure the tow head which appears upon Capt. Le Vasseur's map Exhibit 9, and the tow head which appears on Exhibit 2 and state of they are the same size. You made that measurement yesterday.

A. Yes, but I don't know what it was. I better do it over again. It is a little over one mile and three quarters on Capt. Le Vasseur's map, one mile and three quarters. They are substantially the same.

—. Will you measure on your map from the point of Island 37, to the line of heavy timber and state the distance along the line E—B?

A. A mile and a quarter.

Q. Will you measure the same line Exhibit 9 to Capt. Le Vasseur's deposition?

A. I don't know how we are going to determine the same line. This is the point. Indicating, it would probably be somewhere on that arc.

Q. See if you don't strike that line of heavy timber right there, indicating.

A. I- is right there (indicating) but whether that is on the same line or not I don't know. It does strike the line which is drawn on Le Vasseur's map, to show the separation of willow and heavy timber, but whether it is on the same line or not I can't say.

Q. Will you measure from the north east corner of Island 37, appearing on Exhibit 9, as the shore of 1874, directly across
935 to to the shore line of Deans Island, on the same map as of the same date.

A. About 2,000 feet.

Q. Will you measure from the point to which you measured on the west bank, on Deans Island of 1874, to the most northerly point of Deans Island and state the difference.

A. 1,700 feet.

Q. Now will you take map Exhibit 2, and measure from the north east corner, of Island 37 across to Deans Island bank?

Gen. Cates: Is that Exhibit 2?

Mr. Biggs: Yes sir.

A. If that about three eighths of a mile, about 2,000 feet about the same distance.

Q. Will you now measure from the point on Deans Island, shore to which you have just marked a measurement to the extreme northern point of Deans Island, shore on Exhibit 2, and state the distance?

A. That is the same three eighths of a mile. The same as the other one.

Gen. Cates: You mean the distance across the same as the distance north?

The Witness: Yes.

Q. Then, these distances are approximately the same on the two maps?

A. I should say so.

Q. From the foot of Deans Island, will you measure along the line E—B, to the edge of the sand bar, as it appears on Exhibit 2, and state the distance?

936 A. You mean across this distance here (indicating)?

Q. No, from point E.

A. Oh, to the edge of the water?

Q. To the edge of the sand bar.

A. That is the same distance, three eighths of a mile.

Q. Three eighths of a mile, Colonel?

A. No, I beg pardon, it is half a mile.

Q. On Exhibit 9 will you measure on a line parallel with 35—27, from the same point east one half a mile?

A. I do so, and it strikes the line of the sand bar east of Deans Island, on Exhibit 9, and also at the intersection of the red line which is marked on there as the middle of the channel, at the time of the cut off.

Q. Now measure, from the intersection of Line E—B with the water's edge of the sand bar, to the line of demarcation, between

the heavy timber and the willows and cotton wood, on Exhibit 2, and state the distance?

A. You mean this distance (indicating)?

Q. Yes.

A. Three quarters of a mile.

Q. Then the distance from point E which is the southeastern point of Island 37, along the line E—B, to the line separating the willows from the larger timbers would be a mile and a quarter, Colonel, would it not?

A. Yes sir.

Q. Now measure along the same line E—B, from the point E, to the line of demarcation, between the small cotton wood and willows and the sand bar and state what that distance is?

A. Seven-eighths of a mile.

937 Q. In your measurements of yesterday when you gave the width of the river, on your map Exhibit 2, opposite the head of Deans Island, to be ⅝ of a mile, you were simply measuring to the water edge of the sand bar, were you not?

A. That is half a mile between these points.

Q. And the red line which Mr. Le Vasseur marks as the middle of the channel, prior to the cut off, is also, as I understand you, at the south-east corner of Island 37, a half mile distant from that point, is it not?

A. I will make sure, but I think it was. Yes that is substantially half a mile.

Q. Will you make a point on Map 9, on a parallel line with 35—27, and measure from the intersection of that line with meridian 90—03 west 7,500 feet, and state where it goes.

A. It goes to a point about one thou-and feet inside of the shore line as indicated of Island 37. The starting point being in Barnay's Chute, as appears on the map.

Q. Will you measure from the same place, on the map Exhibit D west the same distance 7,500 feet?

A. That would be about a mile and three eighths a little over a mile and three eighths. It comes to the shore of Island 37 on Exhibit D. The starting point on this map being also in Barnay's chute.

Q. I will ask you to take the intersection of 90—03, and 35—26, on Chart 18 of the Mississippi River Commission, and measure north 1,500 feet?

A. 1,500 feet.

Q. Yes.

A. That is from this corner up.

938 Q. Now from that point measure from the most southerly extremity of Barnay's Chute, and state what the distance is?

A. Yes sir.

Q. State what the distance is?

A. It is 1,900 feet from 90—03. Measured north from the intersection of 90—03 and 35—26.

Q. Now will you measure on map Exhibit 8, from the intersection of 35—26 and 90—03, 1,500 feet north, and then east to the most

southern point, and state the distance between the last two points mentioned?

A. It measures 2,000 but it might as well be 1,900 because it is very difficult to tell.

Q. You were asked to make a number of measurements yesterday by Mr. Ewing, taking the southern extremity of Barnay's chute, as the same appears on map, Exhibit 9, and from these measurements you stated that the map Exhibit 9, must be wrong. I now ask you if Barnay's chute which appears, on Exhibit 9, at the point from which you measured, was not intended to represent upon that map, according to the coloring given, the Barnay's Chute of 1823?

A. Yes, it is apparently so. I had not noticed it at the time but my attention has been called to it since.

Q. These other measurements which I have asked you to make with this map have all checked or substantially so, with the map of 1874, prepared by yourself, have they not?

A. Yes sir, all the others.

Q. Barnay's Chute as it there appears being out of the way.

A. Yes sir.

939 Q. I will also ask you if from measurements you have just made, on map Exhibit 2, from the point B, on that exhibit and from the point D, on Exhibit 2, if there does not appear some changes between the making of the two maps, and if McGavock's or Barnay's chute, does not appear further west upon Exhibit D, than it does upon Exhibit 2, and if you take the two maps Deans Island has been extended westward?

A. I don't attribute it to that. I should simply attribute it to a map of 1874.

Q. In other words when you were making the map of 1874 the allowance by Congress for that work was only $10,000.00?

A. Yes sir.

Q. And with that small sum you were unable to record such chutes with any degree of certainty, by simply averaging them from a reconnaisance from the back of the steamboat?

A. That is correct.

Q. The first survey made by the United States Government or by any one else, which I have any knowledge of, and if you have any knowledge would be glad for you to say so, was the survey of 1883 and 1884, in so far as the precise levels are concerned, giving the height of the land.

A. The first survey that was made in 1879 and 1880, the precise levels were run along the bank of the river, but they were not extended back from the immediate bank of the river. The subsequent survey made I think was in 1884 whatever the date of this map is, the levels were extended back at least a mile from the river bank.

Q. However, the map of 1882, does not show the contour lines showing the levels?

940 A. No.

Q. Then chart 18 is the first map giving these levels?

A. Yes.

Q. I now ask you to look on this Chart 18 and give the contour, making the edge of the sand bar and the growth of willows, to the west bank of Deans Island?

A. It is 230.

Q. The next contour would be drawn where there is an elevation of 5 feet, would it not.

A. Yes, 235.

Q. How far east of the contour line 230 is the average place where contour line 235 is drawn, on the same map going directly east, north 35—26?

A. It is a very irregular line. Taking it from the edge of the sand bar to the extreme western point of contour 235—the distance is about 4,700 feet.

Q. That would indicate that there is a fall of 5 feet in 4,700 would it not?

A. Yes sir.

Q. Now going from this contout line, 235 on the east how far do you go before you strike the 240 contour?

A. The bank of Barnay's Chute is 240. To the nearest point the distance is 3,400 feet.

Q. Then the distance 8,100 feet, from Barnay's Chute west, the land sloped 10 feet?

A. That is correct.

Q. Now, Col. Suter, if at the time of making this survey there had appeared on the land anywhere, Barnay's Chute, and the edge of the sand bar perpendicular bank from 15 to 25 feet higher than the rest of the land, wouldn't the government engineers shave shown it?

941 A. I should imagine so if they were not blind.

Q. Therefore if certain people now point in that place to steep bank which they say is the bank of 1876, your conclusion is that that could not be the bank of 1876, but simply a bank formed by some wash out?

A. Before answering that definitely, I should want to see it, I happen to know the percersity of surveyors.

Q. But it appears from this map that there was no such bank line there at that line.

A. Nothing is shown.

Q. Exhibit 2 to your deposition would indicate that in the judgment of your party the extreme western bank of Deans Island was a caving, when the survey was made.

A. There is a little bar right in front of it.

Q. Immediately north of the little bar?

A. It was probably a vertical bank, but whether it was caving or not is another question and I doubt it very much.

Q. In your judgment the bar being formed from the bank, was there a chute between the bar and the bank?

A. There may have been a little hole but still it would not.

Q. But these arrows, are the signs to indicate a caving bank?

A. It indicated it to the judgment of the men who made that map.

It was a verticle bank but whether it would cave or not is another question.

Q. This was made at low water?

942 A. Yes, at a low stage when there would be no cutting of banks away.

Q. In answer to a question propounded yesterday by Mr. Ewing you stated that from the apex of Deans Island, across to the Tennessee Shorem the width of the river as measured by you was 7,600.

A. Yes, as measured from that map.

Q. This you said, included a sand bar and a towhead.

A. Yes sir.

Q. It also included the chute did it not?

A. Yes sir.

Q. It did not include the distance beyond and about, to the line of demarcation, between the heavy timbers and the willows, did it?

A. No sir.

Q. Will you please measure the distance on that map, from the line of demarcation between the heavy timbers and the willows across the apex of Deans Island, to the opposite shore?

A. You want it up to that green line (indicating)?

A. Yes.

A. It is a little over a mile and three quarters.

Q. In other words the willows and cottonwood, growing along there were about a quarter of a mile wide?

A. Yes sir, just about.

Q. Will you please state the heighth of the bank on the Tennessee side at Centennial Island according to the contours upon chart 18?

943 A. 238 feet.

Q. What is the heighth of the bank itself at that point?

A. That is the heighth of the bank.

Q. What is the heigh- of the bank south of Deans Island on the Tennessee side?

A. It seems to run somewhere, betweem 235 and 240. There is 240 right close to the bank.

Q. Then when the river was bank full stage on the Tennessee side it would inundate Deans Island, up to a point between 235 contour and 240 contour, would it not?

A. Yes sir. That height that we were ta-king about is really on old Island No. 36. I don't know where ehe main bank is.

Q. So that full bank on Tennessee side leaves very little of Deans Island out of water to the east of the southern point of Barnay's Chute and the high shore along Barnay's chute. Is that correct?

A. Yes sir.

Q. Immediately after the cut off the channel ran north of the cut off which is now called the old river, filled up very rapidly, did it not, Colonel?

A. Yes sir.

Q. A rank growth of timber took possession of what had formerly been the bed of the river?

A. Yes, two ends at any rate. I don't know what happened further around, but the two ends were closed up very shortly.

Redirect examination by Mr. Ewing:

944 Q. Colonel Suter, you- attention has been called to certain contour lines, and I will ask you to compare the map, showing the contour lines which we presume are accurate, with the center of the river as marked by Capt. Le Vasseur, for the year 1876, and state about what would be the contour at that point. Right along there (indicating).

A. It is an average of about 235.

Q. Now the center of the river as placed by Capt. Le Vasseur was placed at a point shown on the map, about 235. That would be the average contour of that river line would it not?

A. Yes sir.

Q. As of what date were those contours made?

A. 1883 and 1884.

Q. What is the highest contour line?

A. 240.

Q. 240 is about the highest there is on Deans Island?

A. Yes sir, I should say that was substantially correct. Of course, there may be a few points a little higher.

Q. That was made about eight years after the river had abandoned its old bed.

A. Yes sir.

Q. What is the average of the Mississippi along that point, now and at 1874, what would you say?

A. We can only tell by these soundings.

Q. I will ask you if you think it would be much out of line to say that a point half way between the water lines on each side at a mean stage would run anywhere from 45 to 50 feet deep?

A. That would depend entirely upon the width.

945 Q. From your knowledge of the Mississippi River——

A. I should think 50 feet would be a very conservative estimate.

Q. That is to say, that would be a reasonable conservative estimate of the depth at a point midway?

A. Yes, in a narrow section. Of course, not in a wide one, but at the head of Island 37, I should say it certainly would be.

Q. About hos much would the fill up be in 8 years?

A. About the height of the banks.

Q. About the height of the banks.

A. Yes sir, I have no doubt of it.

Q. And the rise of 5 feet above the mean stage, would then practically place the entire Deans Island under water, if the center of the river was at the point marked on Capt. Le Vasseur's map, isn't that true?

A. The 5 feet above?

Q. Yes.

Mr. Biggs: Before the cut off?

Mr. Ewing: No, at the time we are talking about.

The Witness: I think they had a range of about 35 feet the main stage then would be 17 and 5 feet above, that would bring it up to 22. At the height I could hardly answer that question.

Q. What does those contour lines represent?

A. Horizontal sections.

Q. What do the figures represent?

A. Heights above the Memphis level.

Q. It is an arbitrary plan.

—. ——.

Q. Mr. Biggs pointed out with some interest a few places where Capt. Le Vasseur was correct and he had you make some measurements dealing exclusively, so far as Exhibit 2 and Exhibit D are concerned, with points north of the present channel of the
946 river, and north of where it ran in 1876. Now the map on which he places his alphabetical arrangement is exhibit B to your deposition. Please state whether that survey and the map on which he made these measurements, and lines dealt with a point several miles beyond, and away from the river bank, with any degree of accuracy.

A. You mean the river bank at the time this survey was made?

Q. I mean what at one time had been the river bank. When Exhibit D was made.

A. The Channel of the river was here (indicating).

Q. Do you know whether these surveys had anything to do—except in a general way—with the details a couple of miles above and where the river had once been.

A. That is shown on this map here, Chart 18, that represents their work.

Q. And that Chart shows that Island 37 was——

A. Yes sir.

Q. And above that the map that north of old McKenzie's Chute the surveyors had nothing to do with it?

A. It seems so far as the map shows, Chart 18, their work was simply confined to just that narrow portion of the old head of Island 37.

Q. Just one part of the head of 37, and not going—the map to which I was addressing my question particularly was this one on which the red lines which has been drawn, and which is Exhibit D to your testimony.

A. This is about here (indicating). This was actually surveyed. The whole of Island 37. The bank lines were surveyed and
947 the topography was taken within a limited space, of the edge of the bank. The subsequent survey in 1884 seems to have included at least there is only shown part of it on the map—which is a little fringe of topography right at the head of the island.

Q. And the survey of yours right at these points on which the letters were marked, by Mr. Biggs, was dealing at that time with what was the river channel itself.

A. The river channel was not around 37 at that time.

Q. These two maps, on which he made some comparative measure-

ments may deal with different periods, your- being the river as it ran in 1874 and the other being a map which was made after the cut off, and after the river had left the territory entirely.

A. Yes sir.

Q. You said that boats could have gone between the chutes—that is the chute—indicating—and Deans Island prior to 1874.

A. They could at high water.

Q. At what stage of water would you say?

A. That I could not answer.

Q. You mean there was an opening in there, and if a big rise in the water came, that steamboats might have to go through there.

A. Yes sir. Taking my own map, that is the chute I am talking about, (indicating). Boats going up the old chute to Island 37, if there was water enough for them would go up that little chute, where the point is designated.

Q. You are speaking of a general knowledge of the habits of steamboats, people to cut off distance, if they can get the
948 water.

A. Yes sir.

Q. You have no further information or knowledge on that subject?

A. No sir.

Q. Could they have found water enough if there had been a sufficient rise in the river?

A. Yes sir.

Q. And you have no personal or official knowledge except the conclusion that you drew?

A. Yes sir.

Q. If the highest point on Deans Island was 240, and the river ran as Captain Le Vasseur marked it, could you say whether at high water, all of Deans Island would have been overflowed?

A. All except these few high points we found that were above 240.

Q. Now what points are above 240 on Deans Island? The north end of the island seems to be the highest, there are a few spots, on the lower end, but this is high ground that is cultivated, and it seems to be 240 or above.

Q. In other words higher water would have left a very little of Deans Island, and that would have been only a point of Barnay's chute, would it not?

A. Yes sir, pretty well up towards the head of the island, I should say.

By General Cates:

Q. Colonel, if the permanent bank of the Tennessee side is 240 at high water, which I believe you mean bank full, the water would have found its level over the Arkansas side, regardless of where Capt. Le Vasseur laid down the middle of the river.

A. A point north of Barnay's chute—there are a few points, here is one (indicating). There is another, little patch we found down here (indicating), I think there are a few little points that would be

just going under, but the area under cultivation is about as a
949 good sign as give-. You will see that the contour just about follows a line of that man's scale. That shows that was undoubtedly the highest part of the island.

Q. Where was that?

A. On the west and north of the island?

Q. In the use of the term, higher water, please tell us exactly what you mean. Do you mean bank full?

A. The ordinary signification would mean bank full, or anything above that of course. Anything above bank full is over full stage.

950 Munice Pulp Company et al.

Filed March 30, 1905.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Stipulation of Counsel.

It is agreed by the parties herein through their counsel of record, that the Muncie Pulp Company was adjudicated a bankrupt in the Southern District of New York, its main place of business, on *March* 7th day of December 1904; that Leo Oppenheimer was appointed Receiver in Bankruptcy of said corporation on the 4th day of August 1904, prior to the adjudication, and that said Leo Oppenheimer was on the 6th day of March 1905, appointed trustee in bankruptcy of said corporation.

It is further agreed that the said Leo Oppenheimer as trustee in bankruptcy, entered his appearance in this cause as trustee in bankruptcy of the corporation.

It is further agreed that the said Muncie Pulp Company and Leo Oppenheimer may file their joint and several answer in this cause prior to the determination of the pleas in abatement filed herein, to-wit: to the jurisdiction of the Court; that said pleas in abatement to the jurisdiction shall be first determined by the court and that in the event the adjudication is against said pleas in abatement in whole or in part, that the court shall then consider the entire case upon the pleadings, including the answer*m* a*b*d upon the proofs and that the right shall be reserved to those defendants to rely upon the pleas in abatement to the jurisdiction in the Supreme Court as though the same had been first determined before the filing of
951 the answer, and the filing of the answer is not to — considered as waiving any of the rights of these defendants to rely upon the matters set out in the pleas in abatement.

R. G. BROWN,
Sol. for Defendant.

Muncie Pulp Company.

Filed March 30th, 1905.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Comes the Muncie Pulp Company and Leo Oppenheimer, trustee in bankruptcy for same, whose appearance is hereby entered in this cause, and by leave of Court first had and obtained, amend the pleas heretofore filed in this cause so that said pleas shall read as follows:

1.

That the tract of land described in the bill lies wholly within the State of Arkansas and none of it lies within the State of Tennessee except a very small and insignificant part thereof, to which these defendants never have and do not now assert any title, and title to which they expressly disclaim, viz:

Beginning at the northeast corner of the Tripp 100 acre tract; thence south with the east line of said Trigg 100 acre tract and the east line of the Potter 640 acre tract to a point where the same intersects with the middle line of Powell's Pond; thence with the middle line of said Powell's Pond to the north line of the tract of land set out and described in the bill.

These defendants therefore aver that this Court has no jurisdiction over the subject matter of this suit and plead said want of jurisdiction in abatement of the action.

952 And for further plea these defendants say that at the time this suit was commenced, to-wit, on the 15th day of December, 1903, and at the date of the filing of these pleas, these defendants had not gone upon any land lying within the territorial limits of the State of Tennessee, nor cut any timber from lands lying within the boundaries of the State of Tennessee; but that all the timber which the Muncie Pulp Company and Leo Oppenheimer, as receiver in bankruptcy of said company, and as trustee of bankruptcy of said company, ever cut up to date of the filing of these pleas, was cut off of land lying and being within the boundaries of the State of Arkansas.

These defendants therefore aver that this court has no jurisdiction over this branch of the litigation and plead said want of jurisdiction in abatement of the action.

953 The Muncie Pulp Company.

Filed March 30th, 1905.

STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY et al.

In this cause it is agreed in order to get this case finally heard on the merits at the approaching term of the Supreme Court, the defendants may answer the bill and that the same shall not be treated as a waiver of the pleas in abatement herein filed, but said pleas are first to be determined and if the decision thereon be adverse to defendants, the Court is then to pass upon the merits of the case and treat the answers of defendants or any of them, as having been filed subsequent to a determination of the matters presented by the said pleas in abatement.

This March 21st, 1905.

STATE OF TENNESSEE,
A. W. BIGGS,
W. A. CISSNA,
By EWING & WILLIAMSON, *Att'ys.*

954 Muncie Pulp Company.

Filed March 30th, 1905.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Joint Answer of the Muncie Pulp Company and Leo Oppenheimer, Trustee in Bankruptcy.

Now come the Muncie Pulp Company, a corporation organized and chartered under~~ex~~ the laws of the State of New York, and Leo Oppenheimer, trustee in bankruptcy for said corporation, and by consent filed this their joint and several answer herein in accord with the stipulation of counsel filed herein.

These defendants admit that prior to the — day of March, 1876, the Mississippi River flowed between Arkansas and Tennessee on the east boundary of Tipton County, Tennessee, not on the west boundary as stated in the bill of complaint, but they deny that the course of said river is correctly shown upon the map filed with the bill and made a part thereof and marked Exhibit A. They deny that the boundary of said river prior to the said month of March 1876, is a shown by the black lines on said map. They admit that

the middle of the Mississippi River as it then flowed constituted the boundary line between the States of Arkansas and Tennessee, but they deny that the middle of the River as it then flowed constituted now the boundary line between said States.

They admit that on or about the — day of March, 1876, a sudden change was made in the direction of the main current or channel of the Mississippi River whereby in a very short time a new channel was formed for said river, but they deny that the blue lines traced upon Exhibit A to the bill correctly show the directions of said new channel, which is known as Centennial Cut-off.

955 They deny that as the result of such sudden changes*m* the old bed of the Mississippi River flowing to the north of the channels made, became in a short time dry land. On the contrary these defendants aver that the old bed of the Mississippi River continued to be a channel of commerce and a navigable stream for a very long perio*f*, to-wit: for considerably more than ten years after the date of the formation of said channel.

They deny that the State of Tennessee is now the owner of that part of the bed of the River which at the date of the formation of this new channel constituted one half of the bed of the river from low water mark to the center of said River as it flowed prior to the cut off of 1876.

They deny that that portion of the bed of the old river which is now dry land, and which prior to the cut-off or change of channel of 1876, was between the low water mark of said river on the Tennessee side and the middle of said stream, is the property of the State of Tennessee or that it is held by the State of Tennessee for public purposes, or that the timber situated thereon is the property of said State.

They admit that the entire bed of the Mississippi River as it flowed between what is now known as Centennial Island and Island 47 on the west and Dean's Island on the east, is now dry land with the exception of a line of ponds lying immediately next to the Tennessee bank; that the said land consist- of many thousands of acres of land which is valuable chiefly on account of said timber; but these defendants aver that all of the land thus formed since the date of the cut-off are attached by accretion to the Arkansas shore, an open channel being continual between the said lands and the Tennessee shore up to a very recent date; and these defendants as successors in title to W. A. Cissna claim that the lands so formed lie wholly without the State of Tennessee and wholly within the State of Arkansas, save and except a small portion of the tract described in the bill and more particularly set out in the pleas in abatement filed herein by these defendants.

956 They deny that their co-defendant W. A. Cissna without right or authority and being a trespasser upon the land of the State of Tennessee as set out in the bill undertook to sell and convey to the Muncie Pulp Company the timber on said land; but that they aver that their co-defendant, W. A. Cissna, had good right to sell and convey the standing timber upon the lands described in the bill to the Muncie Pulp Company.

They admit that the consideration for said — was set out in the bill.

They deny that the Muncie Pulp Company knew at the time of said purported sale that its co-defendant, Cissna had no interest in or right to the said land or the timber thereon; they admit that the said Muncie Pulp Company shortly after it purchased from W. A. Cissna the timber standing upon the lands described in the bill, entered upon it with a large force of hands and proceeded to cut the timber from said lands. They admit that the Muncie Pulp Company had cut timber at the date of the filing of the bill from the lands of W. A. Cissna aggregating in value possibly as much as $25,000.00; but these defendants aver that they had not at the time the bill in this cause was filed cut a single stick of timber off of any land belonging to the State of Tennessee and those defendants aver that the larger portion of the timber cut by the Muncie Pulp Company and afterwards by Leo Oppenheimer as receiver and as trustee, was cut entirely to the east of the Arkansas bank of the Mississippi River as it flowed prior to the date of the Centennial Cut-off.

These defendants deny that they have cut timber to anywhere near the value of $25,000.00 within the limits of the tract of land claimed by the complainant in this bill, and state that the amount of timber they have cut within the limits of the tract described in the bill would not exceed the sum of $3,000.00.

These defendants admit that at the date of the filing of the bill herein there were certain cordwood cut and stacked upon part of the tract described in the bill; but they deny that the value of said timber so cut and stacked was $5,000.00, and state that to
957 the best of their knowledge, information and belief, the value of said timber did not exceed $1,000.00.

And now having fully and specifically admitted and denied all the material facts and allegations of the bill of complainant, these defendants further answering, say: That at the date of the Centennial Cut-off and for many years subsequent to said cut-off, the channel of the Mississippi River as it flowed north between Dean's Island and the Tennessee shore remained an open channel of commerce used by boats ascending and descending to the stream; that subsequent to the date of said cut-off the river flowing northwardly between the Tennessee shore and Dean's Island began to shoal and fill up with deposits of sand, gravel and alluvium; that in process of time slowly, gradually and imperceptibly the land built out from Dean's Island in the old bed of the Mississippi River and formed dry land; that many years subsequent to the date of the bluff on the Tennessee shore, became covered with vegetation and that said accretion became a part of Dean's Island and the property of W. A. Cissna. These defendants aver that the accretions on the Tennessee side being more limited in extent and going down merely to the line of Ponds formed at the foot of the Tennessee bank, whereas the accretions from the Arkansas side extended gradually, slowly and imperceptibly from the bank line of the river to the Arkansas side across the old bed of the Mississippi River to the ponds aforesaid;

which accretions these defendants claim became a part of the land of W. A. Cissna and located entirely within the State of Arkansas.

Further answering the bill of complaint these defendants aver and charge that prior to the date of the formation of Centennial Cut-off the State of Tennessee had granted to its citizens the entire western littoral of the Mississippi River from the point of the said formation to the north- end of Island 37, also on either bank of what was known as McKenzie's chute, all of the territory originally occupied by said branch of the river had become attached to the grounds
958 bordering upon McKenzie's Chute by a process of accretion so that at the date of the formation of Centennial cut-off no title to any portion of the western littoral of the Mississippi River or on either bank of McKenzie's chute remained in the State of Tennessee. And these defendants aver——————————

formation of McKenzie's Chute that the title of the western litt*eral* of the Mississippi River and both branches of McKenzie's Chute was in private individuals and no title remained in the State of Tennessee. These defendants therefore aver that if said lands were extended by a process of accretion, or if the lands were extended by a process of accretion or if the lands which had been submerged afterward reappeared by dereliction of the Mississippi River that the title to the same did not vest in the State of Tennessee but vested in the original grantees from the State of Tennessee, or their successors in title.

Wherefore, these defendants pray that the court if it should determine that it was jurisdiction in this cause, will fix and determine what is the true boundary between the State of Tennessee and the State of Arkansas, and in the event that the said boundary is found to be within any part of the land claimed by the complainant in this bill, that decree be given for the State of Tennessee only as to that portion of the tract which is found by the decree of the court to be located within the State of Tennessee and to which the State of Tennessee may establish title by proof, and that as to the residue of the tract claimed herein or as to any lands claimed by the State of Tennessee in these proceedings, that the bill be dismissed at the c-sts of the complainants.

R. G. BROWN,
Sol. for defendants.

959 Muncie Pulp Company.

Filed March 30th 1905.

STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY, et al.

Answer of W. A. Cissna.

Said defendant, not waiving his plea in abatement but expressly relying thereon, by agreement of counsel does not answer so much

and such parts of said bill as he is advised it is material for him to answer and says:

(1)

The land mentioned in the bill is not in the State of Tennessee, but it is in the State of Arkansas.

(2)

If said land or any part of it was ever in the State of Tennessee the same had long prior to the alleged cut-off of 1876, been gradually and imperceptibly washed away by the reason of the Tennessee bank of the Mississippi River and the Arkansas bank of said River had by gradual shifting and accretion been correspondingly increased so that all of the land in controversy has become lost to the State of Tennessee and the jurisdiction of its Court by such gradual errosions and the State of Tennesee has, therefore no right to maintain this suit.

(3)

Defendant is the owner of Dean Island, in the State of
960 Arkansas, together with all accretions thereto.

For a great number of year- prior to 1876 the Mississippi River flowed to the East and South and West of said island. The Tennessee bank of the river opposite to said island was a curved and high bank against which the current or main channel of the river flowed. By reason whereof and from natural causes the said Tennessee bank was continually and continuously caving and washing away, by gradual and imperceptible erosion, and the Arkansas side, or Dean's Island was correspondingly increasing by accretion, that is to say by gradual and imperceptible processes.

Said Mississippi River at one time run to the North of and around Island 37, an island west of the upper portion of Dean's Island. By reason of the accretive growth of Dean's Island from 1823 the river was chocked off from running around and to the north of Island 37 and the main channel thereof then, from these natural causes came to flow through what had theretofore been known as McKenzie's Chute.

By continually eating into the Tennessee shore and by the gradual and imperceptible erosion into said shore and a corresponding and contemporaneous accretion taking place on the Arkansas shore, the river to the South and West of Dean's Island moved a considerable distance into what had there-fore been the lands of the State of Tennessee, or persons claiming under it, until in 1876 by a sudden cut-off the river made a new channel for itself so that it ceased to flow to any considerable extent to the west of Dean's Island. By this cut off the main body of the water and channel of the river was caused to withdraw from its previous channel through McKenzie's Chute as well as around and to the North of Island 37. For a number of years, at least five or eight, the water remained in said McKenzie's chute and in the old bed around and to the north of Island 37 and withdrew and receded therefrom by slow and gradual and imperceptible

tible processes and the Arkansas or Dean's Island bank being a sloping and low bank was extended almost to the high Tennessee bank.

Defendant says that no part of the property described in
961 the bill was in 1876 between the then Tennessee bank and the middle of the river. The same was wholly on the Arkansas side.

(4)

Defendant says that by reason of this gradual and imperceptible shifting of the river and recission of the Tennessee bank the following property immediately across from Dean's Island was caused wholly to disappear; from Island 37 a tract known as the Trigg 152 acre tract; a tract known as the Trigg 57 acre tract, that part of a tract known as the "Chamlers and others" 135 acres which lies to the south of the Trigg 152 acre tract.

From the main Tennessee shore all of the land mentioned in the bill as the 131 acre tract and considerable of the Simon Huddleston tract.

So much so that the point of beginning of the land in controversy was at and prior to the cut off in the river and on the Arkansas side thereof.

(5)

Defendant says that all of the land in controversy, not lying in Arkansas, if any there be, has been already granted by the State of Tennessee to other persons and whatever may have been the action of the river thereon and the right of persons under and through any reclamation of the lands by any recession of the waters, the State of Tennessee has no title.

(1) Included within and as a part of the land described in the bill is 37 acres, at one time situated and lying on the head of Island 37. The same was by virtue of entry 7. dated Sept. 5th 1836, founded on warrant No. 2469 for 30 acres and No. 7097 for two acres and No 7093 for five acres, surveyed for John Trigg Assignee, and granted by him.

(2) Included and as a part of the land described in the bill is 152 acres just north of the above. This was by entry No. 8, dated Sept. 5th, 1836, founded on Warrant No. 3470 for 152 acres, surveyed for John Trigg, assignee, and granted to him.

(3) Included in and as a part of the land described in the
962 bill is certain land lying west of the Trigg 37 acre tract and south of the Trigg 152 acre tract which by virtue of entry No. 35 for 235 acres dated Feb. 13th, 1837, founded on Warrant No. 3547 for 135 acres, surveyed for J. G. Chamlers and others and granted to them.

(4) Included in the land described in the bill is a large part of the land embraced in Entry No. 772, dated July 2nd, 1822, founded on C. W. T. Warrant No. 1820 for 2000 acres surveyed for Simon Huddleston and granted to him.

The last described land with that described in the three proceeding paragraphs comprises all of the land mentioned in the bill ex-

cept that which extended from the Tennessee Bank to the middle of the river of 1823. In other words, the lands above entered and granted with the land lying in the river of 1823 are all of the lands described in the bill. Prior to the "cut-off" the same had disappeared by gradual and imperceptible erosion.

The defendants plead the above entries and grants as a bar to the title of the State of Tennessee, if said title was not lost by the erosions already set forth.

The State having parted with its title could not acquire title by the naked fact of the reappearance of the land, after submergence by the gradual shifting of the river.

And having fully answered, and here and now denying all allegations of the bill not admitted in specific terms, defendant Cissna prays to be hence dismissed.

EWING & WILLIAMSON,
Solicitors for Cissna.

963 Muncie Pulp Company.

Filed March 30th, 1905.

#13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

Agreement of Counsel.

In this cause it is agreed that all the depositions filed were duly sworn to and that they are all to be taken and considered as though signed and sworn to.

It is further agreed that 5 sections from Cotton wood trees referred to in the deposition of Vince Beard and W. H. Moody were introduced in evidence and shall be sent to Jackson and used upon the appeal, as though filed as exhibits, favorally.

CARROLL, McKELLAR AND BIGGS,
CARUTHERS EWING,
For W. A. Cissna.

R. G. BROWN AND
THOS. W. BULLINGTON,
For Muncie Pulp Company.

964 *Final Decree & Appeal.*

Entered March 31st, 1905.

In the Chancery Court of Tennessee.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Final Decree.

This day this cause was heard before the Hon. Lee Thornton acting as special chancellor by consent of all parties hereto, with the right of apeal and exception reserved, as if the cause had been tried before the regular chancellor; upon the pleadings and proof; and the court sustains the pleas of the defendants to the jurisdiction, and hereby orders, adjudged and decrees that the bill filed herein by the State of Tennessee be and the same is hereby dismissed at the costs of the State, to be certified in accordance with the statute.

And from the foregoing decree the said State of Tennessee prays an appeal to the next term of the Supreme Court, which meets in Jackson, Tenn., on first Monday in April, 1905, and said prayer for an appeal is by the court granted. And this being a proper case the court orders that the original exhibits be sent to the Supreme Court, and also the printed record in Stockley vs. Cissna, filed herein. The defendants at the hearing objected to the said record of Stockley vs. Cissna as incompetent, immaterial and irrevelent and the court sustains the objection and exception per- — record in this case as part of this record. — finally ordered, adjudged and decreed.

(STENOG. NOTE.—End of bottom page torn.)

965 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1907.

Present: The Hon. W. D. Beard, Chief Justice, and John H. Henderson, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, May 4th, to-wit:

No. 1, Shelby C. D.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

This cause came on to be heard upon the motion of the Attorney-General to postpone the argument in *in* this cause, and upon mo-

tion of counsel for respondents to hear argument in this cause at this term, and to set a day certain for same; and the Court being of the opinion that this cause should be heard at the present term; it is so ordered by the Court, and Monday, May 20, 1907, is set for said argument.

966 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1907.

Present: The Hon. W. D. Beard, Chief Justice, and John H. Henderson, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, May 18th, to-wit:

No. 1, Shelby C. D.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMapyn.

Upon motion of counsel, and for satisfactory reason appearing, it is ordered by the Court that this cause be set for argument Friday, May 24, 1907.

967 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1907.

Present: The Hon. W. D. Beard, Chief Justice, and John H. Henderson, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, July 6th, to-wit:

No. 1, Shelby C. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

For satisfactory reasons appearing it is ordered by this Court that this cause be continued to the special term of this Court to be held at Jackson, Thursday, Sept. 5, 1907.

968 Supreme Court of the State of Tennessee, April Term, 1907.

Chancery Court of Shelby County.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. and Others.

Opinion.

This suit was brought by the State of Tennessee against W. A. Cissna and the Muncie Pulp Company, in the Chancery Court of Tipton County, Tennessee, to recover about one thousand acres of land charged in the bill to be situated in that county and then in the possession of W. A. Cissna, who claimed to own the same in fee, and the Muncie Pulp Company, his lessee. An injunction was also asked to stay waste in cutting and removing timber, being committed by the Muncie Pulp Company. These defendants made defense by plea in abatement to the jurisdiction of the Court in that the lands sued for were not situated in the State of Tennessee, but in the State of Arkansas. The defendant Cissna in his plea says that these lands were formerly, about 1823, on the Tennessee side of the middle of the Mississippi river, which, as the river then ran, was and is the boundary line between Tennessee and Arkansas, but by gradual and imperceptible erosion upon the Tennessee bank, and accretion upon that of Arkansas, they became in the course of time and are now within and a part of the territory of the State of Arkansas. The defendant Muncie Pulp Company simply says the lands are not within the State of Tennessee, but within the boundaries and a part of the State of Arkansas. The defendants also filed answers to complainant's bill under an agreement of record that in so doing they would not waive their pleas to the jurisdiction of the Court. The case, after issue, was by con-
969 sent of parties, transferred from the Chancery Court of Tipton County to that of Shelby County, and there heard by the Chancellor upon the pleas in abatement and the proof offered by the parties upon the issues thus made. The Chancellor was of the opinion that the case was with the defendants and sustained the pleas and dismissed the bill. Complainant has appealed from this decree and assigned error.

The case is before us alone upon the question of jurisdiction presented by the pleas in abatement, but the decision of this question necessarily involves the title of the complainant to the lands sued for, since she claims them as a sovereign State, under the same grants, treaties and legislation by which its western boundary is defined, declared and established. The location of the boundary line between Tennessee and Arkansas, and the right of the former to recover the lands in question are practically the same question and will therefore be considered together.

The lands described in the bill and sought to be recovered con-

fessedly were at one time, about 1823, under the waters of the Mississippi river. This is admitted in the plea of W. A. Cissna, and is so clearly and conclusively established by the proof that it is not now controverted by any one. The Mississippi at this point at that time and for many years thereafter made a great bend, forming a tongue or peninsula extending northwestward from a direct north and south line, the distance around which was more than twenty miles, but across the neck connecting it with Tennessee less than two miles. This peninsula was separated by McKenzie's Chute, an arm of the river, and the northern part was known as Island 37. The whole, called Devil's Elbow, was part of Tipton County, Tennessee. The river began this bend at the southern point or apex of Dean's Island, which was between the main channel of the Mississippi river and Barnay's chute, and is a part of the territory of Arkansas, and property of the defendant W. A. Cissna, and ran first
westward, then northward between Dean's Island and the
970 main land of the peninsula and Island 37, then westward
and southward around Island 37, then in a northwestern direction until it came within about two miles of the place where it started northward, and then resumed its general course southward. The main channel of the river was at this time southwest and west of Dean's Island, about one mile or a little less in width. The location of the islands here mentioned and the course of the river are difficult to describe, and can best be seen and understood from an inspection of a map made my Major J. H. Humphreys, a civil engineer, a copy of which is exhibited with complainant's bill and here reproduced.

(Here insert the Humphreys map of 1823.)

The river continued to run between Dean's Island and the peninsula and Island 37 opposite it until March 7, 1878. Considerable changes however, had taken place in its bed at this point in the meantime. The width of the channel, by erosion and caving in of the Tennessee bank south, southwest and west of Dean's Island along the main land and Island 37, had increased from its former width to that of one mile and a quarter or one mile and a half, and a towhead, which seems to be a formation upon the bottom of the river, appearing at times but not always above its surface and neither a towhead, which seems to be a formation upon the bottom of the navigable chute running between it and the island, and a sand ban and mud flats, only seen in very low water, had also formed in the river near the bank of that island, perhaps below the towhead. A steamboat reconnais-ance of the river, under the direction of the War Department of the United States, was made by Captain Suter in 1874, and a map of the place which we are now describing was prepared by him or his assistants and is in evidence. There is no proof of any material changes in the river between 1874 and 1876, and this map, while it is not shown to be altogether correct and accurate, may be said to present the general situation as it existed in the
971 latter year. It is also here reproduced.

(Here insert the Suter map.)

Upon the date referred to, March 7, 1876, the river, suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, then reduced in width to about one mile, which new and shorter channel thus made it continues to occupy to this time. The new channel was called the Centennial Cut off, and the island made by it Centennial Island. The change of the channel, as stated, was sudden and violent, about two thousand acres of valuable cultivated lands were swept away, with the farm houses, gin houses and other improvements upon them, in a few hours, and the inhabitants with difficulty saved their lives and personal property. The old channel around the bend of the elbow was abandoned by the current of the river, but remained, for a few years, covered with dead water, becoming a lake or lagoon. It was no longer navigable except in time of high water for small boats, and this continued only for a short time. The fall in the river around the elbow, from six to eight feet, was all condensed in the one mile of the cut off and made a strong current there. This of course drew the water from the old channel rapidly and greatly reduced its depth. The old bed immediately began to fill with sand, sediment and alluvial deposits, and bars formed in it. It became dry land, cottonwood and willow trees began to grow upon it, and it is now for the most part covered with valuable timber and susceptible of cultivation. It is very valuable, both on account of the timber growing upon it and the fertility of its soil. This suit is brought to recover a portion of the main channel lying between the middle of it, as it existed when the cut off took place, and the Tennessee bank. The claim of the State is, that its sovereignty and territory extended to a line drawn along the middle of the Mississippi river, and that it being a navigable stream, it had title to the lands within its boundaries covered by the waters of the river, and when the waters abandoned the bed, they
972 remained its property, and it is entitled to recover them in this suit.

We will now proceed to consider this boundary of Tennessee and the title which she acquired and has to the lands claimed. The territory constituting the State of Tennessee, with perhaps small areas upon her northern and southern boundaries, acquired by conventions with adjoining states, was originally the western part of the colony and state of North Carolina, and her boundaries are the same as they were before ceded by that state. Charles the Second of England, in the second and effective royal charter of North Carolina granted June 30, 1667, to Edward, Earl of Clarendon and his associates, described the territory granted as "all that portion, territory or tract of land situated and being within our dominion of America aforesaid, extending north and eastward as far as the north end of Currituck river or inlet upon a straight westwardly line of Wyonoke creek, which lies within or about the degrees of 36 and 30 minutes northern latitude; and so west in a direct line as far as the south seas, and south and westward as far as the degrees of 29 inclusive of northern latitude, and so west in a direct line as far as the south seas, together with all and singluar the ports, harbors, bays,

rivers and inlets belonging in the province and territory aforesaid, and also all the soils, lands, fields, woods, mountains, farms, lakes, rivers, bays, islets situate or being within the bounds limits last before mentioned, etc." Cobb & Haywood Compilation, vol. 2, P. L.

The western boundary of the territory granted was then unknown, but extended to the western boundary of the possessions of Great Britain in North America at that period. This boundary was, by the treaty between Great Britain, France and Spain, made in February 1763, fixed irrevocably upon a line drawn along the "middle of the Mississippi river." 3 Jenkinson's Treaties, 177; Iowa v. Illinois, 147 U. S., 2; Louisiana v. Mississippi, 202 U. S. 41. This line was afterwards recognized as the western boundary of the original thirteen states, or those whose territory extended to the Mississippi river, in the treaty made by them with England June 3,
973 1783, 8 Stat. at Large, 81, 82.

Virginia and North Carolina then owned all the territory bordering upon the east bank of the Mississipi river from near its source to the southern boundary of Tennessee, now composing the states of Illinois, Kentucky and Tennessee, and afterwards ceded it to the United States for the purpose of forming new states to be admitted to the Union. North Carolina ceded her part of the territory in December, 1789, and authorized her Senators in the Congress of the United States to convey it, which they did February 25, 1790, and the conveyance was accepted by an Act of Congress passed for that purpose April 2, 1790. The territory ceded and conveyed is described in the cession act and conveyance as follows:

"All right, title and claim which this State, (North Carolina) has to the sovereignty and territory of the lands situated within the chartered limits of this state, west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of said mountain to the place where the Wautauga river breaks through it, thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crossed the Iron mountain; from thence along the extreme height of said mountain to where the Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of said mountain to Painted Rock, on the French Broad river; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of said mountain to the southern boundary of this state." Cobb & Haywood Comp. 7, 8, 9, 10.

The inhabitants of this territory, through their representatives organized as a state and adopted a constitution February 6,
974 1796, which described the territorial boundaries of the new State of Tennessee in the language of the cession act, and this

state with this constitution was by Congress admitted to the Union as a sovereign state, June 1, 1796. The Act of Congress does not define the limits of the state further than to declare that it shall have and be composed of all the territory ceded by North Carolina, and they are therefore controlled by the cession act and the constitution of the state. They are repeated in substantially the same language as in those instruments in the constitutions adopted in 1834 and 1870. The description given in the latter is in these words:

"That the limits and boundaries of this state being ascertained, it is declared that they are as hereinafter mentioned, that is to say, beginning on the extreme height of Stone mountain at the place where the line of Virginia intersects it, in latitude 36 degrees 30 minutes north, running then with the extreme height of said mountain (and then with other mountains therein stated and named) to the southern boundary of this state as described in the act of cession of North Carolina to the United States of America; and that all territory, lands and water, lying west of said line as before mentioned and contained within the chartered limits of North Carolina are within the limits and boundaries of this state, over which the people have the right of exercising sovereignty and the right of sale, so far as it is consistent with the Constitution of the United States, the bill of rights, Constitution of North Carolina, the cession act of said state and the ordinances of Congress for the government of the territory northwest of the Ohio." Constitution, Tenn., Art. 1, Sec. 31.

The general description of the boundaries of the State preceding a specific description contained in the Code adopted in 1858, is in the language of the Constitution. Code sec., 58. In the same chapter, section 67, the boundary between this state and the state of Arkansas is described as follows:

"The western boundary of the state of Tennessee is in the middle of the stream of the Mississippi river, including within the
975 state of Tennessee all such islands as are held under grants from the states of Tennessee and North Carolina."

This section must be construed to mean the same as the cession act and provision of the Constitution, otherwise it is invalid. Congress first authorized the state of Tennessee as its agent to dispose of all unappropriated and ungranted lands within its territory for certain purposes, and afterwards in 1846 released and surrendered to it all right and title of the United States to the lands within the state acquired by them from North Carolina then ungranted and unappropriated.

The state of Arkansas, as well as those of Missouri and Iowa, were part of the territory of Louisiana, owned at various times by France and Spain, and finally acquired by the United States from the former by purchase in 1803. Arkansas was admitted into the Union as a sovereign state by an act of Congress approved June 16, 1836, and its eastern boundary was designated and defined as the "middle of the main channel" of the Mississippi river. This boundary is also embodied in the several constitutions of that state

subsequently adopted. There is no difference between the "middle of the Mississippi river" as the western boundary line of Tennessee is described, and the "middle of the main channel" of that river, as the eastern boundary line of Arkansas is defined. They mean the same thing, and the words "main channel" were evidently intended to make the common boundary more definite by designating the larger channel, where there existed two or more channels on account of the numerous islands to be found in the river. The use of the words "middle of the main channel" could not have been intended to designate a different boundary line than that of Tennessee as it then existed, because Congress had no power to change the boundaries of Tennessee as fixed by it when that state was admitted to the Union in 1796. Constitution, U. S., Art. 4, sec. 3; Louisiana v. Mississippi, 202 U. S., 40.

While complainant and the defendants agree that the western boundary line of Tennessee is as declared and fixed by the treaties and legislative enactments which we have briefly stated, that
976 is, that the middle of the Mississippi river as it ran in 1763 is the line that separates the jurisdiction of Tennessee from that of Arkansas, yet they disagree as to what was meant by the expression "middle of the river" and how it is now to be interpreted. Complainant insists that the contracting parties and legislative bodies establishing this boundary by these words, "middle of the river," meant the middle of the main channel of the river, or a line along the river bed equi-distant from the visible, defined and substantially established banks confining the waters on either side, that is the line between it and Arkansas; while the defendants contend that they meant the center of that part of the waters or stream of the river which is deepest and is usually used by steamboats and other craft plying the river, or in other words, the center of the channel of commerce. This is an important question, affecting the states of Tennessee and Arkansas in their sovereign capacity, and their jurisdiction along this entire joint boundary line, and the decision of this case, since at the point where the water flowed over the lands in controversy the deep water channel used by boats in ascending and descending the river previous to 1876 ran much nearer to one bank than the other, the Tennessee bank, and it is entitled to the most careful consideration by the Court. The defendants insist that under the laws of nations and the weight of decisions of the courts of this country, where a navigable river or the middle of such river is made the boundary line separating coterminous states or nations, the center of the channel of commerce is the true and correct line between them, and that this rule should apply in this case. The state controverts this and maintains that the weight of authority, in such cases, is that the separating line is midway the channel or bed of the river and equidistant from the visible and established banks, within which the waters are confined and flow. The state further insists that not only the general rule is in favor of this contention, but that if it were otherwise it would not be applicable to this case, because the line has been fixed as claimed by it by treaties, legislation,
977 and long usage, acquiescence and possession by the two sovereign states interested, complainant and Arkansas. Be-

fore proceeding to the direct question involved we think it will throw some light on the authorities we will discuss to notice what are the constituent parts of rivers or other streams as defined and used by the courts. In Lux v. Haggin, 69 California, 417, it is said;

"A water course is defined to consist of bed, banks and water. It must be made to appear that the water usually flows through a regular channel with banks or sides. The bed and banks, or the channel, is in all cases a natural object to be sought after, not simply by application of any abstract rule but like other natural objects to be sought for and found by the distinctive appearance it represents. Whether, however, worn deep by action of the water or following the exact depression without any marked erosion of soil or rock; whether distinguished by difference of vegetation or otherwise rendered perceptible, a channel is necessary to the constitution of a water course."

In Benjamin v. River Improvement Company, 42 Mich, 628, it is said that the channel of a river is the passage way between the banks through which its waters flow, and in Larabe v. Cloverdale, 131 Cal., 96, a channel is said to include not only all the channels through which under existing conditions of the country the water naturally flows, but new channels through which it may afterwards flow.

We think from examination of a number of cases bearing more or less upon this subject, that the channel of the river and the bed of the river ordinarily mean the same thing and are understood to describe that depression on the earth's surface in which the waters of the stream are confined and flow in its ordinary stages, unaffected by freshets or droughts. Houghton v. Railroad Co., 47 Iowa, 370; Cessill v. State, 40 Ark., 504; Railroad v. Ramsey, 53 Ark. 314; Stover v. Jack, 60 Penn. 339; Howard v. Ingersoll, 13 How. 381, Alabama v. Georgia, 23 How. 505; Branham v. Turnpike Co., 1 Lea 703; Dunleith & Du Buque Bridge Co. v. Dubuque, 55 Iowa, 558.

978 The precise question we are now considering was before the Supreme Court of Arkansas in 1883, and that Court construed the treaties we have referred to, and the act of Congress admitting Arkansas into the Union, as contended for by Tennessee, and held the line between that state and Tennessee to be the middle of the main channel of bed of the Mississippi river, equidistant from the visible banks confining its waters, and not one along the so-called center of the channel of commerce. The opinion is an able and interesting one, and since it is a decision of the direct question here involved by the highest Court of one of the two sovereign states interest-, in a case to which that state was a party, we quote from it at length. Cessill, the plaintiff in error was indicted and convicted of illegally selling liquor from a boat anchored in the Mississippi river, and appealed. Eakin, J., speaking for the Court said:

"It will be observed that the principle upon which the Court proceeded is, that the line of deepest water in the river bed is the boundary of the state, and continues such as it fluctuates.

The act of Congress admitting the State into the Union, approved June 16, 1836, designated for the eastern boundary "the middle of the main channel" of the Mississippi river, between latitude 36 degrees north, and the north east corner of the state of Louisiana, at a point to be determined by extending the north line of the latter State to the middle of the said channel. This description was embodied in the constitution of 1836, and repeated in that of 1864. It was also adopted in the constitution of 1868, with the explanation that the said boundary should include a certain island known as Belle Point Island. In addition to this, the present constitution provides generally that the state shall embrace "all other land originally surveyed and included as a part of the territory of the state of Arkansas." No question arises in this case upon either of the two qualifications, and the sole matter left for us to decide is this: What is
979 meant by the "Main channel," and what is the middle of it?

The channel of a river, bay or sound is, in boatman's parlance, the course over its bed over which the water is deepest, and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries however, it is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow and which may be at sometimes full and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, in as much as it presents something of a permanent nature, or at least at all times visible; and when changed leaving traces of the old land marks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas channels in the sense of the river pilot are ever shifting, invisible,—discoverable only by patient soundings and then imperfectly. We cannot suppose that such channels would be adopted as state boundaries, or as references to determine them.

The Mississippi river is full of islands, having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within the state by taking the largest of those water conduits as the true river. The middle of the main channel, then, must mean the point or line along the river bed equi-distant from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but in a far less and no very inconvenient degree. Gradual attrition on one side, with accretion on the other, make a change in the permanent banks, might perhaps change the boundary with regard to absolute space. But it is not necessary, for practical purposes, that a boundary should be a fixed mathematical line, and this could only apply to
980 changes in the banks of a channel which remains substantially the same. For if the main body of the water were to find a new channel, and abandon the old one, leaving intervening lands in a natural state, the old boundary would still be ascertainable, and would govern. This has been decided in the case between

Kentucky and Missouri (infra) and results, with regard to surveyed lands, from the additional clause above noted, in the constitution of 1874. It seems that the largest channel determines which is the river and the central line of that makes the state boundary.

The boundary line in question is a very old one, and does not concern this state alone. It originated with the treaty between England, France and Spain in February 1763, which made the middle of the Mississippi river the boundary between British and French territories. This line has been ever since observed in subsequent treaties, in Federal legislation, in state Constitutions and judicial decisions, and there are not lacking unmistakable indications of the meaning of the middle of the river. For instance, in the treaty between the United States and Spain, in October 1795, before our purchase of Louisiana, the fourth article provides "that the western boundary of the United States, which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said states to the completion of the 31st degree of latitude north of the equator.'

In the case of Myers v. Perry et al., 1 La. Ann., which resulted from a steamboat collision on the Mississippi, it became necessary to ascertain the locus in quo as affecting jurisdiction between the states of Louisiana and Mississippi. The middle of the river was taken as the boundary line, without any reference to depth of the water. See also, on the same subject, a case very replete with historical learning, that of Morgan & Harrison v. Reading, reported in 3 Sm. & Mar., 366, in which this great empire boundary is
981 described, with reference to the treaty of 1763, as "a line drawn along the middle of the Mississippi." This would not be a good description of a steamboat track, zigzagging from bank to bank amongst sand bars in low water."

"In the case of Missouri v. Kentucky, 11 Wall. 395, which was a contest between states for jurisdiction over Wolf Island, in the Mississippi, Mr. Justice Davis said that by virtue of the treaties above named, together with the treaty of peace with England in 1783, the ancient right of Virginia, to which Kentucky had succeeded, extended to the middle of the bed of the Mississippi river.

"It seems that where there are several channels, the principal one is considered the river, and in this the medium filum makes the boundary.

"There was only one channel in this case, which was the river bed between the Arkansas and Tennessee shores at Osceola. The Court and attorneys treated the case throughout as if the channel meant the line of the deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1784, no question could arise as to change of channel. The instructions asked by the defense were erroneous, but those given for the state were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee

main bank, and to have found the defendants guilty or innocent accordingly."

Cessill v. State, 40 Ark., 501.

We concur fully with the Supreme Court of Arkansas in the construction given the treaties of 1763 and 1783 in that opinion and hold, as held by that Court, that the boundary line between the British possessions in America, which then included all the territory now composing the states bordering upon and having for their western boundary, the Mississippi river, and the terri-
982 tory of Louisiana then belonging to Spain, was fixed and defined as a line along the middle of the main channel of the river, equidistant from the visible and permanent banks confining its waters, and that the several acts of Congress admitting into the Union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties and must be construed to mean the same thing. This question has not before been before this Court, but in a case involving property rights upon an unnavigable stream called for as a boundary line of private estates it was held that "the thread of the stream is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary state of the water, at medium height, neither swollen by freshets nor shrunk by drouths." Branham v. Turnpike Co., 1 Lea 706. The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating the State from Arkansas is as defined in the case of Cessill v. State, supra. This appears from an act of the General Assembly of the state approved April 15, 1903, chapter 420, Acts of 1903, in which the lands in controversy and all others lying upon the Tennessee side of the middle of the old bed of the river are declared to be the property of the state, and the Governor authorized to appoint commissioners to act with other commissioners to be appointed by the state of Arkansas, to run and mark the line, and also to report to the Governor the extent and value of such lands. The General Assembly of Arkansas passed a similar act but it was vetoed by the Governor of that state and therefore no commissioners were appointed under the act passed by the Legislature of Tennessee. This suit was brought by direction of the Governor of this state, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary
983 line, or the Acts of Congress admitting other states bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them, and controlling in this and other cases involving the question.

These same treaties, we have seen, which define the common boundary line of all the states bordering upon both sides of the Mississippi river, and in connection with the acts of Congress ad-

mitting those states into the Union, have been frequently construed by other courts, and in every case that has been called to our attention, with two exceptions, all these courts have concurred with the conclusions reached in the case of Cessill vs. State, supra.

The boundary line separating the states of Louisiana and Mississippi, Missouri and Kentucky, Missouri and Illinois, and Iowa and Illinois, where the Mississippi flows between them, is defined in the several acts of Congress admitting these states into the Union, in words similar to those defining the line between Tennessee and Arkansas, that is, "the middle of the Mississippi river" or "the middle of the main channel of the river." We have seen from cases cited in the opinion of the Court in Cessill v. State, supra, of Myers v. Perry, 1 La. Ann., and Morgan & Harris v. Redding, 3 Sm. & Mar., that the Supreme Courts of Louisiana and Mississippi have both construed the treaty of 1763, and the acts of Congress in relation to it, to define and fix the line equi-distant from the banks of the river. The Supreme Court of Iowa has so held in a case involving the line between it and the state of Illinois. In relation to what is meant by the middle of the channel it is there said:

"The course of navigation, which follows what boatmen call the channel, is extremely sinuous and ofter changing, and is unknown except to experienced navigators. On the other hand the bed of the main river, designated by the word channel used in its primary sense, is the great body of water flowing down the stream; it is broad
984 and well defined by islands or the main shore. It cannot be possible that Congress and the people of the state in describing its boundary used the word channel to describe the sinuous, obscure and changing line of navigation rather than the broad and distinctly defined bed of the main river. The center of this river bed channel may be readily determined, while the center of the navigable channel often could not be known with certainty. The first is a fit boundary line of a state, the second cannot be." Dunleith and Dubuque Bridge Co., vs. Dubuque County, 55 Iowa, 558.

The case of Missouri vs. Kentucky, 11 Wall. 395, involved a question of the jurisdiction over Wolf Island in the Mississippi river. Construing the treaty of 1763 between England, France and Spain, Mr. Justice Davis, speaking for the Court, said:

"It is unnecessary for the purposes of this suit to consider whether on general principles the middle of the channel of the navigable river which divides coterminous states is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain and England in February 1763, stipulated that the middle of the Mississippi river should be the boundary between the British and French territories on the Continent of North America. And this line established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of Peace with Great Britain in 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into

the Union as a state in 1820, were fixed on this basis, as were those of Arkansas in 1836. And Kentucky succeeded in 1792 to the ancient right and possession of Virginia, which extended by virtues of those treaties to the middle of the bed of the Mississippi river."

985 The act of Congress passed April 18, 1818, enabling the people of the territory of Illinois to adopt a constitution and organize a state, defined the western boundary of the state as follows;

"starting in the middle of Lake Michigan, at north latitude 42 degrees 30 minutes, thence west to the middle of the Mississippi river, and thence down the Mississippi river to its confluence with the Ohio river."

The case of St. Louis v. Rutz, 138 U. S., 228, was brought to recover an island in the Mississippi river and involved the location of the line separating the states of Missouri and Illinois. The island was found to be upon the eastern side of the center of the main channel and bed of the river, and the decree was for the defendant. It is there said;

"As the law of Illinois confers upon the owner of land in that state which is bounded by or fronts on the Mississippi river, the title in fee to the bed of the river, to the middle thereof, or so far as the boundary of the state extends, such riparian owner is entitled to all the lands in the river which are formed on the bed of the river or of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, in the State of Missouri, to extend his ownership by mere accretion to land situated in the state of Illinois, the title in fee to which is vested by the law of Illinois to the riparian owner of the land in that state."

In the cases of Jones v. Soulard, 24 How. 41, and St. Louis Public School v. Risley, 10 Wall. 91, it is held, that under the act of Congress admitting Missouri to the Union and defining its eastern boundary as the middle of the main channel of the Mississippi river, the line was the middle of the river, without any reference whatever to where the channel of commerce ran, and presumably to a line midway between the established banks of the river.

In the cases of Nebraska v. Iowa, 143 U. S. 359, 367, and Missouri v. Nebraska, 196 U. S. 23, both of which involved contro-

986 versies of jurisdiction growing out of sudden and violent changes made by the Missouri river in its channel similar to the one made by the Mississippi in this case, it was held that the boundary line between the commonwealths, which were parties to those cases respectively, remained fixed in the center of the old river bed, thus in effect holding that previous to the avulsions by which the channel of the river was changed the state line was the middle of the channel, that is, a line midway between the banks of the river. In the case of Nebraska v. Iowa, 143 U. S. 361, the following quotation is made, with approval, from the opinion of Attorney General Cushing in a matter of dispute between the United States and Mexico

as to the international boundary at the place where the Rio Grande had made a change in its channel;

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territories the river thus breaks its way suffers injury by loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running watter bearing a certain geographical name, but because it is water flowing in a given channel and within given banks, which are the real international boundary."

The only cases that have been called to our attention supporting the contention of the defendants are those of Buttenuth v. St. Louis Bridge Co., 123 Ill. 535, and Iowa v. Illinois, 147 U. S. 1, both involving the line in the Mississippi river separating the states of Iowa and Illinois. The former was decided first, and is cited and approved in the latter. Mr. Justice Fields, delivering the opinion of the Court, says;

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the
987 jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all well recognized treaties on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state on its side will exercise jurisdiction. In international law therefore, and by the usage of European nations, the term "middle of the stream" as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his Elements of International Law, 8th Ed. sec. 192) says; 'Where a navigable river forms the boundary of coterminous states, the middle of the channel, or Thalweg, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long, undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.'

And in sec. 202, while thus stating the rule as to the boundary line of the Mississippi river being the middle of the channel, he states that the channel is remarkably winding, 'crossing and recrossing perpetually from one side to the other of the general bed of the river.'

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Mr. Creasy, in his First Platform of International Law, sec. 231, p. 222, expresses the same doctrine. He says;

988 'It has been stated that, where a navigable river separates neighboring states, the Thalweg, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the river, the medium filum aquæ, was regarded as the boundary line; and still will be regarded prima facie as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the medium filum. Where this is the case, the middle of the channel of traffic is now considered to be the line of demarcation.' "

And after citing several other works on International Law, proceeds:

"The reason and necessity of the rule of international law as to the mid channel being the true boundary line of a navigable river separating independent states may not be cogent in this country, where neighboring states are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "mid channel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67) under which Illinois adopted a constitution and became a state and was admitted into the Union made the middle of the Mississippi river the western boundary of the state. The enabling act of March 6, 1820, (3 Stat. c. 22, sec. 2, p. 545) under which Missouri became a state and was admitted into the Union, made the middle of the main channel of the Mississippi river the eastern boundary, so far as its boundary was coterminous with the western boundary of Illinois. The enabling act of August 6, 1846 (9 Stat. 56, c. 89) under which

989 Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state after reaching the river St. Croix, as follows: 'Thence down the main channel of said river to the Mississippi, thence down the center of the main channel of that (Mississippi) river to the northwest corner of the state of Illinois.' The northwest corner of the state of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, 'middle of the Mississippi river,' and 'middle of the main channel of the Mississippi river,' and 'center of the main channel of that river,' as thus used are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi river separating Illinois from Iowa, should have a different meaning when applied to the Mississippi river separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing."

He then quotes extensively from the case of Dunleith & Dubuque

Bridge Co. vs. County of Dubuque, supra, and Buttenuth vs. St. Louis Bridge Co., supra, and concludes:

"The opinions in both these cases are able, and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of the opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus, the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid channel', and if there be several channels, to the middle of the principle one,
990 or rather the one usually followed."

This case is in direct conflict with the previous cases of Missouri v. Kentucky, St. Louis v. Rutz, Jones v. Soulard, St. Louis Public School v. Risley, and Nebraska v. Iowa, above cited, which involved practically the same question, and the first four construed the same treaties and acts of Congress. They are not differentiated, over-ruled, or even referred to in the case of Iowa v. Illinois. The decision in these cases is based upon the proper construction of the treaties and acts of Congress admitting the states into the Union, and not upon the laws of nations. We are better satisfied with the reasoning of these cases than we are with that of the last one, and prefer to follow them. We think they correctly construe and interpret the treaties and legislation controlling and defining the boundary lines of the coterminous states upon the Mississippi river according to the intention of the powers making the treaties, and of Congress in admitting those states into the Union.

The case of Iowa v. Illinois was decided avowedly upon the rules of international law, and was not a construction of the treaties defining the boundaries under consideration with a view of ascertaining the intention of the parties making them, and the controlling consideration with the Court in the application of the rules of international law to the case was the preservation of equality in the right of navigation to the river to the coterminous states.

There is much conflict in the opinions of text writers upon the law of nations upon this question, but the weight of authority is that at the time the treaties in question were made, in the absence of a convention establishing it otherwise, the true boundary between nations bordering upon navigable waters was a line midway between the visible and fixed banks of the stream. Mr. Creasy, in his work on International Law, the chief authority cited by the Court in Iowa v. Illinois, says that "formerly the line drawn along the middle of the water, the medium filum aquae, was regarded as the boundary line; and still will be regarded prima facie as the boundary,
991 line except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the medium filum."

It will not be amiss here to call attention to what Mr. Angell in his work on Water Courses, says upon this question:

"By the middle of the channel is meant the thread of the stream, the filum aquae; that is, the middle line between the shores upon each side without regard to the channel or lowest parts or deepest parts of the water. In ascertaining the shores the water line on each side to measure it will be to find where these lines are when the water is in its natural and ordinary stage, at medium height, neither swollen by freshets nor shrunk by drouths."

Another author says:

"A river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks and running in such and such channel, hence there is water having a bank and a bed over which the waters flow in its channel, meaning by the word channel the place where the river flows, including the whole breadth of the river."

Grotious, chapter 2, p. 18.

We think some confusion has arisen both in the text books and in the decisions in relation to this matter by failure to properly differentiate these cases where the are several channels caused by the existence if islands in the stream, where it is held that the line is the center of the main channel, meaning the largest division of the river at that place, from those where there is only one channel to be followed.

We do not deem it necessary however, to enter into a discussion of the laws of nations upon the subject.

Whatever may be the general rule, we do not think it applies or is controlling in this case. General rules of international law cannot be invoked when the matter in question has been settled by the parties in interest otherwise, either by agreement, convention, acquiescence, or long and undisturbed occupancy and possession. Twiss International Law, 127; 1 Halleck International Law, 50.

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We do not think the high contracting parties to the treaty between Great Britain, France and Spain, made in 1763, in which the line separating the British possessions in North America and the territory of Louisiana, defined to be the "middle of the river" meant a channel of commerce as it varied and shifted from side to side of the stream, but a line midway between the banks. We understand from Mr. Creasy, as above quoted, that at that day the call for a navigable stream as the boundary line between two nations was construed to be the middle of the bed of the river—a line equidistant from the respective banks, and will be regarded prima facie so at this day. When these treaties were made the country along the banks of the Mississippi river above the city of New Orleans was practically unknown and uninhabited, save by the Indians. The river was not navigated. There were no boats upon the river, and its various windings had not been surveyed or mapped, nor its depth sounded. There was no known fixed channel of commerce in the river. Had a question of jurisdiction arisen under the construction of the treaty given in Iowa v. Illinois, it would have been

impossible to determine whether the occurrence took place within the territories of Great Britain or those of France or Spain. We think, considering the then existing conditions, every presumption is that the parties intended the middle of the channel between the banks which control the waters of the stream, the bed of the river, should be the line separating their respective territories. The banks were visible, and a line midway between them could be ascertained when occasion required it. No channel of commerce existed, and a line in the center of it could not possibly be located. The first constructions of these ancient treaties were in accordance with the contention made by Tennessee in this case. In the treaty made by the United States with Spain in October, 1795, before the purchase of Louisiana, the 4th Article provided "that the western boundary of the United States which separates them from
993 the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said states to the completion of the 31st degree of latitude north of the equator." Cessill v. State, 40 Ark. 505. This was not only an interpretation of the former treaties but it supreseded them. The decisions of all the courts of last resort of the several states, as well as those of the United States, involving this boundary line, with the exception of those of Buttenuth v. St. Louis Bridge Co., supra, and Iowa v. Illinois, supra, have been favorable to the contention that the line runs midway between the banks of the river, and it is only at a late day by those cases, that a doubt was suggested or arose as to the true and correct line which formerly separated the British possessions in America from those of France and Spain, and subsequently a number of the largest and most influential states of the Union. The former construction has become a rule of property and should not be disturbed. We are not impressed with the argument that it is necessary to hold the line to be along the so called channel of commerce in order to preserve to the several states interested in the question equality in the right of navigation of the river. We do not think such necessity exists. Where a navigable river constitutes the boundary between two states—the middle of the channel separating their respective jurisdictions, both are presumed to have free use of the whole of it for the purposes of commerce. The whole river is of right common to both nations as a public highway. The Appollon, 9 Wheaton, 362-361; Handley v. Anthony, 5 Wheaton, 374; Wharton Int. Law Digest, sec. 30; Gould on Waters, 202; Wheaton Int. Law, sec. 192-193; the free navigation of the Mississippi river by citizens of the United States expressly provided for and preserved in the treaty made by the United States with Great Britain in 1783, and again in that made by the United States with Spain, October 27, 1795. The right of the citizens of the several states of the Union to navigate the waters of this river has been frequently declared by acts of Congress; it is asserted in the constitutions of all the states bordering upon its waters, and is so well established
994 that no possible apprehension can be entertained that it will be interfered with. Acts of Congress of May 18 and

June 1, 1796; March 3, 1793; March 26, 1804; Feb. 20, March 3, 1811; April 8, June 4, 1812; March 1, May 8, 1817; Gould on Waters, sec. 68; Constitution Tenn., 1870, Art. 1, sec. 29.

The commerce clause of the Constitution of the United States, all other things aside, affords ample protection to the right of every citizen to the free navigation of the river whether the current be in one state or another, without fear or hindrance of burdens imposed by such states. There can be no doubt of this.

The reasons for having a fixed, certain and visible line, such as the middle of the channel as measured from the respective banks of the river, we think, greatly outweigh those advanced in support of the decision of the case of Iowa v. Illinois. It is of the highest importance to the adjoining states that the location of the boundary line between them be certain, and susceptible of easy proof, otherwise they will be greatly embarrassed in the enforcement of their criminal laws, the assessment and collection of taxes, and many other things in the ordinary and common exercise of sovereignty. It is easy to conceive cases where so much doubt could be thrown upon the location of the channel of commerce that the jurisdiction of either state to punish crime committed upon the river would be entirely defeated.

But the question has been settled by the duly constituted authorities of Tennessee and Arkansas by judicial decisions, legislation and other authorized official actions, long acquiescence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention. The highest Court of Arkansas in a case to which the state was a party, and at its instance, in the assertion of its sovereignty and jurisdiction, has defined the limit between the two states to be the line midway between the visible banks of the river, and enforced the criminal laws of the state up to that line. The General Assembly of Tennessee has claimed title to the lands formerly covered by the waters of the river up to the same line, and the Governor of the State has directed and authorized
995 that the proper officers institute this suit to recover such lands. Both states agree upon it as the true and correct line separating their territories, and others cannot be heard to complain. Such a course of conduct has been held to be conclusive upon states in controversies concerning their boundaries. Indiana v. Kentucky, 136 U. S., 479. Tennessee is now before this Court as a suitor asserting that her western boundary line lies midway between the visible banks of the Mississippi river. Arkansas as a suiter in the case of Cessill v. State, supra, asserted that her eastern boundary line ran at the same place, and exercised jurisdiction to such line. This is binding upon both states, and neither can now recede from such solemn admissions of the location of the line separating them.

Tennessee acquired title to all the soil under the waters of the Mississippi river to the limits of her jurisdiction. It is well settled law that soil under the waters of navigable rivers, as well as the waters, are held by the states for the use and in trust of the public, so long as the river continues navigable.

The United States has always recognized this rule in its disposition of the public domain. The grants made by it lying upon navigable streams to private parties are limited by high water mark, and the soil between that and the rivers and under their waters vested in the states in which it lies. The states, however, may dispose of this property as they may allow, subject to the general control of Congress over all navigable waters, this being a matter within their discretion and governed by the State authorities.

In Hardin v. Jordon, 140 U. S., 351, 352, the title of the state to the soil under navigable waters within their boundaries, and their right to control and dispose of the same, before and after abandoned by the waters, is held and stated in these words:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of the lands so granted enures to the state within which they are situated, if a state has been organized and
996 established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Weber v. Harbor Commissioners, 18 Wall. 57. Such title being in the State the lands are subject to state regulation and control, under the conditions however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See Manchester v. Massachusetts, 139 U. S. 240; Smith v. Maryland, 18 How. 71; McCready v. Virginia, 94 U. S. 391; Martin v. Waddle, 16 Pet. 367; Den v. Jersey Co., 15 How. 426.

The right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

997 In Tennessee it has uniformly been held that grants to lands lying upon navigable streams extend to ordinary low water mark only, and that the title to the bed of the stream remains

in the state. Martin v. Nance, 3 Head 646; Posey v. James, 7 Lea 209; Goodwin v. Thompson, 15 Lea 209; Holbert v. Edens, 5 Lea 204; Stockley v. Cissna, 119 Fed. Rep. 829; Taylor v. Commonwealth, 102 Va., 759; Holman v. Hodges, 50 L. R. A. 73.

In the case of Holbert v. Edens, supra, it is said:

"If a water course be navigable in a legal sense the soil covered by the water as well as the use of the stream belongs to the public."

In the case of Goodwin v. Thompson, 15 Lea, 215, this Court held not only that the soil in navigable streams belonged to the state but that it was not subject to entry or grant as other lands, the statute providing for disposition of public lands not authorizing such grants. In that case it is said:

"We think the public use of our navigable rivers imperatively requires that the soil under the water should be in the state in trust for the public, and that title to the soil under such terms was not intended to be secured by individuals under our general land laws, and that any person setting up claim thereto must be able to show an express legislative grant."

It is also well established law that when the waters recede or land is formed upon the bed of navigable rivers, as in case of islands forming in navigable waters, the property in such dry land is in the state, to be disposed of by it as its authorities may determine and direct. Morris v. Brooks, (Del.) 53 Am. Rep. 215; Hardin v. Jordon, 140 U. S. 351, 352; Packer v. Byrd, 137 U. S. 666-672; 2 Black Com. 261; 11 Am. & Eng. Enc. Law, 1 Ed. 865.

The case of Moris v. Brooks is an instructive one, and the conclusions of the Court well supported by authority. We quote from it:

"New islands arising in the sea or in a navigable river prima facie belong, according to the common law, to the King, in England, and in this country to the State. But this rule is not uni-
998 versal.

"The right to the new islands and also to lands gained by alluvion or dereliction (in cases where they are not gained by insensible degrees), all of which are governed by the same principles, follows the right to the soil which is covered with water. As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative.

But where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments. (2 Bl. Com. 262); (Hale de Jure Maris, Chap. 4 and 6).

This is illustrated by the law relative to islands arising in private rivers. If an island arises in the middle of such a river, it belongs in common to those who have lands on each side thereof, but if it be nearer to one bank than to the other, it belongs only to him who is proprietor of the nearest shore. Yet this, says Sir William Blackstone (2 Com. 261) seems only to be reasonable where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is in the freehold of any one man, as it

usually is, wherever a several fishery is claimed, there it seems just (and so is the constant practice) that the lyotts, or little islands arising in any part of the river shall be the property of him who owneth the piscary and the soil. The rules relative to the sea and navigable rivers are formed on the same principles.

This subject is very satisfactorily explained by Lord Hale in his treatise de Jure Maris, chaps. 4 and 6, to the whole of which I generally refer for the proof of the rule I have stated, that the right to a new island follows the right to the soil on which it was formed. This will be found from those chapters to be the rule with regard to all maritime increments. I will state here a few passages from them: "If a subject hath had by prescription the property of a certain tract, or creek or navigable river, or arm of the sea,
999 even while it is covered with water, by certain known metes and extends, tho- it shall be relicted, the subject will have the propriety in the soil relicted." Harg. Law Tracts, 15. "If a subject hath land adjoining the sea, and the violence of the sea swallows it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quality and bounding upon the firm land, the same can be known, though the sea leave the land again, or it be regained by art or industry, the subject doth not lose his property; and accordingly it was held by Cooke & Fister, M/7 Jac., C. B., though the inundation continue for forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear." Ibit. 15.

The case of the town of Shinbridge in 18 H., 3, is stated in p. 16. 'The river of Severn had gained upon the Town of Shinbridge so much that its channel ran over part of the Shinbridge lands, and lose part thereof unto the other side (Aure), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it at all claimed by the king, though Severn be in that place an arm of the sea; but it was restored to Shinbridge as before. The propriety of the soil was not lost to the owners who had it before.'

'The soil under the water must needs be the same propriety as it is when it is covered with the water. If the soil of the sea while it is covered with water be the king's, it cannot become the subject's because the water has left it. But when the land, as it stood covered with water, did by particular usave or prescription belong to a subject, then recessus maris, so far as the subject's particular interest went while it was covered with water, so far the recessus maris, vel barchii ejusdem, belongs to the same subject."

We think it may be considered as settled that the soil under the Mississippi river, to the western boundary of the state belongs to complainant, and that whenever it is abandoned by the water flowing over it and no longer suitable or required for the pur-
1000 poses of commerce and navigation, when not done imperceptibly and in the process of accretion, may be taken in possession and disposed of by the state as her authorities may see fit.

The change made by the river March 7, 1876, in its channel, did not alter the boundary line separating complainant and Arkansas,

or affect the respective rights of those states or those of the owners of lands abutting upon the river in the abandoned channel or bed. The channels of the rivers and other streams and bodies of water may and do become changed and their physical location altered by the forces of nature operating upon their shores or banks. When the change is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore it is said to be by erosion and accretion. When it is made suddenly and violently and is visible and the effect certain, it is called avulsion. Where the boundary lines between individuals as well as states and nations are marked by streams, and the location of the stream is altered by erosion and accretion it continues to be the boundary line, but where the alteration occurs as the result of an avulsion no change is made, but the limits of the private estates or national territory and jurisdiction remain as before. These principles are well settled at common law and have been frequently applied by the courts of the various states and those of the United States. All the authorities in relation to this doctrine were reviewed by Mr. Justice Brewer in the great case of Nebraska v. Iowa, 143 U. S. 360, a case involving a dispute between those states concerning their joint boundary line where the Missouri river, which marked the limits between them, had, in time of a great freshet, suddenly made a change in its channel similar to that in this case, across the neck of a bend therein, in the form of an ox bow, which was held to be an avulsion, and to leave the line between the states in the center of the old channel or bed of the river where it had previously existed. This case is so exhaustive of the subject and ably considered that we make no apology for quoting from it at length. It is there said:

1001 "It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, altho, during the years, by this accretion, the actual area of his possession may vary. In New Orleans v. United States, 10 Peters 662, 717, this Court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' (See also Jones v. Soulard, 24 How. 41; Banks v. Ogden, 2 Wall. 57; Saulet v. Shepherd, 4 Wall. 502; St. Clair County v. Lovingston, 23 Wall, 46; Jefferies v. East Omaha Land Co., 134 U. S. 178.)

It is equally settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid

change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limit of the two estates.' 2 Bl. Com. 262; Angell on Water Courses, sec. 60; Trustees of Hopkins Academy v. Dickinson, 9 Cuch. 544; Buttonuth v. St. Louis Bridge Co., 123 Ill. 535; Hagan v. Campbell, 8 Porter (Ala.) 9; Murry v. Sermon, 1 Hawks (N. C.) 56.

These propositions which are universally recognized as correct where the boundaries of private property touch on streams,
1002 are in like manner recognized where the boundaries between states or nations are, by prescription or treaty found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on the boundary but leaves it in the center of the old channel. In volume 8, Opinions of Attorneys General, 175-177, this matter received exhaustive consideration. A dispute arose between our government and Mexico, in consideration of changes in the Rio Brava. The matter having been referred to Attorney General Cushing he replied at length. We quote largely from that opinion. After stating the case he proceeds;

'With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation on the other, that is, by gradual, and as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which happening gradually is inappreciable in the successive moments of its progression.

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of
1003 the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel and within given banks, which are the real international boundary.

Such is the received rule of law of nations on this point, as laid down by the writers of authority. (See ex. gr. Puffend. Jus. Nat. Lib. lv., cap. 7, s. ii; Gundling, Jus. Nat. p. 248; Wolff, Jus. Gentium, s. 106-109; Vattell, Droit des Gens, liv. 1, chap. 22, s. 268,

270; Stympanni, Jus. Marit. cap. v/n/476-552; Rayneval, Droit de la Nature, tom. 1, p. 307; Merlin, Repertoire, ss. voc. alluv.'

Further reference is made in the opinion to many authorities, among them Vattell, who states the rule thus, (Book 1, c. 22, secs. 268, 269, 270);

"If a territory termination on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (territoria Arcifinia), and it enjoys the right of alluvion; that it is to say, every gradual increase of soil, every addition, which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it be given me on that footing, I thus acquired beforehand the right of alluvion; and consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly' because in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case, when it happens between individuals and individuals; they ought to unite equity with the welfare of the state, and the care of preventing litigations."

1004 This full and able presentation covers all the law upon the subject of accretion and avulsion, and it seems useless to further discuss it, but we will cite some other cases in which the same doctrine is announced and applied: Moss v. Gibbs, 10 Heisk, 283; Posey v. James, 7 Lea 98; Stockley v. Cissna, 119 Fed. Rep. 812; Missouri v. Kentucky, 78 U. S., 410, Missouri v. Nebraska, 186 U. S. 23; Indiana v. Kentucky, 136 U. S. 508, Rees v. McDaniel, 115 Mo. 145; Holbrook v. Moore, 4 Neb. 437; Collins v. State, 3 Tex. C. T. App. 323; Buttenuth v. St. L. Bridge Co., 123 Ill. 546.

We have in the light of these authorities no hesitancy in holding that the change made in its channel by the Mississippi river in 1876 at Centennial Cut Off was an avulsion, and the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel. The cut off or formation of the new channel worked a great and important change in the course of this great river, shortening its length nearly twenty miles, driving the owners of nearly two thousand acres of valuable cultivated lands from their property, washing away the surface and occupying it as a bed for its waters, and so affecting the old channel that it necessarily filled up in the usual way of beds of rivers abandoned by the stream and became dry land. At the same time it separated from the other portions of Tennessee a large part of a civil district of one of its counties. The change was visible, and the ultimate effects certain and inevitable. It was accompanied with great and uncontrollable force and violence and occurred in less than two days, a remarkably short

time when the importance of its effects and results are considered. The change was complete. It began Friday morning and before the next Sunday morning a channel of the usual width of the river, about one mile wide, had been washed out and a steamboat passed through it that day in the usual course of navigation of the river. What had before been the channel of a great river, and a highway of the nations, became a lagoon, and slough. It is difficult
1005 to conceive of a stronger or more conclusive case of avulsion, both in respect to the new channel thus made and the old one abandoned.

We are now to determine where the line between Tennessee and Arkansas should be located at the place where the lands sued for lie and are bounded by it. We are of the opinion that the true and correct line is midway between the banks of the river as they existed in 1823, as shown by the map of Major J. H. Humphrey. We are led to this conclusion by the following considerations.

We have seen that the line between the states was midway between the banks of the river as they existed in 1763. There is no direct evidence where they then were and none can now be obtained. The earliest record of the location of the banks of the river is as they were in 1823, or between that date and 1830. The territory now composing the state of Arkansas was then a territory and the lands belonged to the United States. Those bounded by the Mississippi river at the point in question, including Dean's Island, were surveyed and laid off into townships and sections, and these surveys and maps then made are now of record in the General Land Office of the United States. The lands upon the Tennessee side of the river, including what is now known as Centennial Island and Ireland 37, which are directly opposite Dean's Island, were granted by the State of Tennessee under the authority vested in it by Congress to various individuals, between 1822 and 1830. These grants and the entries and surveys upon which they were made are found in the proper offices of Tennessee. These surveys, covering both sides of the river, included all the lands there lying. They called for and adjoined each other, and other grants lying back of and behind them upon the main land. The original corners, landmarks and lines are known and can be pointed out by those residing in the neighborhood. Major J. H. Humphreys, a competent civil engineer, surveyed the townships and sections upon Dean's Island and the grants made by Tennessee upon Centennial Island and Island 37, and has constructed a map showing how all of the several tracts lie, and their location in respect to the banks of the river upon both sides,
1006 as they were originally surveyed. The width of the river between these banks was not shown in the original grants and surveys, but when all the lines of the townships and grants were run and located upon the premises, it was an easy matter to measure the distance between those lines and thus ascertain it.

The correctness of the survey of Major Humphreys is not seriously controverted in this record, and we do not think it could be. It was evidently made in a careful manner and is accurate and correct. The defendant Cissna concedes in his plea that this was the situation

in 1823. The presumption is in favor of the permanency of boundary lines, and the burden of proof is upon the party averring that the location of a line has been changed by the action of the forces of nature. The defendant has undertaken to prove that a change took place in this case by accretion to Dean's Island, and erosion upon the opposite Tennessee bank. Their exact contentions are that by erosion upon the banks of what are now Centennial Island and Island 37, and accretion to the banks of Dean's Island, since 1823, both before and after the cut off in 1876, the middle of the river and the line separating the two states had advanced gradually westward towards the Tennessee bank, and that at the time of the cut off the middle of the river was where the eastern boundary line of the Huddleston and Trig lands had been before they were washed away and became a part of the bed of the river, and, that being the boundary between the two states, complainant can recover nothing east of it, and having previously granted that portion of the channel covering the Huddleston and Trigg lands, it cannot recover that, because those who hold under the original grants are entitled to such lands since restoration or reappearance, caused by the abandonment of the channel by the waters, and therefore the bill of complainant must be dismissed. We will dispose of these contentions in the order they are stated.

The great volume of the testimony introduced in this case by both parties was for the purpose of proving that the channel of the river at that place where the lands sued for now lie, in-
1007 creased in width since 1823 and prior to 1876, and the extent of such increase; and by the complainant to prove that no accretions had formed upon Dean's Island after 1823, and by the defendants that the area of the island had in this way, since that date, been greatly increased and extended westward. Witnesses were examined who had lived and owned lands in the vicinity of the premises in dispute for many years before and after 1876, others who had navigated boats upon the river as captains and pilots during that period, and whose duty it was to be familiar with the river, its banks and channel, and still others who had never seen or known the premises until after the abandoned bed had filled up and had overgrown with timber. The chart made of the survey of Colonel Suter in 1874, and others made by authority of the War Department between 1878 and 1884, of the river, were introduced; and a number of civil engineers including Colonel Suter, who testified in the case, and undertook to read and interpret them. These witnesses differed considerably in their reading of the charge and what they show the condition of the premises to have been when the surveys upon which the charts are predicated were made. We will not undertake to analyze all this evidence. It would serve no good purpose, and only unreasonably extend the length of this opinion. We will only state the ultimate facts which we find to be established.

When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, much more immediately south of that island than west of it where the premises sued for are situated. While there is some

conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank. This we think, is clearly established, by the testimony of the witnesses who had resided upon the lands in the neighborhood,
1008 and especially upon Centennial Island and Island 37, and of captains and pilots of steamboats navigating the river for many years previous to 1878, when the change in the channel took place. The lands lying upon the river, on Centennial Island and Island 37, were originally granted to Simon Huddleston,—Chalmers and John Trigg. John Trigg had two grants, one for thirty seven acres and one for one hundred and fifty two acres, lying immediately north of the first tract. A considerable portion of the eastern parts of the Huddleston grants, all of the Trigg thirty seven acre tract and nearly all of the tract of a hundred and fifty two acres, and a part of the Chalmers tract, had been washed away, and the channel of the river at that time flowed, to that extent, over them. The location of these lands and their relative position to the river as it flowed in 1823 will be seen by inspection of the map of Major Humphreys. The eastern bank of the river, lying on the Tennessee side at this point, was rather a high bank, and when the cut off took place and the current of the river was changed and no longer flowed against this bank, erosion upon it ceased and no change was subsequently made in it. It can now be seen and its identity and location are conceded. The lands between this bank and the bank of Dean's Island as it was in 1823, which is also located with reasonable certainty, is all now dry land covered with timber, and as before stated, is now the subject of this controversy.

We do not think that there were any accretions to Dean's Island previous to 1876. This is also clearly established by the evidence of witnesses who were living in the neighborhood and navigated the river immediately preceding the cut off, and were thoroughly familiar with the situation as it then existed. They testify from their own observation and knowledge of the facts. They all state that while the towhead had appeared south and southwest of Dean's Island, and near and below it a sandbar and mud flats had formed, which were beneath the surface except in times of very low water, and that no land had formed along the banks of the island; that in medium stages of the river boats run over this bar and these flats and along the west and south banks of Dean's Island, and through the channel between it and the towhead, and that this was
1009 done by the largest boats then navigating the river. It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than, the erosions upon the Tennessee bank, and therefore there was no room for any accretions to the Arkansas bank. These are facts clearly established in this record, and to our minds they demonstrate that in 1876 there had been no appreciable change in the banks of Dean's Island since 1823.

Much stress is laid upon the chart made in 1874, under the direction of Colonel Suter, and his interpretation of the topographical

signs and tracings appearing upon it, tending to establish that at that time there was timber growing upon what is shown on the chart to be bars and banks in the river. Complainant also examined civil engineers who undertook to interpret these maps and state what they showed in relation to accretions upon Dean's Island and the width of the river at the time they were made. This evidence is not entitled to very great weight. The chart is not the result of a careful survey of the river and its banks, but, in the main, from an inspection of it made from the deck of a steamboat. It is a mere steamboat reconnois-ance. Colonel Suter describes it as follows:

"I was assigned to what was called the transportation routes of the seaboard, and the part assigned to me was the Mississippi river from Cairo to the Gulf. In the summer of 1874—the summer and fall of that year—a certain sum of money was given to me to make an examination, and a party was put on a steam boat belonging to the Government and instructed where to make a reconnois-ance. The funds did not allow of an actual survey, and that was the best we could do. The idea was to get some idea of the condition of the river and the portions of it needing improvements. That party was organized in the latter part of the summer of 1874. I have not had any data at hand that would give the exact date, but near as I can recollect, they started in August. They went down the river from Cairo to Vicksburg and then returned, and subsequently went over the same ground again, extending the examination as far as New Orleans. This particular part of the river which you allude to was passed over four times, twice down stream and twice up stream. The methods followed were somewhat crude, but were the best we could do. The party being, as I said, in a steamboat, the course of the boat was taken by a compass. The distance was determined by the speed of the boat, which had been accurately gauged before the party started. The widths of the river were, of course, estimated, but where it was possible to stop for any length of time to get instructions ashore, the triangulations and get the widths, it was done. That was used as a check, and there were other points that enabled some kind of a check on the width. The greatest difficulty was in the length, which, of course, the speed of the boat varying with the current, and all that rendered it somewhat uncertain. The best that could be done was to take points, say thirty or forty or fifty miles, where anything could be recognized as a town that was shown on the state maps. It enabled the distance in the longitude and latitude to be determined approximately, and the lengths were determined by this reconnois-ance. If the distance- varied they were shortened up all along the lines, according to the judgment of him who made the actual observations. There is one thing, of course, to be borne in mind in a case of this kind; that the examination was not made with any idea of determining actually by metes and bounds. That was not the idea at all. It was to get a sketch, at any rate; something that the river looked like, and a general idea of its shape, direction, and location of the channel, and show points like that."

Colonel Suter does not testify from his personal recollection of the river and its banks. There was nothing about Dean's Island to

attract his special attention to it, and its banks were a very small part of the reconnois-ance made by him. He had not been
1011 there for nearly thirty years and could only testify what he understood the topographical signs upon the chart to mean. The civil engineers examined for complainant read these signs differently, and upon their interpretation the chart tended to support the insistence of complainant that no accretions had formed on Dean's Island at that time. These witnesses were never upon the premises until after this litigation began and knew nothing of the real facts of the case. The testimony of all these witnesses is largely conjectural and speculative, and of that character that can only be relied upon in the absence of better testimony and from the necessity of the case. The chart which we have reproduced at a former page of this opinion, to our minds, so far as it shows anything, corroborates the statements of the witnesses for the complainant, that, at the time of the survey, there were no accretions to Dean's Island. It shows the towhead and the sandbar or mud flats as part of the river and not part of the land. This reconnoisance was made when the waters were at a very low stage, almost unprecedented in the history of the river, and the showing is therefore as favorable as it possible could be to the theory that accretions had then formed.

The defendants have introduced much testimony to show that cottonwood trees of an age which antedates the cut-off are found growing upon what was the old bed of the river, as evidence that there were accretions to the island previous to the cutoff. Sections cut from such trees have been produced in Court, and the number of rings or circles in them which, it is said, show the annual growth, pointed out as conclusive evidence of their age. We do not, under the facts of this case, attach much importance to this evidence. There is testimony in the record that the cotton wood in the alluvial bottoms of the Mississippi grows facter than any but one other known tree, and that trees of the size of these found on this land have been known to grow within the time elapsing since 1876. It also appears that dry land first appeared in the old channel along the mud
1012 flats and sandbars where the water was shallowest, upon the Arkansas side of the river, and that the formation there was black alluvion and very fertile, while at other places, near the Tennessee bank, appearing above the surface later, there was more sand, and of course less fertility. It is therefore, reasonable to suppose that the cottonwoods first began to grow upon the side next to Dean's Island, and have attained greater size there than they have on the Tennessee side. This we think clearly accounts for the difference in the size of the timber at the different places in the old channel, although there is conffict in the evidence as to whether this is in fact true. What are called annual rings or circles in these trees, according to the evidence, is not reliable testimony of their age. It appears that the tres are much affected by wet and dry seasons, and by cold weather, and that in some years more than one ring is formed. The sections produced in Court were also evidently cut

very near the surface, where the tree is abnormally enlarged, and are not fair specimens of the growth upon the land.

There is also testimony of several witnesses tending to show that there is an elevation along the old river channel, considerably west of the original Dean's Island bank, which they took to be and called the bank of 1876. This is mere speculation upon the part of these witnesses. They did not reside in the neighborhood previous to 1876, and they know nothing of the condition of things as they then existed. The witnesses examined in the case, old men who have lived in the neighborhood all their lives, and are familiar with the country and with the effects of freshets in the Mississippi river, say that there is no such bank; that what the defendant's witnesses took for banks are mere ridges or banks thrown up by the action of the water of the river during freshets, when the old bed was flooded, and the depressions near those banks mere channels that were washed out on such occasions.

While all the matters which it is insisted this character of testimony tends to establish are circumstances to be considered in ascertaining the ultimate facts of whether there were or were
1013 not accretions to Dean's Island previous to the avulsion, yet they are of a conjectural and speculative character, and cannot be held to outweigh or even equal the positive and uncontradicted testimony of witnesses who testify from personal knowledge and observation, of the events and facts which they had the opportunity and which it was their interest and duty to observe and know. The statements of these living witnesses of the condition and location of the river and its banks at the place in question are reasonable and consistent with the admitted facts and the history of such occurrences and we have no doubt but that they are true.

The question involved is the location of a boundary line. Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence. This has not been done by the defendants in this case.

We are clear also that there were no accretions to the Arkansas bank after 1876. The doctrine of accretions has no application to the filling up of the old channel, abandoned by the river for a new one, as the result of an avulsion. The rights of the parties, in every respect, remain as they existed prior to the change. The proof conclusively shows that this change was sudden, violent, and complete; that it resulted in drawing off much of the waters of the old channel, and leaving those remaining still and stagnant, a mer lagoon, that it was no longer used by boats navigating the river, except occasionally by small craft when the waters were up; that the channel immediately began to fill with sand and other alluvial deposits; and shang, bars, and banks appeared in a short time above the surface, and willows and cottonwoods began to grow upon them. This process of filling up went on over the entire channel, but it is prob-

able that land first appeared and vegetation first began to grow next to the Arkansas side, upon the sand bars and mud flats there
1014 previous to the cut-off, and the waters shallowest. This steadily proceeded until the old bed of the river became dry land, covered with valuable timber. This final result was evident from March 7, 1876, when the cut-off was made. The new channel was upon the direct general course of the river and only about one-twentieth the length of the old one, and the fall in it was so great that it was a physical impossibility for the waters of the river to return to their old bed. In the nature of things and the history of such occurrences upon the Mississippi river no one could doubt but that it would be only a few years at the furthermost until the old bed should be entirely filled up, and almost every vestige of its formerly being the channel of a great river gone. This effect of the avulsion was necessary, fixed and certain, and inevitable. It is immaterial whether the land first appeared on one or the other side, because it was known and certain that the entire bed would be filled up and become dry land. The underlying reason for holding that boundary lines upon running streams may be changed by erosion and accretion, and that the states or individual proprietors separated by the stream may lose or gain territory and land, is that the loss and gain are so gradual and imperceptible that it is impossible to identify and follow the soil lost, or to prove where that gained came from. This is illustrated in the case of Nebraska v. Iowa, supra. In that case it was insisted that the doctrine of accretion had no application to the Missouri river because of the rapid and great changes constantly going on in respect to its banks. The Court in disposing of this insistence, while admitting the facts, said:

"Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony; that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color, which, in
1015 in the history of the country, has made it known as the "muddy" Missouri; and also, that while the disappearance, by reason of this process, of a mass of a bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like a visible and instantaneous creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, or acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below,

and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other."

Thus, in effect it was held, that the loss must be suffered, because it was impossible for the losing party to follow and identify his property. It would hardly be contended that if the avulsion in this case had immediately resulted, by great deposits of alluvion and drawing off of the waters of the abandoned channel, in drying them up, that because land first appeared upon the Arkansas bank where the waters were shallowest, it was an accretion to that bank. The principle is not changed because it took a period of several years to accomplish the same fixed, known and inevitable result. The filling up of the old channel in this case was independent of the riparian rights and worked no change in them. In the case of Willey v. Lewis, 28 Wkly. Lw. Bul. 104, decided by the Court of Common Pleas
1016 of Ohio where a stream changed its channel and the old bed gradually dried up, the question was whether the doctrine of accretion applied. The Court said:

"In the case at bar, until the new channel was cut through, the water ran in the old channel as above located. When the new channel was cut through the river ran through that and the old channel became an abandoned channel. The change was sudden and rapid—was avulsion—as distinguished from an imperceptible change—accretion. A change of channel could not, in the nature of things, be instantaneous, it must require a certain time. But if it is rapid, sudden and distinguishable from an imperceptible change, I think under this late case it must be controlled by the law of avulsion. I see no middle course. It must be either accretion or avulsion. I do not think it an answer to say that some water still ran in the old channel until it eventually dried up; that must necessarily be the case in every change of channel; and if it were an answer, then the proposition that the boundary remains as it was would be a myth."

It is not every gradual change of the channel of streams caused by filling up with deposits cast by the waters that will, as an accretion, change the boundary lines of either states or riparian proprietors. This was held in the case of Missouri v. Kentucky, 11 Wall. 395. The main channel of the Mississippi river originally ran west of Wolf Island, and the island was part of the territory of the state of Kentucky. Through a period of several years the western channel gradually filled up and the main channel shifted to the east of the island. The state of Missouri claimed jurisdiction over the island on this account and brought suit against the State of Kentucky to establish such jurisdiction. It was held, notwithstanding the change was slow and gradual, yet since there was no doubt where the state line ran, it was not changed by the change in the flow of the waters, and the suit dismissed.

The case of Indiana v. Kentucky, 136 U. S., 479, was a
1017 similar case and involved jurisdiction over Green river island in the Ohio river. When the state of Kentucky was originally admitted into the Union the main channel of the Ohio river, upon the northern bank of which at low water mark, the line separating

Kentucky and the territories north of it ran, was north of this island Afterwards by slow process of accertion and filling up the channel changed to the south of the island, and Indiana claimed jurisdiction over it and brought suit to enforce such jurisdiction. It was held, that it appearing that the island was originally within the limits of Kentucky, the jurisdiction over it was not lost by the change in the channel of the river.

The case of Hughes and others v. Heirs of Birney and others, 107 La. 664, is also analogous to this. Previous to 1876 the Mississippi river, opposite the city of Vicksburg, Mississippi, reversed its course and ran northwards for some distance, then eastward, then southward pursuing its general course, forming a long narrow tongue of land, called De Soto Point, and owned by some eight or more different proprietors. In that year, 1876, the river made a new channel for itself, cutting across the tongue of land near its northern extremity. This cut-off by erosion gradually swept away all the land south of it until it reached the southern extremity of the tongue, where it made for itself a new and permanent channel, through which the current ran, and all the old channel, including that made in the erosion, became a lake, called Lake Centennial. About eight months elapsed from the time the first cut-off was made until the permanent channel was reached and formed. The lake then, where there was formerly land upon the tongue, began to fill up, bars appeared above low water in about three years, and gradually became dry land fit for cultivation and habitation. The owner of the northern extremity of the tongue which was not washed away, claimed it as accretion to her land. The Court held, that this claim could not be maintained, but that the land being subject to survey and identification was the property of those who owned it at the time

the surface was washed away; that the ownership of the soil
1018 carries with it all that is directly above and under it; that ground upon which the river rested temporarily, in going over that portion of De Soto Point, never ceased to belong to the defendants, the heirs of Birney, and deposits placed upon it by the river in retiring from it, having been put upon land belonging to them, became likewise their property, and that the doctrine of reappearance of land after submergence controlled the case.

The formation of dry land in the old channel of the river opposite Deans Island, was not an accretion to either bank of that channel, but a filling up by deposit from the bottom of the old bed of the river until it emerged from the water and became habitable and susceptible of cultivation. It was not in any way built upon the banks of aided by them. The new soil did not accrete to the banks, but built up on that of the owners of the old bed. It was not an accretion to anything, but an emergence of land, that had been theretofore covered by the waters, caused by an avulsion, and was and is the property of those who held it in its submerged condition. The channel of the river as it flowed in 1876 when the cut-off took place, covered the channel occupied by it in 1823, and part of the grants of Simon Huddleston, —— Chalmers and John Trigg, formerly on the eastern shores of Centennial Island and Island 37. When the waters

of the river abandoned these lands, and they emerged and became dry land, the owners, in this case the State and the grantees, Huddleston and others, and not the then abutting riparian proprietors, were entitled to it. This is well settled law. In the case of Mulry v. Norton, 100 N. Y. 426, it is said:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or enables another to acquire it, for the erosion must be accompanied by transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such lapse of time as will preclude the identity of the property from being established upon its reliction.

Land lost by submergence may be regained by reliction, and
1019 its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main land have been gradually encroached upon by the ocean, so that navigable channels have been extended therefrom, the people by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels, to ownership of the land under them in cases of its permanent acquisition by the sea. It is clearly true, however, that when the waters disappear from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners."

To the same effect are the cases above cited of Morris v. Brooks (Del.) 53 Am. Rep. 215; Hughes et al. v. Heirs of Birney et al., 107 La. 664; Hardin v. Jordan, 140 U. S. 382; St. Louis v. Rutz, 138 U. S., 226-246; Stockley v. Cissna, 119 Fed. Rep. 831.

This was the rule of the common law, and it applies, as is fully shown in the authorities we have cited, in favor of the state and of individuals, and as well to cases of emergence of lands which have in all known times been covered by the sea or navigable rivers, as well as those which have been submerged and re-appeared again. If the soil under the waters belonged to an individual, the dry land appearing is his property, and if the submerged soil belonged to the state, when it is abandoned by the waters and becomes habitable and susceptible of cultivation it remains her property. Clearly, the position of the defendant, that the state is not entitled to recover the portions of the channel covered by the grants to Huddleston, Trigg and Chalmers, is sound. These parties, or their assigns, are entitled to them. Morris v. Brooks, supra; 2 Bl. Com. 262; Hale, de Jure Maris, c. 4 and 6.

What then are the rights of the states of Tennessee and Arkansas in the premises in controversy, and what is the true location of the line between them? We think unquestionably that the
1020 bed of the abandoned river should be divided between them, for we apprehend that the Arkansas side belongs to that state, since the title of riparian owners under its laws are limited to high water mark, (R. R. v. Ramsey, 53 Ark. 314) the line separating their respective jurisdictions to be run along the channel midway between the banks as they existed and were surveyed in 1823, as shown in

the map made by Major J. H. Humphreys, and exhibited with the bill of complaint. This was the line between Tennessee and the territory of Louisiana when the former became a state and was admitted into the Union. It was the line between Tennessee and that territory after it was purchased by the United States, as is shown by the surveys and grants upon both banks of the river made between 1822 and 1830, and the only occurrence tending to show a change in it since that date is the widening of the river between them and 1876 by erosion on the Tennessee bank to the extent of submerging the lands there constituting a part of the grants made to Simon Huddleston, —— Chalmers, and John Trigg. The same rule that entitles those parties to their lands when abandoned by the river also entitles Tennessee to its original one half of the river bed. This is the natural and necessary result of the avulsion. The effect of it was to press back the line of the state, as it ran at low water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two states, so as to restore to Tennessee what it held before the erosions upon its banks. The right of restoration to their lands was one of the vested rights of those grantees and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted.

1021 It restores all parties to their original status and does justice to them all. If the result of the avulsion had only affected the waters of the river so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandon- cannot change the rights of the parties. The others interested cannot be restored to their own by the forces of nature and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of the property when the same can without doubt be identified and located.

It is said that complainant only sued for the land lying west of the center of the channel as it was in 1876, and therefore cannot recover to the center of the channel of 1823. This is true, but this case must be remanded, for a hearing upon the answers of the defendants, and if it is desired, the bill may then be amended so as to make the proper averments to entitle her to recover under the principles here settled.

Reversed and remanded.

SHIELDS, *J.*

1022 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at Its Special September Term, A. D 1907.

Present: The Hon. W. D. Beard, Chief Justice, and John H. Henderson, W. K. McAlister, M. M. Neil, and Jno. K. Shields, Associate Judges, when the following proceedings were had, September 7th, to-wit:

No. 1, Shelby C. D.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Be it remembered that this cause came on to be heard on this the 7th day of Sept., 1907, before the Honorable the Judges of the Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Shelby County, the assignment of errors and brief on behalf of the appellant State of Tennessee, the reply and briefs in support thereof on behalf of appellees Muncie Pulp Company and W. A. Cissna, and the oral argument of counsel for the respective parties, and the Court being of opinion that the assignment of errors of Complainant State of Tennessee is well taken and that for the reasons stated in the written opinion of the Court, made a part of this decree, the Chancellor erred in sustaining the pleas of defendants to the jurisdiction of the Court, it is all so ordered, adjudged and decreed.

Thereupon it is further ordered, adjudged and decreed that the decree of the Chancery Court of Shelby County be and hereby is reversed, and the cause remanded for a hearing upon the answers of the defendants in accordance with the principles laid down in the written opinion of the court, a copy of which will accompany the procedendo to the Chancery Court of Shelby County.

It is further ordered that complainant may in the Court below amend her bill so as to make the proper averments to entitle her to recover to the center of the channel of the Mississippi River of 1823, in accordance with the principles laid down in said written opinion of the Court.

1023 The defendants will pay all the costs of the appeal to this Court, for which execution may issue.

It is further ordered that the original exhibits to pleadings and depositions and the printed record in the case of Stockley vs. Cissna, sent up with the record in this case under the decree of the Chancery Court of Shelby County, be returned to that Court for use therein upon the trial of this cause.

The defendants, W. A. Cissna and The Muncie Pulp Company except to the decree and opinion of the Court and pray an appeal

to the Supreme Court of the United States, which prayer for appeal is denied, and the said defendants except.

Said defendants thereupon applied to the Court for time within which to apply for a Writ of Certiorari to the said Supreme Court of the United States, which is denied by the Court, and to this action said defendants except.

1023½ Shelby Chancery No. 2.

Chancery Court of Shelby County.

John P. Bullington, Wm. H. Carroll, Att'ys for Complainant, and Caruthers Ewing, Att'y for Defendant.

No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Petition of W. A. Cissna.

Volumn Three.

Bill of Cosos $—.

Filed Mar. 29, 1911. T. B. Carroll, Clerk, by J. E. Springbett, D. C.

Lamar Heiskell, C. & M.

Filed Apr. 26, 1911. For Writ of Error. T. B. Carroll, Clerk, by J. E. Springbett, D. C.

1024 STATE OF TENNESSEE,
Shelby County:

Chancery Court of Shelby County.

Be it remembered, That at a Term of the Chancery Court of Shelby County, State aforesaid begun and held at the Court House in the City of Memphis, in and for said County, on Monday, the 3rd day of October, 1910, the same being the first Monday in October, 1910, present and presiding the Hon. F. H. Heiskell, Chancellor, of said Court, Part 1, the following proceedings were had, to-wit:—

Decree on Procedendo.

Ent. Oct. 11, '07.

No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Decree on Procedendo.

This cause came on to be heard upon the procedendo from the Supreme Court, of the State of Tennessee, filed herein on the 1st day of October, 1907, which is in the words and figures as follows:—

No. 1, Shelby Chancery Docket.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

(Reversed and Remanded.)

Be it remembered that this cause came on to be heard on this 7th day of September, 1907, before the Honorable the Judges of the Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Shelby County, the assignment
1025 of errors and briefs on behalf of the appellant, State of Tennessee, the reply and briefs in support thereof, on behalf of appellees Muncie Pulp Company and W. A. Cissna, and the oral argument of counsel for the respective parties, and the Court being of the opinion that the assignment of errors of complainant State of Tennessee is well taken and that for the reasons stated in the written opinion of the court, made a part of this decree, the chancellor erred in sustaining the pleas of the defendants to the jurisdiction of the court, it is also ordered, adjudged and decreed.

Thereupon, it is further ordered, adjudged and decreed that the decree of the Chancery Court of Shelby County be and is hereby reversed, and the cause remanded for a hearing upon the answers of the defendants in accordance with the principles laid down in the written opinion of the court, a copy of which will accompany, the procedendo to the Chancery Court of Shelby County.

It is further ordered that complainant may in the court below amend her bill so as to make the proper averments to entitle her to recover to the center channel of the Mississippi River of 1823, in accordance with the principles laid down in said written opinion of the Court.

The defendant will pay all the costs of the appeal to this Court, for which execution may issue.

It is further ordered that the original exhibits to pleadings and depositions and the printed record in the case of Stockley vs. Cissna, sent up with the record in this case under the decree of the Chancery Court of Shelby County, be returned to that Court for use therein upon the trial of this cause.

The defendant W. A. Cissna, and def't, Muncie Pulp Company, except to the decree and opinion of the court and pray
1026 an appeal to the Supreme Court of the United States, which prayer for appeal is denied, and the said defendants except.

Said defendants thereupon applied to the court for time within which to apply for a writ of certiorari, to the said Supreme Court of the United States, which is denied by the Court, and to this action said defendants except.

And the Court being advised in the premises doth order, adjudge and decree that this cause be re-instated on the hearing docket, to be proceeded with, and determined in accordance with the principles laid down in the opinion of the Supreme Court.

1027 *Amended Bill.*

Filed Dec. 27th, 1907.

(Not in filed and lost or mislaid and after diligent search and inquiry, same cannot be found.)

Subpœna to Answer Amended Bill.

Issued 27th Day of Dec., 1907.

To the Sheriff of Tipton County:

Summon H. W. Stockley.

If to be found in your County, to appear before the Chancery Court, of Shelby County, at the Court House, in the City of Memphis, Tennessee, on the first Monday in February next, then and there to answer the amended bill of complaint of State of Tennessee, a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness Lamar Heiskell, Clerk & Master, of said Court, at office in Memphis, this first Monday in October, 1907.

LAMAR HEISKELL,
Clerk & Master,
By W. M. COX, *D. C. & M.*

Endorsed: Came to hand:—Marked (within by order of counsel for plaintiff, 1/22/1908. S. E. Gibbs, D. S.

1028 *Alias Subpœna to Answer.*

Issued 13th Day of January, 1908.

THE STATE OF TENNESSEE:

To the Sheriff of Shelby County:

Summon, H. W. Stockley, if to be found in your County, to appear before the Chancery Court of Shelby County, at the Court House in Memphis, Tennessee, on the first Monday in February next, then and there to answer the amended bill of complaint, of the State of Tennessee, a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness, Lamar Heiskell, Clerk & Master, at office, in Memphis, this first Monday in October, 1907.

LAMAR HEISKELL,
Clerk & Master,
By W. M. COX, *D. C. & M.*

Endorsed: Issued 13th day of January 1908—Came to hand January 14th 1908 executed same day by reading writ to W. H. Stockley, and leaving copy of the bill with him.

F. L. MONTEVERDE, *Sheriff,*
By J. S. CARTER, *D. S.*

Pleas in Abatement of H. W. Stockley to Amended and Supplemental Bill.

Filed February 5th, 1908.

No. 13271, R. D.

THE STATE OF TENNESSEE
vs.
THE MUNCIE PULP COMPANY et al.

Pleas in Abatement.

1029 The defendant, H. W. Stockley, for pleas in abatement to the amended and supplimental bill filed against him by the compl't in this cause, on December 27th 1907—says—

First. That the tract of land the title to which is sought to be established and cleared up in this cause, lies wholly within Tipton County, Tennessee, and that no part of it, lies in Shelby County.

Second. That the defendant H. W. Stockley is a citizen and resident of Tipton County, Tennessee, and was such citizen and resident of said County, at the time of the filing of said amended and supplimental bill, and for many years prior thereto.

Wherefore this defendant says that this court ought not to take

further ju-isdiction of the aforesaid amended and supplimental bill, and that the same should be dismissed so far as this defendant is concerned.

G. J. McSPADDEN,
Sol. for H. W. Stockley.

STATE OF TENNESSEE,
Shelby County:

The affiant G. J. McSpadden, makes oath that he is the solicitor of the defendant H. W. Stockley, in this cause; that affiant has personal knowledge of all the facts set forth in the two foregoing pleas in abatement and that the same are true in substance and in fact.

G. J. McSPADDEN.

Subscribed and sworn to before me, this the 6th day of February, 1908.

[N. P. SEAL.] GEO. B. COLEMAN,
Notary Public.

Deposition of Maj. J. H. Humphreys.

Filed August 18th, 1909.

1030 No. 13271, R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

The deposition of Maj. J. H. Humphreys, witness for the complainant in the above styled cause, taken at the office of Messrs. Carroll & McKellar, Memphis, Tennessee, this the 7th day of July, 1909, by consent of counsel for W. A. Cissna, subject to exceptions for relevancy and competency only. The leave is reserved to Mr. Ewing if he desires t- cross-examine Maj. Humphreys.

The said first witness, being duly sworn, deposed as follows:

Direct examination by Colonel Carroll:

Q. 1. Maj. Humphreys, when did you first survey that area of land and water indicated on what is called in the reports, the Humphreys map of 1823?

Ans. The exact date I made the survey I do not now recall. I made the survey for Mr. Stockley, and that was come time before his suit was instituted in the Federal Court, against Mr. Cissna.

Q. 2. I show you the 60th page of 119 Tennessee, upon which is reproduced the Humphreys map showing the conditions of the river in 1823. Please look at it and say if you recognize that map?

A. Yes sir, the outlines of the map are very similar to the map I made.

Q. 3. That is what purports to be a copy of your map. You will find a point on that map, almost due north of the east line of Hall's 100 acre tract at which four sections corner in the State of Arkansas 11, 12, 13 and 14. You *w*pointed out that corner to *you* when you made that map?

A. Mr. Farnville.

1031 Q. 4. What did you find there to indicate it was the old established corner?

A. Well, I found simply a corner stake there, and a sweet gum tree, but the sweet gum trees was not one of the original witness trees to the corner.

Q. 5. What did you find at the northeast corner of Hall's 100 acres on the old bank of the river; what sort of point did you find, if any?

A. I never was out there?

Q. 6. Who pointed that out to you?

A. I don't know anything about that corner. I never was out there. That was merely included in there from the grants.

Q. 7. Do you recall meeting a man named Groves, in your survey?

A. I think I met some man up there but I do not recollect his name. It was not the northeast corner. It was the northwest corner.

Q. 8. Do you recall that when you made that survey a man by the name of Groves, J. A. Groves, pointed out to you a corner on the northeast line which was the northwest corner of the Hall 100 acre tract?

A. I do not recall that. Here is the corner he showed me. Then I ran down there, and then up here, and then back to that corner.

Q. 9. As to the map that is before you, that is the map that you made. The Supreme Court, in its opinion in this case, has stated that it is of the opinion that the true and correct line is midway between the banks of the river as they existed in 1823, as shown by the map of Maj. J. H. Humphreys. Since you gave you- testimony in the case of Stockley vs. Cissna, which was determined by the Supreme Court, and upon appeal from Chancellor Cooper at Covington, and in this case, which was determined by the

1032 Supreme Court, in an opinion delivered by Mr. Justice Shields, have you had occasion to make any further survey of any part of that territory, and if so, when?

A. Well, the only survey I made up there, I made for Stockley last winter. I just surveyed that 131 acre tract then.

—. 10. When you were up there last winter, did you or not put monuments so as to show Stockley's land, and also to show the property outside of Stockley's land, between the banks, of 1823, and the middle thread of the river of 1823, covering the Stockley grant of 1901?

A. Yes, I marked three corners which are in the middle of the river, and they were the corners of a grant to Stockley.

—. 11. Where di- you put those monuments and what character of monument did you put there?

A. An iron pipe.

Q. 12. Where did you put them?

A. Well, I put them at the southeast corner of the grants, and at a corner in the middle of the east line of the grant, and another at the northeast corner of the grant all of which were in the middle of the river.

—. 13. Then you laid off Stockley's 131 acre tract?

A. There is another tract. That is part of the Huddleston grant. There is another grant.

—. 14. Take the map in front of you, and give the riparian owners along the banks of the river, all the lands restored by the evulsion of 1876, where would the western boundary of the old bed of the river be traced along your map? I mean the old river bank?

A. There is the bank shown on the map.

—. 15. That is what I understand. Then if you begin at the Huddleston northeast corner, and the land immediately be-
1033 tween the bank of 1823, and the middle thread of the river of 1823, following the shore line as indicated by your map is a part of the old river bed, and all the land west of the bank line shown by your map, is a part of the old river bed, and all of the land west of the bank line as shown by your map is restored land belonging to whoever owns the shore; is that correct?

A. Yes sir, it is restored land, and I suppose belongs to the parties who own the shore.

Q. 16. Then by taking your map and taking, for instance, the northeast corner of Hall's 100 acre tract, all of the land between that corner, and the opposite Arkansas bank would be a part of the old Mississippi River?

A. Yes sir.

Q. 17. And all that part of the land west of the middle of the river, and between the shores of Tennessee on Island 37 and the middle thread of the river, would be the old bed of the river?

A. Yes sir.

Q. 18. What is the distance, across from Hall's 100 acre tract according to your map to the Arkansas shore?

A. That measures about 60 chains.

—. 19. Major, how much of Trigg 151 1.2 acres had caved into the river prior to the evulsion?

A. I have lost my map. I have no map now. My original map showed the banks when I made the survey I have not got it, and it does not seem to be here.

Q. 20. Had the bank been caving on the Tennessee shore along from the Love's tract down to and including this small 37 acre tract of Trigg?

1034 A. Yes, I think it had very largely caved off, and caved nearly up to the 157 acres of Trigg. It was only a few chains from there to the bank.

Q. 21. On the west and the north banks of Island 37, was the caving pretty perceptible?

A. That is something I do not know anything about. You know all this was platted from the Grants. I never was up there. I

never was any further up than the northeast corner of the Trigg tract. The shore land as shown on the map was established by platting the grants.

Q. 22. You did not plat any of the Hall land?

A. No sir.

Q. 23. Were you ever up there?

A. Well, I corssed over there by road, when I went over once or twice. That corner was right on the banks of the Arkansas shore (indicating).

Q. 24. Do you recall whether or not that part of the 151 acres which is immediately north of Trigg's two tracts had caved?

A. I know a large part of that had caved. I think nearly all of it had caved.

Q. 25. In making the survey, did you come across wire fences?

A. Yes sir.

Q. 26. Here is a map that seems to have been made by a man named Martin. I wish you would examine it and see if you recognize what is what he calls Cissna'- wire fence?

A. It seems to me that is what they call Sandy Chute there. Cissna did have a wire fence along the north bank of Sandy Chute extending down and along the bank of the stream called Old River, which connected over near Stockley's place. That is where
1035 I recollect to have seen the wire fence. Possibly there are other places I do not recall.

Q. 27. On this map, Cissna's wire fence seems to terminate close to Huddleston's northeast corner?

A. Yes sir.

Q. 28. Assuming that map is correct, and shows the wire fence as it runs from a little east of Open Lake down to about Sandy Chute, how much of the Old River bed on the Tennessee side was included in that wire fence?

A. Well, I think it is all included and more too. It runs right across the Huddleston grant there, and I think that wire fence runs into these other grants on Island 37.

Q. 29. In other words, Mr. Cissna, just run a wire fence around the old bed of the river, along the other lands west of the Old River?

A. Yes sir, other lands which had been washed away and restored.

Q. 30. How much of that land did you travel over in surveying the 1,050 acres, the Stockley grant?

A. How much of that land do you mean? of the old river bed?

Q. 31. Yes.

A. Well, I went all the way around that grant.

Q. 32. Was the timber pretty generally cut on it?

A. Yes sir.

Q. 33. How much of the timber was left standing?

A. Well, there were places where it was pretty well all cut.

Q. 34. What was the character of that timber?

A. Well, originally there was some fine timber there.

Q. 35. Cottonwood?

1036 A. Cottonwood generally.

Q. 36. When you first went to survey for Stockley, sometime in 1901, how much timber was there?

A. There was a good deal of timber along there. Cissna, had out a great deal over there along the tram road they had in there. That was laid on one of the highest ridges in the bottom.

Q. 37. When you were last there, how did the condition as to the timber compare with your first trip?

A. Well, in place- a very large part of the timber had been cut out. There were other places in which it had not been cut. I could hardly form any idea as to the proportionate amount.

Q. 38. In other words, there was a perceptible difference between the amount of timber there, that had been cut between the two trips?

A. Yes, sir.

Q. 39. You have no occasion to change your statement in any regard about the accuracy of your survey?

A. No, sir, none at all.

J. H. HUMPHREYS.

Subscribed and sworn to before me, this the 14th day of August, 1909.

[N. P. Seal.] GEORGE W. SILVERTOOTH,
Notary Public.

Affidavit of W. H. Carroll.

Filed January 19th, 1910.

No. 13721. R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

1037 William H. Carroll, being first duly sworn, upon his oath states that he has searched and caused to be searched every place in and outside of the city of Memphis, and ordered to find the record in the above entitled cause, and has wholly failed to do so; that he has not seen the record for several years. The original bill in this case was filed by Mr. Albert W. Biggs, who was then a member of the firm of Carroll, McKellar, Bullington & Biggs, and the active conduct of the case was in charge of Mr. Biggs, just as long as he remained a member of the firm. Just before the last argument of the case in the Supreme Court, Mr. Biggs sent over a transcript of the record, in the Supreme Court of Tennessee, and affiant prepared his argument, as he remembers, upon that transcript.

The Clerk & Master reports that he is not able to find the record at the Court House, and affiant verily believes that the record has been lost, and needs to be supplied.

W. H. CARROLL.

Subscribed and sworn to before me this the 18th day of January, 1910.

[N. P. Seal.] W. D. KYSER,
Notary Public.

Affidavit of John P. Bullington.

Filed January 19th, 1910.

No. 13721. R. D.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY et al.

Affiant, John P. Bullington, being duly sworn, on his oath
1038 states that when the suit was instituted in the above entitled cause, he was a member of the firm of Carroll, McKellar, Bullington & Biggs;

That Mr. Biggs, has the control of the case just as long as he remained a member of that firm; took all the proofs in the case, and prepared the case for hearing before the Chancery Court and Supreme Court, but that after affiant returned to the City of Memphis, he has been assisting Mr. Carroll, in the further preparation of the case for final decision and hearing, and was able to find the transcript of the record of the case from the Supreme Court of the State.

He has searched that office and has made inquiried everywhere and searched everywhere and is not able to find the original papers in this case; and he is satisfied that they have been lost in some inaccountable way and that the record needs to be supplied.

JOHN P. BULLINGTON.

Subscribed and sworn to before me, this the 18th day of January, 1910.

[N. P. Seal.] W. D. KYSER,
Notary Public.

1039 *Deposition of J. A. Green.*

Filed January 25, 1910.

In the Chancery Court of Shelby County, Tennessee, Division 1.

13271. R. D.

STATE OF TENNESSEE
VS.
MUNCIE PULP Co. et al.

Second deposition of J. A. Green, taken in pursuance of adjournment under notice duly given to counsel for defendants at the office of Brown & Anderson, in the Business Men's Club Building, on Monroe St., in Memphis, Tennessee, on Friday, 11 day of Feb'y, 1910. Said deposition being taken under the continuance of a

notice given to counsel for the defendants, and continued from Monday 7th day of February, 1910.

Present: Thomas W. Bullett, and R. G. Brown, Attorneys for defendants, Muncie Pulp Co. and Leo Oppenheimer, Trustee, and Receiver in Bankruptcy for said Muncie Pulp Company; Mr. Ewing not being present, though notice was duly served on him on Feb'y 1st.

Witness, being duly sworn deposes as follows:

Direct examination by Mr. Bullington:

Q. State your name and residence?
A. J. A. Green; Covington, Tennessee.
Q. Are you the same J. A. Green whose deposition was taken in this cause on December 23rd, 1909, in the office of Carroll & McKellar?
1040 A. Yes, sir.
Q. Was your deposition then taken ever transcribed read over and compared by you and signed and sworn to?
A. Yes, sir.
Q. Mr. Green, I will ask you to take the forty-five pages of typewritten matter now handed to you and read the questions and answers therein, and examine the signature thereto and state whether or not the questions are the same questions that were propounded to you, and if the answers are the correct answers, made by you, and whether or not you now adopt them being here and now again answered.
A. Since the above questions was asked, I have carefully read the questions and answers and adopt them as my own answers which are correct, except that I have corrected the following typographical errors on the following pages:
Page two, *error* to question No. —.
Page five, answer to question No. —.
Page six, answer to question No. —.
Page 11, answer to question No. —.
Page 13, answer to question No. —.
Page 14, answer to question No. —.
Page 19, answer to question No. —.
Page 22, answer to question No. —.
Page 24, answer to question No. —.
Page 25, answer to question No. —.
The questions which were asked were asked in my presence, by counsel who are present, and the answers to the questions so corrected, are the answers which I now give to those questions.
Q. Mr. Green, since your original deposition was given.
1041 I believe you have filed and marked exhibits to your deposition certain grants of land in Arkansas, asked for by Colonel Carroll in your re-examination.
A. Yes, sir.

Cross-examination by Mr. Bullett:

Q. Mr. Green, on the map which you have filed as Green's Exhibit "X" No. 2, the western mouth of Dean's Chute, appears to be about 10 chains south of a projection of the south line of John Trigg's one hundred acre survey, does it not?

A. Yes, sir.

Q. Mr. Green, you were requested to file with your map, or plat following out and locating Martin's survey to file with it your field notes. Have you done so?

A. Instead of filing them separately, I have marked them "Courses and distances" on the map itself.

Further *despondent* saith not.

J. A. GREEN.

Sworn to ans subscribed before me by counsent this Feb. 12, 1910.

[SEAL.] R. G. BROWN,
Notary Public.

STATE OF TENNESSEE
v.
MUNCIE PULP COMPANY et al.

Deposition of J. A. Green, taken by consent in the office of Carroll & McKellar, on December 23, 1909, subject to exceptions for irrelevancy and incompetency, and on behalf of the State of Tennessee.

1042 It is especially understood that no consent to the taking of this deposition in made or implied by Judge Bullett so as to bind Mr. Ewing, or his client, Mr. Cissna.

Mr. J. A. GREEN, being first duly sworn, testified as follows:

Direct examination.

By Col. Carroll:

Q. Mr. Green, where do you live?

A. In Covington, Tennessee.

Q. How long have you lived in the County of Tipton?

A. Since 1873.

Q. What is your business?

A. Abstractor of titles and surveyor.

Q. How long have you been a surveyor?

A. Thirty years.

Q. Did you ever have any occasion to survey, prior to 1909, any part of that territory in Tipton County known as Island 37?

A. Yes, sir.

Q. What part of it did you survey?

A. I have surveyed different portions of thirty-seven different entires.

Q. Are you familiar with that area of country?

A. Yes, sir, in a general way.

Q. Have you recently made a survey of Island 37 and the territory contiguous thereto, or not?

A. I have made a survey of part of thirty seven.

Q. For whom did you make that survey?

A. At your request.

1043 Q. How long were you making it?

A. I suppose about twenty days.

Q. What assistance did you have?

A. I had three gentlemen with me of Covington.

Q. What participation did they have in it?

A. They were flagmen and chain carriers.

Q. Where did you commence your survey?

A. At the northeast corner of Triggs 151½ acres; south east corner of Hall's, I believe it is.

Q. How did you establish that northeast corner?

A. I found a stake at the northeast corner of Hall's 610 acres, and from that point I ran out to get the north east corner of the Trigg 151½ acres.

Q. What did you do to indicate that corner?

A. I put an iron stop, or iron pipe, and marked it Number One.

Q. From thence where did you run?

A. I ran up to the northeast corner of Hall's 100 acre entry.

Q. How did you ascertain that was the northeast corner of Hall's 100 acres?

A. I had established that corner several years before; had been to it repeatedly.

Q. Had either of those two corners that you have mentioned ever been subject to the influence of erosion, were they corners that were well known and established, that had never been subject to erosion?

A. Yes, sir.

Q. How did you designate the corner at the northwest corner of Hall's 100 acre grant?

1044 A. I found an iron stake there that I had planted several years before.

Q. How is that marked, if marked at all?

A. I marked that Number Two.

Q. From thence where did you run?

A. I ran north 3½ degrees west 40.32 chains.

Q. And where to?

A. Where I placed an iron stake or post and marked it Number Three.

Q. And why did you stop at that point that you designated by an iron stake Number Three?

A. I took that to be the center thread of the river in 1823, as near as I could get it.

Q. How did you endeavor to arrive at that particular point as being along the center of the river in 1823?

A. I measured from known corners in Arkansas just north of there.

Q. What was there intervening betweem the point where you

drove your stake Number Three and the point from which you measured to ascertain that that was the center of the river of 1823—was there any water?

A. Dean's Chute was north of this stake.

Q. What is Dean's Chute?

A. It is a stream of water dividing Dean's Island from the main body of land in Arkansas.

Q. Is that what's known as Barnay's Chute also?

A. Yes sir, I have seen that name used—Barnay's Chute, on some maps.

Q. Directly across from the point that you marked Num-
1045 ber Three to the Arkansas shore, what is the number of the section?

A. Twenty four.

Q. At all stages of water is there a stream of water lying next to the main Arkansas bank known as Dean's Chute?

A. I think it goes dry in places at times.

Q. But in ordinary stages of water, how is it? Is there water there now?

A. Yes sir, there is water now.

Q. From stake number three where did you next go?

A. I located stake Number Four.

Q. And what is designated as Stake Number Four on the map?

A. It is an iron post—a line post.

Q. And how far distant is that from Stake Number Three?

A. 43.07 chains.

Judge Bullett: The line post of what?

A. Of the middle thread.

Q. Opposite stake number Four on the Arkansas shore what is the section in Arkansas?

A. Twenty four is north and nineteen is east.

Q. From stake number four where did you next go?

A. I went to stake Number Five.

Q. And what did you put at number Five?

A. An iron post.

Q. And how far distant and in what direction from stake four is stake five?

A. South 56 degrees 17 minutes east 44.19 chains from stake number four.

Q. Opposite from the fifth iron stake that you drove, what is the section in Arkansas?

A. Section nineteen north, and thirty east.

1046 Q. From five where did you run?

A. Went to an iron post which I marked five X.

Q. Along the middle thread of the river of 1823?

A. Yes sir.

Q. And what's the corresponding section opposite in Arkansas?

A. Number thirty.

Q. From Five X where did you go?

A. Went south 30 degrees 43 minutes east 48.26 chains, and found an iron pump said to have been planted by Maj. Humphreys.

Q. How far distant is that iron pump that you found from the northeast corner of Trigg's 152 acre grant?

A. 32 chains north 72 degrees 20 minutes east.

Q. From the iron pump across into Arkansas what section do you find?

A. Number 29.

Q. State whether or not Dean's Chute intervenes between that iron post and the main land in Arkansas?

A. No sir.

Q. What do you find there?

A. It seems to be Dean's Chute. It seems to be the extension of Dean's Chute.

Q. And opposite the pump is section 28 in Arkansas?

A. 29.

Q. You call that stream of water that prior to the evulsion of 1876, which I beleive took place on the morning or night of the 7th of March of that year, it is designated on Humphrey's map as Barnay's Chute, that flows along against the main Arkansas shore, Dean's Chute, don't you?

1047 A. Yes sir.

Q. Along what section lines do you find Dean's Chute to be where the river flowed between Dean's Island and the Arkansas shore, along your map and along the map Maj. Humphreys m*dae*?

A. Dean's Chute flows through section- 32 and 33.

Q. Then those two sections in Arkansas were divided by Dean's Chute?

A. Yes sir.

Q. Part of each being on Dean's Island?

A. Yes sir.

Q. From the iron pump located by Maj. Humphreys where did you run?

A. I began at an iron pump known as the northeast corner of the Huddleston 2,000 acre survey as appears on Humphreys' map which I herewith file and mark 3 X.

Q. Did you run from the iron stake opposite section 29 in Arkansas to the iron pump northeast corner of the Huddleston tract, or how did you run?

A. No sir, I did not. I didn't run that line at all.

A. I note on your map that you have designated an iron stake. How did you arrive at that stake?

A. There was an iron stake north 49 degrees east 42½ chains from the iron pump at the northeast corner of the Huddleston 2,000 acre survey.

Q. Did you go to that iron stake?

A. Yes sir. I thought your question was between these two points (indicating on the map).

Q. Well, what point did you run from that?

A. I ran from the northeast corner of the Huddleston 2,000 acre tract.

1048 Q. Then you went from the iron pump northeast corner of the Huddleston 2,000 acre tract to the stake you have referred to?

A. To the iron stake.

Q. In what direction did you go, and what is the distance you went?

A. North 49 degrees east 42½ chains.

Q. When you got to that stake, which way did you run?

A. I ran south 55 degrees east 50 chains.

Q. And what did you place, if anything, there?

A. Planted an iron post marked Number Six.

Q. And where was that?

A. In Mr. Cissna's field.

Q. And why did you place an iron stake at that particular point?

A. I figured that was the center there of the river of 1823.

Q. How did you arrive at that point as being the center of the river of 1823?

A. I surveyed out the shore line of Tennessee, located that, and then scaled from Maj. Humphreys' survey to get the distance across.

Q. From Number Six where did you go?

A. I ran south 80 degrees east 40 chains.

Q. And what did you do there?

A. Placed an iron stake marked number seven.

Q. And why did you place that stake there?

A. For the same reason that I did the other, number six.

1049 Q. Now, go back to the iron stake that Maj. Humphreys located, from Huddleston's northeast corner as along the middle thread of the river and see what section in Arkansas is opposite to that stake.

A. Section five, Township Nine, Range Ten.

Q. Now go back to number seven. Where did you run from Number Seven?

A. I ran north 77 degrees east 29.05 chains.

Q. And what did you mark there?

A. Planted an iron post, which I marked Number Eight.

Q. And why did you plant it there?

A. For the reason that I did six and seven.

Q. How did you arrive at that point as alon*f* the middle thread of the river of 1823?

A. I got that from surveying the fo*tt* of Island 36 and scaling like I did for number six, after having measured the line across there.

Q. I note that the explanations upon your map are: The Arkansas shore in brown, the Tennessee shore line in green where the timber was cut yellow; where the fields are shown red; where the iron posts are shown black dots; the river bed of 1823 in purple; the wire fence marked by red line; the old tram road *in* by brown line. Does or does not your map approximately correctly show the iron fence called in this record Cissna's iron fence?

A. Yes sir, you mean the wire fence?

Q. Yes, that's what I mean.

Judge Bullett: I object to that question unless the witness is first called upon to state whether he knows what is, or was, Cissna's wire fence.

Q. Mr. Green, between that area of territory beginning at
1050 the iron pump, the northeast corner of *the* Huddleston's 2000 acre grant; running thence north 29 degrees east to the iron stake; running thence south 55 degrees east 50 chains to the stake number six, and running thence almost due west back to the iron pump I find marked a field. Is that a correct disignation, or otherwise?

A. I don't understand the point.

Q. From there to there; there to there; and back. Is that all a field in there? (Indicating.)

A. Yes, sir.

Q. Was that cultivated or not when you were there?

A. Yes sir.

Q. What was growing on it?

A. Cotton and corn. I think mostly cotton.

Q. From a rough calculation, how many acres were in it? Just run it through your head quick.

A. I expect it was 100 acres.

Q. I notice another little field down there, south of Sandy Chute, How many acres in that field,—about I mean?

A. I suppose twenty-five or thirty acres.

A. Then, as I understand you, from the iron stake marked Three to the iron stake marked eight you put seven iron stakes, and you found one iron stake or an iron map designating the middle thread of the river of 1823?

A. Yes sir.

Q. After you put those monuments down designating the middle of the river of 1823, what did you do in order to get the shore lines of 1823?

A. I had run the Tennessee shore line before that, and scaled from Maj. Humphreys' survey of the Arkansas shore line, and measured across in two or three places as a test, as near as I could.

1051 Q. What monuments, if any, did you put down along the Tennessee shore line. Just designate them so that I can get all the monuments you put down, and designate them by stakes, beginning at the one; going from there and then going back.

A. Stake number one; stake number two, iron stake marked N. E. 155″; iron stakes number twelve, eleven and ten.

Q. What is the scale of your map?

A. Twenty chains to the inch.

Judge Bullett: That's all marked on the map, isen't it?

A. Yes sir.

Q. I believe you stated that opposite the iron stake that Maj. Humphreys drove 42½ chains northeast of his iron pump which

he drove to designate the northeast corner of the Huddleston 2,000 acre grant was Section five on Deans Island?

A. Yes sir.

Q. How far below, or rather above section five does the iron fence extend that you have marked on your map a wire fence?

A. It extends south from the iron pump to a lake and thence up that lake to Sandy Chute in the neighborhood of iron stake number seven.

Q. Did you or not find a wire fence beginning about opposite to stake number seven, and extending along where you have marked the red line, and terminating about in Kenton's field?

A. Yes sir.

Q. I note on your map marked W. A. Cissna, and about and around a field, I mean the south field, there is nothing indicative of anything being there. Is it timbered, or otherwide?

A. It is all timbered, excepting that field.

Q. What sort of timber and what size?

1052 A. Well, all kinds you might say. I didn't notice particularly; some elm, cottonwood, general growth in those bottoms.

Q. How is it as to the next field almost immediately north of the smaller field 100 acre field?

Q. The timber was cut out of that field.

Q. What's the distance from the stake Trigg's northeast corner to the iron pump?

A. 36 chains.

Q. And now what's the distance from here to there (indicating)?

A. I have not got those points marked. That's Maj. Humphreys' survey.

Q. Well, according to the scale of the map what's the distance?

Judge Bullett: I object to the question, because no points are resignated in the question.

Q. The question I asked you, or intended to ask you, was: You will find a dotted line on your map from an iron pump to an iron stake, and that line runs through the 100 acre field and you will also find a line and a dotted line that runs from an iron stake, the northeast corner of the Trigg 152 acre tract to an iron pump. What's the distance between the two lines, according to the scale of your map?

A. About 142 chains.

Q. What's the width of that area of territory designated on your map by yellow between those two lines and between the middle thread of 1,823 and the shore line of Tennessee? I mean the average width of that area from which timber was cut?

Judge Bullett: I object to the question upon the ground that it assumes that timber was cut from it, without any statement

1053 by the witness that timber had been cut from it.

A. Approximately about 15 chains.

Q. Did you go over that territory?

A. Didn't survey it. Went over it.
Q. Did you go its width and breadth?
A. Yes sir.
Q. What did you find there?
A. I found timber out in there. Some timber standing.
Q. What size stumps were there?
A. They would run from eighteen inches to three feet I reckon.
Q. What sort of timber did you find standin*f*, and how much did you find standing?
A. Well, some small cottonwoods and other small growth timber.
Q. Marketable timber, or not?
A. No sir, I reckon not.
Q. According to the scale of your map, what's the distance from the wire fence to the outer edge where you have designated that the timber was cut from, beginning from about the center of the tract of land?
A. Perhaps 55 chains.
Q. Take this pen and mark A and B, and run a line from A to B, so as to indicate the points you have testified from and to. How far is it from B across the timber cut area?
A. (The witness after ma-king the lines as requested answers) I judge that to be about 20 chains.
Q. Well, mark C there, and draw a line. You are not a timber man are you, Mr. Green?
A. No sir.
1054 Q. Were the stumps on that territory on your map in yellow thick or thin or medium?
A. Very th*ov*k in places and thin in others.
Q. Susceptible to being counted and measured?
A. It ought to be a right difficult job. Some of the stumps are so badly decayed.
Q. Now you file your map as a part of your testimony and mark it Exhibit BB?
A. Yes sir.
Q. And identify it?
A. Yes sir.

Cross-examination by Judge Bullett:

Q. Mr. Green, you did the work that you have specified as shown upon the map that you have filed under instructions of the counsel for the state of Tennessee, as I understand you, in the case of Tennessee against the Muncie Pulp Company, is that a fact?
A. Yes sir.
Q. Will you kindly state what instructions you received from the State to guide you in your work, especially that you were to establish in the work to be done.
A. I was to establish the middle thread of the river of 1823.
Q. You mean the middle thread of the river as the river ran in 1823?
A. Yes sir.

Q. Had you any instructions to ascertain as established either the banks of the middle thread of the river as the river ran at the time of the evlusion in 1876?

1055 A. No sir.

Q. You were not to give any attention to that matter at all?

A. No sir.

Q. Now, in laying down on the map as you have done, the middle thread of the 1823 tell us exactly how you ascertained that; what assumptions you made, and what was done by your own investigations.

A. I located the shore line of Tennessee, running across to Deans Chute at two or three different points, and then scaled -t to see how everything corresponded to the map that I had.

Q. What map did you have and by which you made the comparisons?

A. Maj. Humphreys'.

Q. Maj. Humphreys' map. Did you undertake at all to establish what were the boundaries of the section of the township in the State of Arkansas as they were laid out in or about 1823, or did you accept Maj. Humphreys' location of those?

A. I accepted Maj. Humphreys' map.

Q. So that the location of the bank of '23 as shown by the outer edge of those section lines is not your work, but it Maj. Humphreys' work entirely?

A. The Arkansas shore, excepting one place.

Q. What place is that?

A. Opposite stake three.

Q. What point did you establish on the Arkansas side yourself. Just state what point so we can readily refer to it. If it would be a corner that is common to any sections let us know what it is.

1056 A. Corner of 13, 14, 23 and 24.

Q. How did you establish that corner?

A. I went to other corners, parties showing me their deeds and telling me, to establish it, and proved by surveying to that point.

Q. On the Tennessee shore how did you locate the boundaries of the bank of the river as it is supposed to have flowed in the year 1823?

A. I ran out the calls from known corners.

Q. What grants or surveys, if any, in the State of Tennessee of the date of 1823, or thereabouts, did you use as designating the boundaries of the state and bank of 1823?

A. I used the Hall 100 acre entry and the Trigg 151½ acre entry on Island 37.

Q. Only these?

A. I did not survey them.

Q. You did not then locate as of 1823 the bank of the Mississippi River, the Tennessee bank of the Mississippi River along the Trigg survey, 151½ acres, or the Trigg survey of 37 acres either one did you?

A. No sir.

Q. Did you attempt on either side of McKenzie Chute, that is,

on the south bank of McKenzie Chute, personally to locate the river boundaries of the Huddleston tract, or of any Tennessee tract below that point, or did you rely on Maj. Humphrey's entirely for that?

A. I did not survey anything from Trigg's 151½ acres until I got to the northeast corner of Huddleston's 2,000 acres.

Q. For everything between those points you relied simply
1057 upon the map of Mr. Humphreys which had been placed in your hands?

A. Yes sir.

Q. Did you observe so as to enable you to state whether there had been erosion to any considerable extent of the Tennessee bank along the line of Trigg's 152½ acres and Trigg's 37 acres? Is it not in fact true that practically the whole of those after 1823 had been washed away and had fallen into the bed of the river?

A. Most of them had been washed away, but I don't know what year.

Q. I mean to say that at a period subsequent to 1823? It is appraent from observation that those two Trigg surveys had been washed away and had become part of the river bed. Is not that so?

A. It seems so. Most of them.

Q. You find running along the western boundary of those two surveys, you find do you not a road that is evidently upon what was the bank at a period subsequent to 1823, a bank at the time of the evulsion in other words?

A. There is a road on that bank. I don't know how long it has been there.

Q. That bank is a perfectly clear bank, isen't it, showing that it was the bank of the river at the time of the evulsion, and it is just at the foot of that road, or rather at the side of that road?

A. There is a well defined bank there, but I don't know whether it was there at the time of the cutoff or not.

Q. Now, in fixing the middle there of the bank of 1823, you made no observation to ascertain what that corresponded with—
1058 what was the middle thread of the river as of 1876, did you, in the work that you did unfer the direction of the State?

A. No sir.

Q. Now, if I understand you correctly, then you fixed the middle thread of 1823, simply by finding the line midway between the outer boundaries of the sections in Arkansas as shown on Maj. Humphrey's map, and the opposite boundaries of the grants which had been made by Tennessee back about '33 or afterwards?

A. Yes sir.

Q. And with the exception of the boundaries of the Hall 100 acres and the Trigg 151½ acres in Tennessee on Island 37, you assumed Maj. Humphreys' map to be correct, and proceeded upon that basis? I mean you proceeded upon that basis in fixing the center line of the river of 1823?

A. Yes sir.

Q. You said that Hall's corner did not show erosion. Do you

mean to say that the Hall corner to which you refere had never dropped into the Mississippi River by virtue of erosion on that side?

A. Don't think it had.

Q. What evidence have you of that fact?

A. The lake is just north of that point that is spoken of in the grant, and the only point, Trigg's corner, I find in a field.

Q. Then you find in fact that there has been some addition to the soil there instead of erosion. Is that so, since 1823, at the Trigg entry?

A. Yes.

Q. The Hall corner you say, according to the original grant, called for a lake which is still there?

1059 A. The Lobe grant calls for a slue there. I think I marked a lake. The love entry including the tow head beginning at Hall's corner. There is no distance given in his survey or how it is to that point, but it is a short line comparatively known.

Q. On the opposite bank to that point—I mean on the Arkansas bank, did you observe whether there was or was not evidence of erosion,—that is, a caving of the bank as it was shown by the sections lines of 1823, or thereabouts?

A. Yes sir.

Q. In other words, now Hall's corner there is upon the inner side of the curve of the river, is it not, as existing at that point?

A. Yes sir.

Q. Do you know enough about the action of the river to state whether the natural course of events would be that the current made—current would be thrown over upon the outer side of the curve, that is on the Arkansas shore, eroding that, while, it would leave the Tennessee shore to gradually be built up. Is that or not true?

A. Yes sir. That is true. Yes sir.

Q. That you found to be the cause?

A. Yes sir.

Q. Now, immediately below, as of 1823, I mean opposite the Trigg surveys The Trigg 152 acres and the Trigg 37½ acres, do you not find that the current cutting around Dean's Island would entirely wash it and leave the Arkansas side free to build up by deposit?

A. That looks reasonable.

Q. Now, Mr. Green, have you marked on you- map the

1060 1,050 acres claimed by the State in this section in its original petition of declaration?

A. No sir.

Q. Did you not find on Maj. Humphreys' map a tracing very distinctly of a tract of 1,050 acres beginning at the northwest corner of the Huddleston survey; following that survey around and running northwardly at length with the west line of the Trigg 152 acre survey extending southwardly?

A. I don't think it was on the Humphreys' map. Not marked so.

Q. The Humphreys' map then, as exhibited to you did not have that point, or survey of 1,050?

A. That's my recollection.

Q. Did you upon this survey made for the state attempt to ascertain at all where the mouth of Barnay Chute was at the time of the evulsion of 1876?

A. No sir.

Q. Mr. Green, in making that survey were you requested or instructed to make any observation of the timber that might be upon either side of the line of 1823, center thread of '23, or any other line that you might draw with a view to ascertaining where the banks of the middle thread of 1876 might be located?

A. No sir.

Q. You have spoken about an area upon which you have found that timber had been cut. Do you know who cut that timber. Have you *have* knowledge on that subject—I mean, personal knowledge?

A. No personal knowedge.

Q. You have put down upon your map with a part of the explanation,—yellow where timber was. How does that—will
1061 you kindly point that out—that acre upon which you found timber had been cut, and which you have thus marked in yellow, and explain it so as we can understand it definitely?

A. It begins at Humphreys' iron stake north 49 east 42½ chains from the iron pump at the northeast corner of Huddleston'- 2,000 acres, and runs northwardly to Long Lond.

Q. Running along the edge of what is called Missle Pond, doesn't it?

A. Yes, Thence in a curved line southeastwardly to Cissna's field.

Q. How far from the Huddleston corner marked by a pump that you have spoken of?

A. I suppose eight or ten chains?

Q. Then running back from that point to the original iron stake, does it?

A. Yes sir. Well, it doesn't run straight, it makes a curved line shorter.

Q. Now what territory is the territory in which you observed that that timber had been cut. Am I correct about that?

A. Yes, sir, approximately.

Q. Well, those lines were put down for the purpose of indicating where timber had been cut?

A. Yes sir.

Q. Now, how does the middle thread of 1823 stand with relation to that tract that's marked in yellow, in the middle tract of '23 as you have laid down?

A. It runs along the eastern edge.

1062 Q. The middle tract of '23 runs long the eastern edge of that?

A. Yes sir.

Q. The middle thread I mean to say?

A. Yes sir, No, that begins down to the southern end of the tract mounted in yellow.

Q. What is the width of its base—of the southern base of that tract?

A. Why, I estimate it to be about thirty chains.

Q. It runs northwardly, the east and west lines coming to a point so as to make a triangule. That's true, is it not?

A. Yes sir.

Q. Did you go through that tract for the purpose of estimating the amount of timber that had been cut off of it and the character of timber that had been cut?

A. No, sir. In a general way I did.

Q. I mean at the time you were doing work for the State.

A. I walked through the land, looking at it to get an idea of the area and the amount as near as I could.

Q. Have you calculated the area which you have thus bounded in yellow?

A. No sir, I have not.

Q. You have no idea how much timber was cut—made no calculation at all?

A. No sir.

Q. You had no idea of who did the cutting?

A. Not of my own knowledge.

Q. Now, you were asked by Col. Carroll to draw a straight line between three points, A, B, and C, which you did and have marked upon your map, your line running east and westwardly along the southern line of the Trigg 37 acres. What does that line
1063 represent? I did not quite understand you?

A. Approximately the distance between those points.

Q. The distance between the red l-ne that you have marked as containing a fence, a wire fence, and the east bank—the eastern boundary of the area which you say shows cut timber and the eastern boundary of which corresponds with the middle thread of 1823?

A. Yes sir.

Q. Mr. Green, you were asked about a field which you said approximated 100 acres. Have you any calculation, or is that a mere guess?

A. I just run the thing through my mind. Had never made any calculation of it.

Q. And the other field of 35 acres, you did the same thing?

A. Yes sir, made no calculation.

Q. Now, the Huddleston northeast corner you say you found marked by a pump which you were told had been put in there by Maj. Humphreys. Did you accept that as correct, or did you personally locate the northeast corner of the Huddleston tract?

A. I accepted that as correct.

Q. Did you,—talking about the south line, that is the line from the pump, the Huddleston corner running north 49 east 42½ chains to an iron stake. . Did you run that line yourself, or did you accept that as correct from Maj. Humphreys?

A. I surveyed that line.

Q. Did you find that your survey of that line corresponded with Maj. Humphreys' call at that point?

A. The distance was correct. There is a difference in variation.

Q. What was the difference in variation?

1064 A. About four and a half degrees, I believe.

Q. Did you throw your line as you measured it northwardly or southwardly from Maj. Humphreys' line, or east or west from it?

A. Running from the pump it would be south.

Q. From Maj. Humphreys' line?

A. Yes sir.

Q. Now, Mr. Green, let me see if I clearly understand you: In running this middle thread of the river as of 1823 you accepted Maj. Humphreys' line as laid down by him from the point designated as an iron stake being north 49 east 42.50 chains from the Huddleston northeast corner up to the point marked on your map as iron pump, being north 72 degrees 20 minutes east 36 chains from the northeast corner of the Trigg 151½ acre tract. Is that correct?

A. Yes sir.

Q. In other words, you did not run yourself any line or make any survey between the points that I have indicated. Simply accepted Maj. Humphreys' as correct showing the middle thread of the river of 1823 between those points?

A. Yes sir.

Q. Now from that point, that is, the iron pump north 72 degrees 20 minutes 36 chains from the northeast corner of Triggs 152½ acre survey up to the point number three being the prolongation of the west line of Hall's 100 acre survey, and 40.32 chains west therefrom you made the survey yourself. Am I correct in that?

A. Yes sir.

Q. And in doing that you accepted as your guide simply the Arkansas section boundaries and the Tennessee grants and laid down the line midway between them?

1065 A. Yes sir.

Q. You did this regardless of erosion on the one side and the building up of the river banks on the other side?

A. Yes sir.

Q. On the Arkansas side you did not find that there had been great erosion and that the middle bank as of 1823 did not correspond at all with what had been the bank at the time of the evulsion of the river about 1876. In other words had not the Tennessee shore made and the Arkansas shore receded since 1823?

A. Yes sir.

Q. Was not the recession on the Arkansas bank at least as much as a half mile, or perhaps more?

A. I don't know sir. I couldn't cross the water. There was water in there I couldn't cross.

Q. You don't know the extent of the recession?

A. No sir.

Q. Now, the balance of the surveying you did for the State was simply to begin at the point first above mentioned, to-wit: at the iron stake standing north 49:50 from the Huddleston corner and

then carrying the middle thread as of 1823 to the old Mississippi River as eastward,—southwards—and eastwards?

A. Yes sir.

Q. When I said carrying to the old river I should really have asked if you did not bring the last stake practically to the bank of the present river?

A. Yes sir.

Q. And that bank was in what is now designated as Sandy Chute, was it not?

1066 A. Yes sir.

Q. Now, Mr. Green, since you made that survey for the State of Tennessee, have you at the request of the counsel for the Muncie Pulp Company, made another survey down there?

A. Yes sir.

Q. I will ask you to state what instructions you received from counsel with reference to that survey, and if the instructions were given in writing you are at liberty to produce the writing.

A. I have the instructions, I believe.

Q. Will you read them to the sternographer?

A. They express better than I could tell.

"Memorandum for Survey to be Made by Mr. Green:

"In a general way I wish to retrace the line of James A. Martin, showing the Arkansas bank of the Mississippi River in 1876.

"In detail pursue the following course, to-wit:

I. Begin at the point on the Miss. river where Sandy Chute as laid down on Martin's map turns to the west. This point will be very near where your first stop for the State in located.

"II. With this as a beginning point follow the north line of Sandy Chute as appearing on Martin's map. Follow that bank down to the point where begins the line designated on Martin's map as 'Bank of River in 1876 when the Centennial cut off was made'; put in a wooden stake and follow at that point.

"III. Trace Martin's bank of 1876 up to the point where it ends in the extension of the north line of John Trigg 100 acre tract.

"IV. In following this line of the bank of 1876 (1) Mark
1067 the point where the line crosses the south side of the tract claimed by the State which line runs S. 49 W. 42 chs. to Huddleston's N. E. corner; (2) Mark the point where Martin's bank of 1876 crosses the extension westwards of the division line between township 9 and township 10; (2) Extend the bank river line of Martin to the point where it intersects the north line of the John Trigg 100 acre survey as extended eastward. Mark each of those points with posts.

"V. Mark on the division line between township 9 and township 10 the following distances from the corner common to the sections 4 and 5, and 32 and 33, to-wit.

(*a*) To the intersection of that line with the bank line of 1823;

(*b*) To the intersection of that line with Humphreys' east line;

(*c*) To the intersection of that line with Martin's bank line of 1876;

(*d*) To the intersection of that township line with the west line of Humphrey's survey near Cissna's wire fence and east of Open Bayou and laid down on Martin's map.

"VI. Blaze well the line representing Martin's bank of river in 1876 from Sandy Chute to the extension of the north line of the Trigg 100 acre tract;

"VII. Mark the distance from the corner common to sections 4, 5, 32 and 33 to the south bank 1823 on Dean's Island; mark the distance from that point of intersection to the middle thread of 1823 as marked by you and the distance from that point to the north line of Sandy Chute as laid down on Martin's map.

"VIII. Please observe as you go along the physical char-
1068 acter of the bank with reference to its elevations etc. and of the age and character of the timber on either side.

(Signed) THOS. W. BULLITT, *Att'y,*
Lincoln Building, Louisville, Ky."

Q. Mr. Green, you just answered that you filed the instructions given?

A. Yes sir.

Q. Mr. Green, did you make the survey there requested, that is tracting out Mr. Martin's line as shown on his map according to the request that was made of you?

A. I did.

Q. You had a copy of Mr. Martin's map with you at the time? I show you a blue print purporting to be a copy of Martin's map and ask you if that was the one you had with you? (passing map to witness).

A. Yes sir, that's the map.

Q. File that as a part of your depositnon marking it "Green X, number 1.

A. I do.

Q. Have you with you, Mr. Green, the map of your survey?

A. Yes sir.

Q. Have you completed that map?

A. No sir.

Q. Have you the map nearly completed, Mr. Green?

A. Yes sir.

Q. With the consent now of counsel for the other side that you may withdraw the map for completion and file it later as a part of your deposition I will ask you now to produce the map and identify it as a part of your deposition, marking it "Green X number 2".

Permission is asked of counsel for the State to withdraw the map in question for completion.

1069 A. I do.

The taking of this deposition was then adjourned until three o'clock in the afternoon.

Pursuant to adjournment the taking of this deposition was continued at Three o'clock P. M. December 23rd, 1909.

Cross-examination (continued).

By Judge Bullitt:

Q. Mr. Green, the brown line being marked River Bank in 1823 when United States Survey was made, represents the outer boundaries of section 32, section 5 section 4 and part of another section as shown on the map, doesn't it?

A, Yes sir.

Q. Dean's Chute is the same as shown on map?

A. Yes sir.

Q. All as of 1823?

A. Yes sir.

Q. The boundary here in pink represents what?

A. 1050 acre tract.

Q. Where did you get that?

A. I copi*l*ed that from Martin's map.

Q. You have not seen Maj. Humphrey's map which contains that same boundary? as I understand you?

A. Think not. I don't remember of having seen it.

Q. Now the middle thread of 1823—as you have laid it down on the map for the State corresponds how nearly with the eastern line of that 1050 acre tract as laid down on your map here?

Q. With what?

Q. With this (indicating).

A. I suppose it was intended as the same thing, or very near.

1070 Q. Then the middle thread of '23 as extended by you from the corners, that is the southeast corner and the northeast corner of that 1,050 acre tract are not laid on this map?

A. No, sir.

Q. I will ask you if you will lay down on this map the line which you drew as the middle thread of 1823 for the State, and connect the same with the eastern line of this 1,050 acre tract.

A. I will and will make it a double black line and mark the same as middle channel of 1823.

Q. Will you please also mark on this double black line, and on the east line of the 1,050 acre tract the location of the monuments as erected by you in the survey which you made for the State of Tennessee?

A. I will do so.

Q. You understand, Mr. Green, I will ask you to extend your survey as made for the State on this map both to the north end of this 1,050 acre tract and the south end of this 1,050 acre tract as far *as* to the east as your north boundary will allow?

A. Yes, sir.

Q. In tracing Martin's line from the head of Sandy Chute where it leaves the Mississippi river, running westwardly, then turning northwardly from that, did you put any stakes, or did you blaze out

your line so that it can be easily seen by any one following that line as surveyed by you?

A. I put down wooden stakes with matches showing what corner my survey was from my point of beginning, which was the iron post number eight, I believe.

Q. I am speaking now of the survey that you made under and at the request of the counsel for the Muncie Pulp Company. This map in other words that you hold in your hands. Did you
1071 put any stakes along Sandy Chute, and where did you locate them?

A. I did.

Q. Cane you trace upon your map where the location of the points where you placed those stakes?

A. I can.

Q. And you will?

A. I will.

Q. By numbers?

A. Yes, sir.

Q. A general description so they can identify it. Now after leaving the bank of Sandy Chute and turning to the right or northwardly as is shown upon your map did you put stakes along that line, or did you blaze along the line so that they can easily be seen?

A. North of the township line as projected; west of the common corner of 4, 5, 32 and 33 blazed the line and put in stakes,

Q. How did you blaze?

A. Just blazed the trees north and south.

Q. On either side of it,—on either side of your line?

A. Yes, sir.

Q. What sort of blaze did you use?

A. Just cut the bark you know, so as to show plainly.

Q. Chipped the bark so as to show plainly. Well then, that was *was* from the corner north that you have blazed; from that point southwardly until you reached the point from Huddleston's corner, how did you mark the line?

A. From the section line southwardly I did not make an actual survey, for want of time, but traced the bank, and near the northeast corner of the Huddleston survey surveyed across to this
1072 same bank I have followed. I then continued tracing that bank to where it intersected with the bank of Sandy Chute.

Q. Did you put any stakes along there to indicate that line? and marks?

A. I put a stake near Mr. Cissna's field fence north of the Huddleston corner.

Q. And upon that that you traced as Martin's line?

A. Yes, sir.

Q. Though you did not actually make the survey in taking the different points north or south, I mean this last time that you speak of, have you practically followed Martin's line?

A. I don't think there is any doubt.

Q. Now, Mr. Green, I will ask you to begin at the point where Sandy Chute leaves the river as the head of Sandy Chute and fol-

low Martin's line as carried out by you to that point clear to the north of 1,050 acre tract as you have laid it down there and explain what you found in the way of the bank, and what you may have found in the way of timber indicating that you were not on the line of a former bank of the Mississippi river on that line?

A. I found a well defined bank along Sandy Chute, and also along the line marked as the bank of the river of 1876 to the north line of 1,050 acre tract. The depression at Sandy Chute where the bank of 1876 intersects Sandy Chute was small as compared with the balance.

Q. Do I understand you to say that along Sandy Chute, and that from that point that you speak of where Martin's line leaves Sandy Chute up to the north line of the 1,050 acre tract you found a well defined bank?

1073 A. Yes, sir.

Q. Does the Martin line as thus traced out by you run along on the bottom of that bank on the edge of it?

A. Well, I took about the edge of the bank. It was a sort of a sloping bank in places, and we just got as near as we could between the average of the real bottom of the bank and the top of it. Some places we were on top and others below.

Q. You found that bank to be continuous, did you, all the way through?

A. Yes, sir.

Q. Did you take any levels to ascertain what was the difference in the elevation between the soil on the one side of the bank on the east side and that on the west side?

A. No, sir.

Q. Is there a perceptible difference in elevation?

A. Yes, sir.

Q. Now, Mr. Green, did you notice in passing along that bank of Sandy Chute northwardly to the north line of the 1,050 acre tract whether or not this Martin line that you traced was bounded by different characters of timber on either side of it? If so just tell us as nearly as you can now, what the difference in the character of the timber is, and whether it is clearly marked or not?

A. Yes, sir, I found there is a difference in the timber on the east than that was on the west. There were elms and box elders and such as that on the east of this bank. The west of it was principally cotton wood, where the larger timber had been cut. There wasn't very much small timber excepting cotton wood; and some hackberry.

1074 Q. Did you find any hackberry westward of that line, or was the hackberry all eastwardly of Martin's line?

A. I couldn't tell; I wasn't looking particularly for any kind of tree.

Q. Did you notice whether or not there was any difference,—I mean east of the line than west of the line in regard to the vines growing on the trees, and undergrowth and brush?

A. Well, no, sir, not particularly, although there were more vines east of that line than there was west.

Q. Do you remember to have observed any vines growing upon the cotton wood or willow trees west of that line, west of that bank?

A. I don't remember.

Q. Is there, or not, a plain line of demarkation in the character and appearance of the timber on the one side and on the other side of that bank?

A. While I am no judge, yet I think so.

Q. Is it not a fact, Mr. Green that on the east side you have very much larger and older appearing trees than you find west of that bank, and isn't that perfectly apparent to the eye?

A. Well, you find a different kind of timber altogether, that doesn't grow large while it might be sold.

Q. Is there as you ride along that bank a clear line of demarkation between the Character of the timber on the one side and on the other?

A. Yes, sir.

Q. Is it not true that on the left of the bank that is west of the bank along which you went you will find nothing but cotton woods and willows? Cotton wood part of the way, and willows at other points?

1075 A. Principally cotton woods. Some other timber but I couldn't call the name now.

Q. Is it not, as you go on, manifest to the eye that the timber west of that bank is of younger growth than the timber to the right of east of that bank?

A. I should judge so.

Q. Did you not discover in crossing there that there was a decided difference in the soil? That on the east of the bank the soil was very much firmer than on the west of the bank in the cotton woods and willows that the soil was softer and more disposed to be miry?

A. Yes, sir.

Q. East of the bank isn't it true that all through the bogs that it is covered with undergrowth, while west of the bank along the cottonwoods or willows there is scarcely any undergrowth or grass?

A. Yes, sir, generally so.

Q. Now, in going down Sandy Chute and between Sandy Chute and the point where you have fixed the middle bank of '23 isn't the ground flat and evidently old grown in cultivation a long time?

A. Part of it.

Q. I mean down the bank of Sandy Chute until you get to the turn?

A. The western part is new ground. Stumps are visible in the fields now.

Q. Large stumps too, are they not?

A. Why I never noticed any very large ones.

Q. Well, the upper part of that, the eastern part of the territory to which I refer?

A. That looks like old ground; looks like it has been in cultivation quite awhile.

1076 Q. Mr. Green, I take leave to inform you that there was an -vulsion of the Mississippi River in the year 1876; Sandy

Chute and a considerable portion of territory south of it being at that time in the bed of the Mississippi River. Assuming that to be true, I will ask you whether there is anything on the ground to indicate that as late as 1876 the bank of the Mississippi River was, or could have been north of the north bank of Sandy Chute?

A. I cannot answer that question, I don't know.

Q. Is not the ground of such a character as to indicate that there was no bank of recent years north of the north bank of Sandy Chute?

A. Well, there are slues running all through there apparently parallel to Dean's Island. I noticed two or three in crossing the field.

Q. Is it not,—the point I want to put to you is whether it is not the north bank of the river when the revulsion took place?

A. I couldn't tell you about that.

Q. Did you notice a large tree near the bank, a large cotton wood tree near the north bank of Sandy Chute near one of the cabins that stands there?

A. Yes, sir.

Q. Did you notice—By the way, have you such memoranda or data as would enable you to locate that stump on your map?

A. No, sir. Well, I might in the neighborhood of it.

Q. Have you such data as would enable you to locate the cabins along that bank?

A. No, sir, I could locate some of them.

1077 Q. I would like you to locate on your ma*o* such of the cabins as your field notes would enable you to do.

A. I can also locate one tree I think.

Q. Yes, One T*h*ree that you mean has been cut down?

A. Yes, sir.

Q. I would be glad if you would locate that tree on your map and describe the tree so that it can be recognized. When you shall have laid down on this map the lines that you drew for the State, will it be practicable by the scale to state the distances between the line that you drew southwest of the 1,050 acre tract,—distances between your center line, I mean, of '73, and the north bank of Sandy Chute. You could do that with the scale?

A. Yes, sir, approximately so. Of course, that is not accurate.

Q. It would be a close approximation?

A. Yes, sir.

Q. Mr. Green, in running this line, on your map from where the bank of '76 turns from the bank of Sandy Chute northwardly did you notice, that there had been recently certain trees cut immediately to the west of this bank, of '76 and immediately to the west of it fresh cut trees?

A. I remember there was one east. I cannot remember about the others, though I think there was.

Q. Do you recollect when you were running this line, that you found one tree that had been recently cut within the last thirty days, that the tree was badly shattered and fell across the fence upon the bank of Sandy Chute?

A. I remember a tree on the bank of Sandy Chute.

Q. Can you locate the tree that you found cut there where it fell over the bank there and into Sandy Chute, on your map?

1078 A. I think so. I think I can locate that.

Q. Now, I note right from this line you have marked as the bank of '76 there was a tree cut, which split for a considerable distance, after it fell, do you think, you can locate that on your map with approximate accuracy?

A. Yes sir, I will do so.

Q. Now, Mr. Green, did you notice along the north bank of Sandy Chute, and where this Martin's line turns northwardly, this peculiarity in the growth of the remaining trees there, that they grew at an angle over Sandy Creek, and over the depressed territory?

A. Yes sir.

Q. Do you know what that indicates, Mr. Green?

A. Indicates that there was water there—what I have always noticed and been told—water and sunshine.

Q. Is it not a fact Mr. Green, that in this alluvial country where trees grow along the bank of, and that impinge, in the bank, that the trees will have a tendency to grow at an angle over the stream?

A. Yes sir.

Q. And you find, that characteristic of growth of the trees all the way along his yellow line, that you have traced on your map there as the bank of '76?

A. Yes sir.

Redirect examination.

By Col. Carroll:

Q. Mr. Green, I notice, on the yellow line that counsel referred to, as the bank of 1876, what bank does that purport to be, the bank of Tennessee, or the bank of Arkansas shore?

A. I could not tell you about that. I simply copied what was written on there—the bank of the river, in 1876 when the Centennial Cut Off was made, supposed to be the Arkansas bank.

1079 Q. And where is supposed to have been the Tennessee bank in 1876?

A. This line here is marked "Old Riber Bank, in 1876 by Mr. Maryin.

Q. Well, now, when you finish your map, so designate those as that there would be no mistake, of counsel thereabouts. And you can do it by your own designation?

A. Yes sir.

Q. Now then, if I have exactly caught the proposition, eastwardly from your yellow line the timber was of large dimensions and of a different variety, from that which was west, of that line, is that correct?

A. Was of a different variety. I don't know that it was any larger. There is a very large timber in the slough—stumps rather.

Q. How much tramping did you do around there, while you were getting up that map surveying?

A. Just running the survey across from sections, Four, Five, Thirty-two and Thirty-Three to the point markes Stake Number Five, and then retracing that and coming down Sandy Creek.

A. Put your finger on the Section line between *g* five and thirty-two; right upon the Arkansas Bank of 1823. Now run your finger right down along the shore of 1823, until you get to the next section line between five and four. Did you find an- depression there—along there?

A. I found at the south-east corner of section five, a depression quite a big one.

Q. Well, what sort of a depression was it?

A. Well, there was bank there, where the cane was growing, I suppose eight or ten feet higher than this lower place, and large timber growing on that ridge.

Q. On five?

1080 A. That was at the southeast corner of five?

Q. Well, extend down to the other corner. What did you find, along there?

Q. Northwest corner?

A. Yes.

A. I found old timber until I got to the end of my line, thirtu-two chains; then I found different growth of timber, altogether.

Q. What sort of growth was it?

A. Timber that usually grows in that kind of land, except it wasen't large like the timber east of there.

Q. Now, run your finger up the shore, or rather down the shore, of Section 32, to the point of Deans Island, what did you find, along there?

A. I didn't go down that way.

Q. You didn't go down there?

A. No sir.

Q. What did you find in Dean's Chute?

A. I found a good deal of water in it.

Q. Well, what do you mean by a good deal of water?

A. Well, I don't know how deep it was. It was from bank to bank.

Q. How far distant was it?

A. On the section line I triangulated there at seven and a half chains.

Q. Well, now, go on, the river beyond, what did you find along down the river bank?

A. I didn't go down in there.

Q. Where did you go, across into Arkansas?

A. Up at the head of Deans Island.

Q. Did you find the surveys of Mr. Martin correct, all of them?

A. I did on the section line, approximately correct.

1081 Q. Well, on the other line?

A. It was approximately correct scaling the section line to his line, marked bank of river, in 1876?

Q. As far as you went along the old shore of Deans Island, you found a well defined bank, didn't you?

A. Yes sir, at those two points, where I crossed.
Q. You found a well defined bank?
A. Yes sir.
Q. In order to arrive at the middle thread of the river, where you have marked that middle thread number three, I understood, you to say that you made a survey in Arkansas?
A. I did.
Q. And you located that point equidistant between the northeast corner of the Hall 100 acre tract and the opposite shore in Arkansas, is that correct?
A. No sir, not the northeast corner of the Hall The Love, at right angles, across the river.
Q. From Love's?
A. Yes sir, I took this way. You see this way couldn't be correct (indicating on the map).
Q. From a pont on Love's 172 acre tract you ran across the current at right angles?
A. Yes sir, practically at right angles.
Q. And that number three is a point in the middle of the old channel of 1823?
A. As near as I could figure it.
Q. Did you go from the Arkansas bank of '23, or from the Arkansas bank, after the erosion took place, which you have mentioned, in your cross examination?
A. I went from the section line, allowing the distance, given in the original surveys.
Q. And then what did you do?
A. Then I took my distance from there from the original survey.
1082 Q. You followed the Government Survey of 1821?
A. Yes sir.
Q. How far distant according to your observation had the water eaten into the Arkansas shore, from the point on your map to the point between section- 23 and 24, down to the point of Deans Island?
A. I couldn't speak of any point excepting at the corner of 13.11, 23 and 24. It had eaten practically to the corner section.
Q. Well, why have you got it indicated on this map as having eaten further up the river, than the point there?
A. That is copied from Maj. Humphreys' survey; he made those surveys.
Q. Now, I understand you to say that you couldn't cross here for water somewhere?
A. Yes sir, Dean's Chute.
Q. Well, you keep calling it Dean's Chute. I have always known the chute that separated Dean's Island from the main Arkansas shore as Barnay's Chute, Do you mean to refer to that part of the river that hugged the Arkansas shore at a point beyond Deans Island, and flowed around it in a northwesternly direction?
A. Yes sir.
A. Well, was that a well defined channel?

A. Yes sir.
Q. Is it yet a well defined channel?
A. Yes sir.

Recross examination.

By Judge Bullitt:

Q. Mr. Green, at the request of counsel for the State you have stated that on extention and projection of the township line,
1083 between township- nine and ten, you found older timber on the Mississipi Bank, Arkansas Bank of 1823, and the intersections of sections 32, 33, 5 and 4, than you found to the west of that line. Now I will ask you what was the character of the timber between the Bank of '23, on the Arkansas side, and the line that you marked in yellow, on your map as compared to the timber lying between yellow line which is the river bank of 1876, and the distance that you went in projecting that line marked Stake Number 5; was the timber east of the yellow line, older and larger than the timber west of it, or was the reverse the case?

A. There was a different character of timber altogether east of the line than there was west of it.

Q. Which appeared to be the older growth?

A. Yeast of the line.

Q. How much older would you judge the timber east of the yellow line than the t-mber west of the yellow line?

A. I couldn't tell that.

Q. It was however, perceptibly older?

A. I would judge so from the character of the timber.

Q. If I understood you rightly, you found in going from the corner common to section- 4, 5, 32 and 33, westerly you found, three very distinctly marked characters if timber; in the first place you found very old timber; then you found old, but not so old, and then you found young timber?

A. Yes sir.

Q. You found young timber west of the yellow line you found older timber east, and you found very much older timber further east?

A. Yes sir, a different character of timber altogether west of the yellow line.

Q. You spoke of the Arkansas shore, on the map which
1084 you made for the State in response to Col. Carroll's question a few months ago, you spoke of the erosion of the Arkansas side as having been eaten back to the corner of the section. Which corner did you then refer to?

A. Corner of 13, 14, 23 and 24.

Q. That has marked on it, as a distance 13.70 chains, hasen't it?

A. Yes sir.

Q. That's the line you refer to?

A. Yes sir.

Q. That is due north of Island 37 is it not?

A. Yes sir.

Q. Did you go back as far as that section corner?
A. Yes sir, I went back in there, I measured back to that point. (Indicating on the map.)
Q. Is it not true that the eating into the bank, had eaten further north than that corner?
A. I don't know about that, I think not from the character of the timber.
Q. I will ask you, Mr. Green, that you complete the map in the manner in which you have been requested to do?
A. I will.

Redirect examination by Col. Carroll:

Q. Now, Mr. Green, will you get from the records and file copies of the grants of the lands, in Arkansas that you have made mention *to*, to-wit: Marked 1, 2, 3, 4, 5, 6, and sign your name to them?
1085 A. Yes sir.
Judge Bullett: Mr. Green, I will ask you to attach to your map the field notes by you made in carrying out your survey.
A. Yes sir.

And further *despondent* saith not.

J. A. GREEN.

Sworn to and subscribed before me, this the 23rd day of December, 1909.

M. F. DOBBINS,
Notary Public.

Due Notary Public, for fee $1.00.

M. F. DOBBINS, *N. P.*

1086 EX. AA TO DEPOSITION OF J. A. GREEN.

U. S. Patent to Robert C. Dean.

Filed January 29th, 1910.

United States Patent to Rovert C. Dean.

Filed Dec. 6th, 1905.

M1. 4-430. 81234.

Pre-emption Certificate No. 4842.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greetings:
Whereas, Robert C. Dean, last assignee of Townsend Dickerson, assignee of Levi Davis of Crittenden County, Arkansas, has de-

posited in the General Land Office, of the United States a certificate of the Register of the land office of Helena, whereby it appears that full payment has been made by the said Robert C. Dean, as aforesaid, according to the provisions of an Act of Congress, of the 24th day of April 1820, entitled "An Act making further provisions for the sale of the public lands" for the northeast fractional quarter (on Island) of fractional section thirty-three, in township ten, north, of range ten, east, in the district of lands subject to sale at Helena, Arkansas, containing one hundred and thirty nine acres, and thirty five hundredths of an acre, according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor General, which said tract has been purchased by the said Robert C. Dean, as aforesaid.

Now, Know ye, that the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such cases made and provided, have given and
1087 granted, and do, by these presents, give and grant unto the said Robert C. Dean, as aforesaid and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Robert C. Dean, as aforesaid and to his heirs and assigns forever.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of September in the year of our Lord, One Thousand eight hundred and fifty-six, and of the Independence of the United States, the seventy first.

By the President,

JAMES K. POLK,
By KNOX WALKER, *Secretary.*

[L. S.] S. H. LAUGHLIM,
Recorder of the General Land Office.

Recorded Vol. 9, page 262.

81234.

DEPARTMENT OF THE INTERIOR,
M. F. H. GENERAL LAND OFFICE,
J. A. D. WASHINGTON, D. C., July 11th, 1896.

I, E. F. Best, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of patent, in favor of Robert C. Dean, founded on Helena, Arkansas, cash Entry No. 3842, is a true and literal exemplification from the record, in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of
1088 Washington, the day and the year above written.

[SEAL.] E. F. BEST,
Acting Commissioner of General Land Office.

Certificate of Record.

STATE OF ARKANSAS,
County of Mississippi, ss:

I, Hugh D. Tomlinson, Circuit Clerk and ex-officio recorder for the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record, in my office, on the 19th day of January A. D. 1897 at — o'clock A. M., and the same is now duly recorded, with the acknowledgments and certificates thereon in record book No. 19, page 603.

In witness whereof I have hereunto set my hand, and affixed the seal of the said Court, this the 23rd day of January, A. D. 1897.

[COURT SEAL.]

H. D. TOMLINSON,
Circuit Clerk and ex-Officio Recorder,
By O. B. FERGUSON, *D. C.*

I hereby certify that I have compared the within and it is a true copy of the original patent on file in the Chancery Clerk's Office at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

1089 AA-1 TO DEPOSITION OF GREEN.

U. S. Patent to David Wright.

Filed Jany. 29th, 1910.

United States Patent to David Green.

Filed Dec. 6th, 1905.

4–430.

Pre-emption Certificate No. 5064.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, David Wright, of Crittenden County, Arkansas, has deposited in the General Land Office of the United States a certificate of the register of the land office at Helena, whereby it appears that full payment has been made by the said David Wright, according to the provisions of an Act of Congress of the 24th of April 1820, entitled "An act making further provision for the sale of the public lands" for the south fractional half, (South of Chute) of fractional section thirty-two, in township ten, north of range ten east, in the district of lands subject to sale at Helena, Arkansas, containing eighty-seven acres, and eighty-one hundredths of an acre, according

to the official plat of the survey of the said lands returned to the General Land Office, by the surveyor General, which said tract has been purchased by the said David Wright.

Now, Know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress, in such cases made and provided, have given, and granted, and by these presents, do give and grant unto the said David Wright, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights privileges and immunities, and appurtenances of whatsoever nature thereunto be-
1090 longing, unto the said David Wright and to his heirs and assigns forever.

In testimony whereof, I, Zachery Taylor, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the first day of December, in the year of Our Lord, One Thousand Eight Hundred and forty nine and of the Independence of the United States the seventy fourth.

By the President:

Z. TAYLOR,
By THOS. EWING, JR., *Secretary.*

[L. S.] N. SARGENT,
Recorder of the General Land Office.

Recorded Vol. 10, page 362.

81234. (4–205.)

B—DEPARTMENT OF THE INTERIOR.

M. F. H. General Land Office.

J. A. D. WASHINGTON, D. C., July 11th, 1896.

I, E. F. Best, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of David Wright, founded on Helena, Arkansas, cash Entry No. 5064, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and the year above written.

[SEAL.] E. F. BEST,
Acting Commissioner of the General Land Office.

1091 *Certificate of Record.*

STATE OF ARKANSAS,
County of Miss., ss:

I, Hugh D. Tomlinson, Circuit Clerk and ex officio recorder of the county aforesaid, do hereby certify that the annexed and foregoing

instrument of writing was filed for record in my office, on the 19th day of January A. D. 1897, at — o'clock A. M., and the same is now duly recorded with the acknowledgments, and certificates thereon in record book 19, page- 599 and 600.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 22nd day of January A. D. 1887.

H. TOMLINSON,
Circuit Clerk and ex-Officio Recorder,
By O. B. FERGUSON, *D. C.*

I certify that I have compared the within, and it is a true copy *copy* of the original patent on file in the Chancery Clerk's office, in the city of Covington, Tenn., in the case of H. W. Stockley vs. W. A. Cissna, et al.

EXHIBIT AA-2 TO DEPOSITION OF J. A. GREEN.

Filed January 29th, 1910.

U. S. Patent to Benedict J. Knott.

United States Patent to Benedict J. Knott.

Filed Dec. 6th, 1905.

McL-Chotaw Certificate No. 750.

The United States of America to all to whom these presents shall come, Greeting:

1092 Whereas, Benedict J. Knott, assignee of Ah.-Church Mq-Ho-Na-Tip Bah-Tubbe and I Yo-Mah-Ho-Ka, represent-ives, of Ath-ho-law, deceased, has deposited in the General Land Office of the United States, a certificate of the register of the Land Office at Helena, Arkansas, whereby it appears that Choctaw Certificate No. 750, in the name of Ath-ko-la, for three hundred and twenty acres of land (issued by the Secretary of War, in pursuance, of the provisions of the Act of Congress of the 23rd of August, 1842, entitled "An Act to provide for the satisfaction of claims arising under the fourteenth and nineteenth articles of the treat*ing* of Dancing Rabbitt Creek, conclud*ing* in Sept., one thousand eight hundred and thirty, of the Act of Congress, of the 3rd of March, 1845, entitled "An Act, making appropriation for the current, and contingent expenses of the Indian Department, and for fulfilling treaty stipulations, with the various Indian tribes, for the fiscal year, commencing on the 1st day of July 1845, and ending on the 30th day of June 1846, and of the joint resolution of Congress, of the 3rd of August 1846, entitled "Join- resilution to authorize the Secretary of War, to adjudicate the claims of the Su-Quak-Natchah and other clans of Choctaw Indians, those cases were left under*t*termined by the commissioners

for want of the township maps, has been surrendered by the said Benedict J. Knott, in full satisfaction for the south fractional half (On Island) of section thirty-three in township ten, north of range ten, east, in the district land subject to sale at Helena, Arkansas, containing three hundred and eleven acres, and fuifty three hundredths of an acre, according to the official plat, of the survey of the said lands, returned to the General Land Office, by the surveyor General which said tract has been located by the said Benedict J.
1093 Knott. Now, Know ye, that the United States of America, in consideration of the premises, and in conformity, with the several Acts of Congress, in such cases made and provided, have given and granted and by these presents, do give and grant unto the said Benedict J. Knott, and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Benedict J. Knott, and to his heirs, and assigns forever.

In testimony whereof, I Zachery Taylor, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be affixed.

Given under my hand at the city of Washington, the first day of August in the year of our Lord, One Thousand, Eight Hundred and forty nine, and of the Independence of the United States the seventy fourth.

By the President.

Z. TAYLOR,

[L. S.] By THOS. EWING, JR.,
Secretary.

N. SATGENT,
Recorder of the General Land Office.

Recorded Vol. 1, page 13.

81234.

4-205.

B. M. F. H.

GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11th, 1896.

I, E. F. Best*m* Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the patent in favor of Benedit J. Knott, founded on Helena, Arkansas, Choctaw Certificate 750, is a true and literal exemplification from the record
1094 in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day of the year above written.

[SEAL.] E. F. BEST,
Acting Commissioner of the General Land Office.

Certificate of Record.

STATE OF ARKANSAS,
County of Mississippi:

I, Hugh D. Tomlinson, circuit clerk and ex-officio recorder of the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 19th day of January A. D. 1897, at — o'clock A. M., and the same is now duly recorded, with the acknowledgments and certificates thereon in record Book 19, page 607 and 608.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this the 23rd day of January, A, D. 1897.

[SEAL.] H. D. TOMLINSON,
Circuit Clerk and ex-Officio Recorder,
By O. B. FERGUSON, *D. C.*

I certify that I have compared the within, and it is a true copy of the original patent on file, in the Chancery Clerk's office, at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.
J. A. GREEN.

1095 EXHIBIT A-3 TO DEPOSITION OF J. A. GREEN.

U. S. Patent to Simon Richards.

Filed January 29th, 1910.

United States Patent to Simon Richards.

Fied Dec. 6th, 1905.

4-430 81234

M. L.

Preemption Certificate No. 5055.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, Simon Richards, of Crittenden County, Arkansas, has deposited in the General Land Office, of the United States, a certificate of the Registers of the Land Office, at Helena, whereby it appears that full payment has been made by the said Simon Richards, according to the provisions of an Act of Congress, of the 24th of April 1820, entitled "An Act making further provision for the sale of the public lands" for fractional section five, in township nine, north, of range ten, east in the district of lands, subject to sale at Helena, Arkansas containing forty-eight acres, and sixty four hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor Gen-

eral, which said tract has been purchased, by the said Simon Richards.

Now, Know Ye, that the United States, of America, in consideration of the premises, and in conformity, with the several acts of Congress, in such cases made and provided, have given, and granted, and by These presents, do give and grant unto the said Simon Richards, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities,
and appurtenances, of whatsoever nature thereunto belong-
1096 ing, unto the said Simon Richards, and to his heirs and assigns forever.

In Testimony Whereof, I, Zachery Taylor, President of the United States of America, have caused these letters to be made patent, and the seal of the Central Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the first day of December, in the year of Our Lord, One Thousand, eight hundred and forty nine, and of the independence of the United States, the seventy fourth.

By the President.

ZACHERY TAYLOR,
By THOS. EWING, JR., *Secretary.*

N. SARGENT,
Recorder of the General Land Office.

[L. S.] Recorded Vol. 10, page 358.

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4-205.
M. F. H.
J. A. D.

DEPARTMENT OF INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11th, 1896.

I, E. T. Best, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the patent in favor of Simon Richards, founded on Helena, Arkansas, Cash entry No. 5050 is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and the year above written.

[SEAL.]

E. F. BEST,
Acting Commissioner of General Land Office.

1097 *Certificate of Record.*

[SEAL.]

THE STATE OF ARKANSAS,
County of Crittenden, ss:

I, J. T. Haden, Circuit Clerk and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing

instrument of writing was filed for record in my office on the 19th say of January A. D. 1897 at 3 o'clock P. M., and the same is now duly recorded, with the acknowledgments and certificates thereon in record Book No. 1-2 page- 317-318.

[SEAL.]

J. T. HADEN,
Clerk and ex-Officio Recorder.
By R. F. WARD, *D. C.*

I certify that I have compared the within and it is a true copy of the original patent on file in the Chancery Clerk's office at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

1098 *U. S. Patent to James G. Andrews.*

Filed Jan'y 29th, 1910.

EXHIBIT 4 TO DEPOSITION — GREEN.

No. 13721.

STATE OF TENN.
VS.
MUNCIE PULP Co. et al.

United States Patent to James G. Andrews.

Filed Dec. 6th, 1905.

81234.

(4-406.)
M. C. L.

Certificate No. 15284.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, James G. Andrewsm of Shelby County, Tennessee, has deposited in the General Land Office of the United States a certificate of the Register of the Land Office, at Little Rock, Arkansas, whereby it appears that full payment has been made by the said James G. Andrews, according to the provisions of the Act of Congress of the 24th day of April 1820, entitled "An Ant, making further provision for the sale of the public lands" and the acts supplemental thereto, for the north half of northwest quarter of section four in township nine, north of Range Ten, east, in the district of land, subject to sale at Little Rock, Arkansas, containing eighty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said *H*James G. Andrews.

Now, know ye, that the United States of America, in considera-

tion of the premises, and in conformity with the several acts of Congress, in such cases made and provided, have given and granted, and by these presents, do give, and grant unto the said James G. Andrews, and to his heirs, the said tract above described, to
1099 have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said James G. Andrews, and to his heirs and assigns forever.

In testimony whereof, I Rutherford B. Hays, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given *unto* my hand at the City of Washington, the 23rd day of September, in the year of our Lord, one thousand eight hundred and seventy nine, and of the Independence of the United States the one hundred and fourth.

By the President,

R. B. HAYS,
By WM. C. COOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office. [L. S.]

Recorded Vol. 27, page 258.

81234.

(4-205.)
M. F. H.
J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11, 1896.

I, E. F. Best, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of James G. Andrews, founded on Little Rock, Arkansas, cash entry No. 15284, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

[SEAL.]

E. F. BEST,
Acting Commissioner of the General Land Office.

1100 *Certificate of Record.*

THE STATE OF ARKANSAS,
County of Crittenden:

I, J. T. Haden, Circuit Court Clerk, and ex officio Recorder for the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record, in my office, on the 19th day of January, A. D. 1897, at 3 o'clock P. M., and the same is now duly recorded with the acknowledgment and certificates thereon in record Book No. ½, page- 315,-316.

J. T. HADEN.
R. F. WARD, *D. C.*

Endorsed.

I certify that I have compared the within and it is a true copy of the original patent on file in the Chancery Clerk's office, at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

Ex. 5 to Green's Dep.

U. S. Patent to J. M. Rogers, Cert. No. 4348.

Filed Jan'y 29th, 1910.

Stockley
vs.
Cissna.

United States Patent to James M. Rogers.

Filed Dec. 6th, 1905.

M. L. 4—430.

81234.

Pre-emption Certificate No. 4348.

The United States of America to all to whom these presents shall come, Greeting*s:*

1101 Whereas, James M. Rogers, last assignee of Charles Coker, has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Helena, whereby it appears that full payment has been made by the said Charles Coker, according to the provisions of the Act of Congress on the 24th of April 1820, entitled "An Act making further provisions for the sale of the public lands" for the northeast fractional quarter and the south fractional half of the northwest fractional quarter of fractional section four, in township nine, north of range ten, east, in the district of lands, subject to sale at Helena, Arkansas, containing one hundred and sixty four acres, and thirty five hundredths of an acre, according to the official plat of the survey of the said lands, returned to the general land office by the Surveyor General, which said tract has been purchased by the said Charles Coker.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress, in such cases made and provided, have given and granted, and by these presents do give and grant unto the said James M. Rogers*m* and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, im-

munities and appurtenances, of whatsoever nature thereunto belonging, unto the said James H. Rogers, and to his heirs and assigns forever.

In testimony whereof, I, John Tyler, President of the United States, have caused these letters to be made, patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the first day of February in the year of Our Lord, one thousand, eight
1102 hundred and forty three and of the Independence of the United States, the sixty seventh.

By the President,

JOHN TYLER,
By R. TYLER, *Secretary.*

J. WILLIAMSON, [L. S.]
Recorder of the General Land Office.

Recorded Vol. 8, page 368.

81234.

4-205.
B.
M. F. H.
J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11th, 1896.

I, E. F. Dent, Acting Commissioner, of the General Land Office, do hereby certify that the annexed copy of patent in favor of James M. Rogers*m* founded on Helena, Arkansas, Cash Entry No. 4348, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the City of Washington, on the day and the year above written.

[SEAL.]

E. F. BEST,
Acting Commissioner of the General Land Office.

Certificate of Record.

THE STATE OF ARKANSAS,
County of Crittenden, ss:

I, J. F. Haden, Circuit Clerk, and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing, was filed for record in my office on the 19th day of January, A. D. 1897, at 3 o'clock, P. M., and the same is now duly recorded, with the acknowledgments, and certificates thereon in record Book 1-2 page- 316-317.

[COURT SEAL.]

J. F. HADEN,
Clerk and ex-Officio Recorder.
By R. F. WARD, *D. C.*

1103 Endorsement on above: United States to James M. Rogers, No. 2070 Patent.

I certify that I have compared the within and it is a true copy of the original patent on file, in the Chancery Clerk's office, at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

EX. AA6 TO DEPOSITION OF J. A. GREEN.

U. S. Patent to J. M. Rogers, No. 5148.

Filed Jany. 29th, 1910.

United States Patent to James M. Rogers.

Filed Dec. 6th, 19-5.

81234.

Ml. 4-430.

Certificate No. 5148.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, James M. Rogers, assignee of Henry L. Biscoe, has deposited in the general Land Office, of the United States, a certificate of the register of the Land Office at Helena, whereby it appears that full payment has been made by the said Henry L. Biscoe, according to the provisions of the Act of Congress of the 24th of April 1820, entitled "An Act, making further provision for the sale of the public lands" for the southwest fractional quarter of fractional section thirty four in township ten, north of Range ten, east, in the district of lands subject to sale, at Helena, Ar-
1104 kansas, containing one hundred and fifty-eight acres, and forty nine hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Officer by the surveyor General, which said tract has been purchased by the said Henry L. Briscoe.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress, in such cases made and provided, have given and grantedm and by these presents, do give and grant unto the said James M. Rogers, and to his heirsm the said tract above described, to have and to hold the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said James M. Rogers, and to his heirs, and assigns forever.

In testimony whereof, I, Zachery Taylor, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of December in the year of our Lord, One thousand eight hundred

and forty nine, and of the Independence of the United States the seventy fourth.

By the President,

Z. TAYLOR,
By THOS. EWING, Jr., *Secretary*,

[L. S.] N. SARGENT,
Recorder of the General Land Office.

Recorded Vol. 10, page 441.

1105 81234.

4-205.
B.
M. F. H.
J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11, 1896.

I, E. F. Best, acting commissioner, of the General Land Office do hereby certify that the annexed copy of patent in favor of James M. Rogers, founded on Helena, Arkansas, Cash Entry No. 5148, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office, to be affixed on the day and year above written.

[SEAL.]

E. F. BEST,
Acting Commissioner of the General Land Office.

Certificate of Record.

STATE OF ARKANSAS,
County of Mississippi, ss:

I, Hugh D. Tomlinson, Circuit Clerk and ex officio recorder for the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 19th day of January A. D. 1897, at — o'clock, A. M., and the same is now duly recorded with the acknowledgments, and certificates thereon, in record Book No. 19, page 601, and 602.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, this 22nd day of January, A. D. 1897.

H. D. TOMLINSON,
Circuit Clerk and ex-Officio Recorder.
By O. B. FERGUSON, *D. C.*

1106 I certify that I have compared the within and it is a true copy of the original patent on file, in Chancery Clerk's Office, at Covington, Tennessee, in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

Ex. AA7, Deposition Green.

U. S. Patent to Martin W. and Wm. Bunch.

Filed Jan'y 29th, 1910.

United States Patent to Martin W. Bunch and William Bunch.

Filed Dec. 6th, 1905.

81234.

M. L. 4-430.

Certificate No. 3659.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, Martin W. Bunch and William Bunch, of Missouri County, Arkansas, have deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Helena, whereby it appears that full payment has been made by the said Martin W. Bunch and William Bunch, according to the provisions of the act of Congress of the 24th of April 1820, entitled "An Act making further provision for the sale of the public lands" for the northwest fractional quarter of fractional section thirty four, in township ten, north of range ten, east in the district of lands subject to sale at Helena, Arkansas, containing one hundred and forty three acres and twenty nine hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Martin W. Bunch,
1107 and William Bunch.

Now, know ye, that the United States of America in consideration of the premises, and in conformity with the several acts of Congress in such cases made, and provided, have given and granted, and by these presents, do give and grant unto the said Martin W. Bunch, and William Bunch, and to their heirs, the said tract above described; to have and to hold the same, together with all rights, privileges, immunities and appurtenances of whatever nature, thereunto belonging, unto the said Martin W. Bunch and William Bunch, and to their heirs and assigns forever, as tenants in common, and not as joint tenants.

In testimony whereof, I, James K. Polk, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be thereunto affixed.

Given under my hand at the City of Washington, the twenty sixth day of August, in the year of our Lord, one thousand eight hundred and forty seven, and on the Independence of the United States the seventy second.

By the President, JAMES K. POLK,
By J. KNOX WALKER, *Secretary.*

[L. S.] JOS. S. WILSON,
Acting Recorder of the General Land Officer ad Interim.

Recorder Vol. 9, page 469.

1108 4-205.

81234.

B.
M. F. H.
J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11, 1896.

I, E. F. Best, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of patent, in favor of Martin W. Bunch and William Bunch founded on Helena, Arkansas, Cash Entry, No. 3659, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and the year above written.

[SEAL.[

E. F. BEST,
Acting Commissioner of the General Land Office.

Certificate of Record.

STATE OF ARKANSAS,
County of Mississippi, ss:

I, Hugh D. Tomlinson Circuit Clerk and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument, of writing was filed for record in my office, on the 19th day of January 1897, at — o'clock, A. M., and the same is now duly recorder with the acknowledgments and certificates thereon, in record Book No. 19 page 605.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this the 23rd day of January A. D., 1897.

H. D. TOMLINSON,
Circuit Clerk, and ex-Officio Recorder.

1109 [COURT SEAL.] By O. B. FERGUSON, *D. C.*

Endorsement on Above: United States to Martin W. Bunch, and William Bunch. Patent No. 9. Filed for record January 19, 1897. H. D. Tomlinson, D. C., Fee $2.00.

I certify that I have compared the within and it is a true copy of the original patent on file in the Chancery Clerk's Office at Covington, Tenn., in the case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

Ex. AA8, Deposition of Green.

U. S. Patent to William Jones.

Filed Jan'y 29th, 1910.

United States Patent to William Jones.

Filed Dec. 6th, 1905.

4-430.

81234.

M. Y.

Preemption Certificate No. 4821.

The United States of America to all to whom these presents shall come, Greetings:

Whereas, William Jones, of Mississippi County, Arkansas, has deposited in the General Land Office of the United States, a certificate of the Register of the land office of Helena, whereby it appears that full payment has been made by the said William Jones, according to the provisions of an Act of Congress, of the 24th day of April 1802, entitled "An Act making further provision for the sale of the public lands" for fractional section three, in township nine, north of range ten, east, in the district of lands sub-
1110 ject to sale at Helena, Arkansas, containing twelve acres, and ten hundredths of an acre, according to the General Land Office, by the Surveyor General, which said tract has been purchased, by the said William Jones.

Now, know ye, that the United States of America in consideration of the premises, and in conformity, in such cases made and provided, have given, and granted, and by these presents do, give and grant, unto the said William Jones, and to his heirs the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said William Jones, and to his heirs and assigns forever.

In testimony whereof, I, Zachery Taylor, President of the United States of America, have caused these letters to be made patent, and the seal od the General Land Office to be affixed.

Given under my hand at the City of Washington, the twenty second day of November, in the year of our Lord, one thousand, eight hundred and forty nine? and of the Independence of the United States, the seventy fourth.

By the President,

Z. TAYLOR,

[L. S.] By THOS. EWING, Jr., *Secretary.*

N. SARGENT,

Recorder of the General Land Office.

Recorded Vol. 10, page 343.

81234.

4-205. B.

M. F. H.
J. A. D.
1111

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 11, 1896.

I, E. F. Best, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of patent, in favor of William Jones, founded on Helena, Arkansas, cash entry No. 4821, is a true and literal exemplification from the record in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and the year above written.

[SEAL.]

E. F. BEST,
Acting Commissioner of the General Land Office.

Certificate of Record.

THE STATE OF ARKANSAS,
County of Crittenden, ss:

I, J. T. Haden, Circuit Clerk, and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of wrtiting was filed for record in my office on the 19th day of January, A. D. 1897, at 3 o'clock P. M., and the same is now duly recorded, with the acknowledgment, and certificates thereon in record Book 1-2— page 318-319 and 320.

[SEAL.]

J. T. HADEN,
Clerk and ex-Officio Recorder.
R. F. WARD, *D. C.*

I certify that I have compared the within and it is a true copy of the original patent on file, in Chancery Clerk's office at Covington, Tenn., in case of H. W. Stockley vs. W. A. Cissna, et al.

J. A. GREEN.

1112 *Deposition of Mr. R. G. Brown and Exhibits* 1, 2, 3 & 4.

Filed February 9th, 1910.

R. D. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

The deposition of Mr. R. G. Brown, taken under notice duly given to the Attorneys for the Defendant, in the Chancery Court Clerk's office, Shelby County, Tennessee, at ten o'clock, on Thursday, January 27th, 1910.

Direct examination by John J. Bullington, of counsel for complainant:

Q. Please state your name, age, residence and occupation?
A. R. G. Brown, Memphis, Tennessee; lawyer.
Q. How long have you practiced law in Memphis, Mr. Brown?
A. Since 1878.
Q. Please state whether or not, as an Attorney, you, at any time, represented either the Muncie Pulp Company or Leo Oppenheimer, Receiver, or W. A. Cissna, in the controversy between said parties and the State of Tennessee?
A. I represented the Muncie Pulp Company as its attorney in December 1903, when the suit of the State of Tennessee versus Muncie Pulp Company was started. The Muncie Pulp Co. went into bankruptcy in August, 1905, and Leo Oppenheimer, of New York, was appointed, first, Receiver in bankruptcy proceedings, and afterwards, Trustee in those proceedings pending before the District Court for the Southern District of New York. I represented Leo Oppenheimer from August, 1905.
Q. Please state whether or not you ever had in your possession the original contract between W. A. Cissna and the Muncie Pulp Company, and by which contract the Muncie Pulp Company
1113 purchased from W. A. Cissna certain timber in the lands in controversy between Cissna and the State of Tennessee.
A. I did.
Q. Please state whether or not you have said original contract, or an authenticated copy thereof, now in your possession.
A. I am rather of the opinion that I have the original contract in my office from the Memphis Trust Building to the Business Men's Club Building, some of my papers were lost, and it may possibly be this paper was amongst those which were lost. I will, however, make search for the paper, and if found, make a copy of it as "Exhibit 1" to this deposition.

(Examination resumed by Col. Carroll:)

Q. Mr. Brown, do you recall the execution of two bonds in this case, one for $10,000.00, and one for $15,000.00?

A. I do.

Q. What did you have to do with the timber that was cut off of the land sued for after the execution of the second bond, and the marketing of that timber?

A. The first bond, as I recall it, was for $10,000.00, and it was given to secure the release of certain timber which was cut at the time the suit was started. This timber was the logs and pulp wood that the Muncie Pulp Company had cut at the time the suit was instituted. It was located at the lod-loading landing on the southeast corner of Dean's Island,—a part of the original island. Afterwards, in order to go on with the timber operation, a $15,000.00 bond was given to account for the value of any timber cut subsequent to the execution of that bond from land which might
1114 be subsequently adjudged to belong to the State of Tennessee.

The second bond for $15,000.00, as I recall it, was executed some time in March, or April, of 1904, and the Muncie Pulp Company continued to cut timber, after that bond was executed, up to about the 15th or 20th of July, 1905. With the taking off of that timber I had nothing to do. In August 1905, I represented Leo Oppenheimer, first Receiver, and afterwards Trustee, of the Muncie Pulp Company, and, as this representative, I had personal charge of the timber that was cut from this land, from the 1st of October, 1905, until about the 1st of September 1906.

Q. Of your own knowledge, you are not aware of any facts relating to the cuttinh of the timber anterior to the giving of the second bond?

Q. No; nor have I any personal knowledge of what timber was cut after the bond was given, except from the 1st of October, 1905, up to the 1st of September, 1906; of that timber I have personal knowledge.

Q. Who sold that timber?

A. I did.

Q. And at what price?

A. At the time the bankruptcy proceedings was instituted the Muncie Pulp Company had a contract with the Anderson-Tulley Co., of Memphis, to purchase all of the saw log timber taken from this land. The contract called for $13.00 per thousand for No. 1 logs, and $11.00 per thousand for No. 2 logs. It was a very valuable contract having been made at a time when cottonwood logs were high. In order to carry out this contract and get the benefit of the same, I made an arrangement with Mr. Caruthers Ewing, Attorney for W. A. Cissna, that I should handle these logging operation- and deposit in bank $8.00 per thousand for all saw log timber taken from the island land, until there should be deposited in the bank the
1115 sum of $16,000.00. There were two purchase money notes executed by the Muncie Pulp Company to W. A. Cissna, in June of 1901, for $7,000.00 each, the notes bearing, as I recollect

it now, five per cent interest. These were the last two of four purchase money notes equal amounts, that were given at the time the timber was purchased, the timber of the entire lands having been purchased for $35,000.00, $7,000.00 ca-h, and four notes of $7,000.00 each maturing in June, 1902, 1903 and 1905. The last two notes had not been paid when the company went into bankruptcy. One of them was owned by the Corn Exchange National Bank, another by Mrs. M. L. Kenney, Mr. Cissna's mother-in-law. Mrs. Kinney and the Corn Exchange National Bank, joined in a suit established in the Chancery Court of Mississippi County, Arkansas, seeking to enforce a vendor's lien on this timber, and a common law lien provided for in the contract of sale. An attachment was issued on all standing timber on the island, and on all timber which had been cur, By agreement between myself and Mr. Caruthers Ewing, this attachment was released, and I undertook to cut the timber and deposit in Bank $8.00 per thousand for all saw logs taken, one dollar per cord, for all pulp wood taken from the land. I made a contract with the South Wood Supply Co., of Hickman, Ky., to purchase this pulp wood at $1.50 per cord, and the cost of cutting the pulp wood, cut and delivered on the bank, where it was to be taken by the South Wood Supply Co., was fifty cents per cord, leav- one dollar per cord to come to the Receiver of the Muncie Pulp Company. I deposited in the bank the net proceeds of the sale of the pulp wood, one dollar per cord, and the net proceeds of the
1116 sale of the saw logs to Anderson-Tulley Co., $8.00 per thousand, until there was $16,000.00 in bank. After that date I remitted to Leo Oppenheimer, Trustee, of the Muncie Pulp Compant, the net proceeds of what saw log timber and pulp wood was sold from the land. The amount remitted to Leo Oppenheimer was somewhat over $7,000.00, perhaps a few hundred over $7,000.00; making in all for the value of the timber that I removed from the land, $23,000.00.

Q. How much of this timber was cut east of what is called in this record the Martin Bank of 1876?

A. Every foot of it, with the exception of about 18 trees which were cut immediately west of the Martin Bank, probably not more than 200 feet west of the bank. These trees were cut by error, Vince Beard, the man I had in charge, being sick at the time, some of his timber men got over the bank and got these 18 or 20 trees. When advised of this, I notified Mr. Beard that was contrary to my agreement, and must not be done, and it was not done after this date. These trees were small trees, not over eighteen inches in diameter and were used for pulp wood. There were probably some six or eight cords of pulp wood in the trees, I will say.

Q. How many acres were the trees cut off of west of the Martin bank of 1876?

A. Probably two acres would cover it.

Q. And east?

A. East of it I never attempted to estimate the acreage but the cutting was done at about a distance of about one-eighth of a mile north of the tram road that had been built by the Muncie Pulp

Co. When I took charge of this cutting I went up to Dean's Island to inspect the cutting and to give Mr. Beard his instructions as to what timber he should cut under the agreement. *cut under*
1117 *the agreement.* There was at that time a tram road built of wood, that had been placed on the land by the Muncie Pulp Company. It extended as nearly as I can estimate about one-eighth of a mile north of the Township line between Township 9, North, and Township 10, North, and was within 100 to 75 feet of the Martin Bank, where the tram road terminated. The timber had been cut at that time, October, 1905, for a distance of about one-eighth of a mile north of this tram road, That is, a majority of it had been cut out; from that time on they cut north of that point up to Barnay Chute, and east of the Martin Bank.

Q. Was the account kept separately of the timber that was cut between the Martin Bank and the middle thread of the river, as laid down on Humphrey's map?

A. No; no, it was not. The line laid down for the middle thread of the river of 1823 on Maj. Humphrey's map was never marked on the land, and there was no way by which we could tell when the timber was cut east or west of that line.

Q. In all, you sold upwards of $23,000.00 worth of timber, saw logs and pulp wood? And the money you turned over to the Trustee in Bankruptcy of the Muncie Pulp Company?

A. That is a fact.

Q. And you acted upon the assumption that all of the lands lying east of the Martin Bank of 1876 was the property of Cissna, and was in the contract between Cissna and the Muncie Pulp Co.?

A. That is true.

Q. When did you first see Barnay Chute?

A. In March of 1904.

Q. How wide was it?

1118 A. It varied somewhat in width, but I would say that it would average 150 feet; possibly 200.

Q. Did it flow between the main Arkansas shore and Dean's Island?

A. Yes sir.

Q. It was suggested to Mr. Bullington and myself that the copy of the bond for $10,000.00 doesn't show its due execution by the Muncie Pulp Company. The original bond cannot be found. What do you know about the execution of that bond?

A. I had that bond drawn up in Memphis, and sent it in on to the Muncie Pulp Company to have it executed. The bond was executed and returned to me, and I filed it personally in the Chancery Court of Shelby, County, Tennessee. I am positive of this fact, because I consulted with Mr. A. W. Biggs as to the terms of the bond, and the bond was drawn up here. After it was returned an order approving it was made by Chancellor Heiskell.

Q. Have you any date (a) showing the amount of the pulp wood saw logs, the dates when sold, by whom sold, and the dates that you remitted the money to Mr. Oppenheimer?

A. I can't say whether I have or not. As stated in the former

part of this deposition, when I moved my office from the Memphis Trust Building to the Business Men's Club Building some of my papers were lost. They were placed in a filing case to be taken to the top floor of the Business Mens' Club Building, and one of the porters lost one of those filing cases, and I cannot now say whether I have any of that data. It appeared in this way: The Anderson-Tulley Company sent me statements from time to time of the amount of saw logs they had taken up, these statements showing the amount they *had* to Vince Beard for getting out this timber, and the balance being the amount that was due to the Receiver and Trustee of the Muncie Pulp Company. They sent me checks which were deposited in bank until there was $16,000.00 there, afterwards, I remitted from time to time to Mr. Leo Oppenheimer, Trustee; but my statements that in all, there was realized about $23,-
1119 000.00 will not be over $300.00 out of the way. In regard to the settlements for the pulp wood, they were very badly mixed up, Mr. Beard makin*f* me reports as to the amount of pulp wood delivered on different barges and the Southern Wood Supply Co. making statements afterwards; these statements did not always agree, and had to be reconciled and corrections made. Consequently, I can't get any such report on the pulp wood as I can on the saw log timber. The Anderson-Tulley Co. can furnish an accurate statement of the amount of saw log timber that they got from me.

Q. Examine the document I hand you?

A. I will say that this was a correct statement up to the time here shown July 31st 1905.

Q. Now, Mr. Brown, will you file that as "Exhibit" as part of your testimony?

A. I will file it as "Exhibit 2", I said I would file the other as "Exhibit 1", Colonel.

Q. Now, Mr. Brown, we are furnished with another account of the Muncie Pulp Co., an account with Anderson-Tulley Co. which is marked in pencil, "Brown & Ewing", and in ink "Vince Beard" and that purports to show a sale of cord wood timber between the 18th of March, 1905, and the 23rd, of March 1906. Please examine that account and state what you know about it, if anything and if you know anything about it, state it, to the stenographer.

A. The document handed me has no relation whatever to pulp wood and the Anderson-Tulley Co. never bought any pulp wood from the Muncie Pulp Co. This is evidently saw timber. It is stated in feet and not in cords, I will say, from examinin*f* this account that it was a statement made by the Anderson-Tulley Co. to Vince Beard, showing the amount paid to him, because the number of feet of the timber is shown, and opposite it the price is put at $5.00 and $3.00. The meaning of that is that Vince Beard
1120 was to get $5.00 per thousand for all saw timber, No. 1 Logs, and $3.00 per thousand for all saw logs graded No. 2 And this simply shows the amount of money that was due to Vince Beard for getting out the timber. I file the same as "Exhibit 3" and I will state that these payments were made to Vince Beard upon my authority, and in accordance with the agreement made between

Mr. Ewing and myself, so that the saw timber should realize $8.00 per thousand to the Muncie Pulp Co.

Q. How far north of the mouth of Barnay Chute did you cut timber?

A. We did not go quite to the mouth of Barnay Chute. There was some timber that is left there.

Q. You will recall that in the course of his testimony in this case, Mr. Martin said he found an established corner of four sections of Dean's Island, and he ran a line from that corner due west about 98 chains. That line I — island down on the map, and it extends from the corner that I have referred to to Martin's Bank of 1876. Did you cut both north and south of that line?

A. No sir; when I took charge of the cutting the timber had been cut off a distance of about one-quarter of a mile above that line, but I continued cutting to the north—did not cut a stick of timber south of the line you refer to south of the projection of the Township line between Township 9, North and 10 North, and again, from the common corner of Sections four and five. Township 9 North, and sections 31 and 32 in Township 10 North.

Q. What is your best idea of the acreage you cut the timber off of north of that line that I have referred to?

1121 A. It would be a mere guess on my part, because I never attempted to estimate the acreage, but I will say that it was somewhere between 225 and 250 acres.

Q. Mr. Brown, was the second bond issued by the Surety Co.?

A. It was.

Q. How do you know it?

A. Because I saw it, I prepared the bond and sent it on for execution, and it was returned to my office and I filed it. I know that both bonds were executed.

Q. Mr. Brown, the Exhibit 2 that you filed—account of Anderson-Tulley Co. with Mr. Ewing and yourself, as Trustees, only shows something upwards of $14,000.00 of saw log timber. Where is the account to be found of the $7,000.00 that was subsequently sold, which you account for by remitting the proceeds to Oppenheimer?

A. To be found with Southern Wood Supply Co., Hickman, Ky.

Q. Have you any data by which you can give the dates of remittances to Mr. Oppenheimer?

A. I may have, but I am not positive, as stated, some of my papers were lost. I will make a search for them, however, and try and have them by February 5th.

Q. Prior to your having any connection with the timber, and prior to the institution of this suit by the State of Tennessee, whatever timber was cut from the lands now claimed by the State, had already been cut by the Muncie Pulp Co. is that correct—excluding those lands north of that line from the corner of four sections of the Martin Bank of 1876?

A. I had nothing to do with the cutting of timber, and no supervision over the cutting of the timber prior to October 1st, 1905. At that time all of the cutting had been done south of the projec-

tion of the Township line, had been done by the Muncie
1122 Pulp Co., as I am informed. The saw log timber was all cut up to that line, for a distance of possibly one-quarter of a mile north of that line, when I took charge on October 1st, 1905. After October 1st, 1905, all of the cutting was done under my supervision, and I made several trips up to the island to see how the cutting was being done; so I speak of personal knowledge of all timber cut for a distance approximately of one-quarter of a mile from Township line, and only by hearsay for timber cut south of that point.

Q. Your *connection* for the Muncie Pulp Co. has been that the Arkansas bank of 1876 is that elevation described by Martin; laid down on his map, and that the Arkansas territory was all that area intervening between the bank and Tennessee bank of 1876, and that Cissna's wire fence divided the territory of Tennessee and the territory of Arkansas. Is that correct?

A. No sir, you haven't got my contention exactly right. My contention is that the bank laid down by Martin as the bank of 1876, was the distinct elevation running from the south end of the island to the north end of Barnay Chute, being an elevation varying between four and twelve feet high, and was the solid, firm bank of the Arkansas shore in 1876, when the Centennial cut-off took place, and that as a matter of fact, if that be held to be an evulsion that the Arkansas boundary line was one-half of the distance between the Martin Bank and the Tennessee bank, on Centennial Idland and the Island 37. If, however the cut-off was an avulsion, but the old bed of the river, continued to be a river for years, and subsequently gradually filled up, this made territory would belong to that island to which it attached, and that was the view of Mr. Cissna when he placed his wire fence along the eastern bank of what is called on Mr. Humphrey's map the old chute, and it is only a distance of probably four hundred feet east of the Tennessee bank of 1876.

1123 Q. Is it the claim now that Cissna's wire fence is the dividing line between Arkansas and Tennessee?

A. That is one of the claims that they make. That however, has been decided by the Supreme Court of Tennessee not to be the fact, the cut-off of 1876 having been judicially pronounced by that eminent body to have been an avulsion, and a complete avulsion, which should fix the boundary line between Tennessee and Arkansas at the middle of the territory between Arkansas bank of 1876 and the Tennessee bank of 1876, and this would place Cissna's wire fence about three-eighths of a mile west of the middle line between the Arkansas bank of 1876 and the Tennessee bank of 1876.

The further taking of this deposition is adjourned until ten o'clock A. M., Saturday, Feb'y., 5th, at the office of Brown & Anderson, Monroe Avenue, Memphis, Tenn., to enable counsel for defendants to cross-examine Mr. Brown, if they so desire, and to take such other proof as by them may be desired.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY.

The further taking of the deposition of Mr. R. G. Brown, taken under notice duly given to the complainants, in the Chan-
1124 cery Court Clerk's Office, Memphis, the same having been adjourned on January 27th, 1910, from said Chancery Court Clerk's — to the office of Brown & Anderson, in the Business Men's Club Building, on Monroe Street, Memphis, Tenn., to ten o'clock, Saturday, February 5th, 1910.

Examination resumed by Mr. Bullington:

Q. Mr. Brown, in your direct examination, some reference was made to a certain bond for $10,000.00 executed by the American Surety Co., and you were asked if said bond had ever been approved by the Court, and my recollection is, you replied that it had been. Since said examination, have you been able to find in your office, or elsewhere, any order approving said bond?

A. I find, in a file of papers kept in my office, an order in the Chancery Court of Tipton County, Tennessee, of Date January 6th, 1905, approving the bond for $10,000.00 made by the Muncie Pulp Co., with the American Surety Co., of New York, as sureties. This approval of this bond was made at Chambers, and is signed F. H. Heiskell, and O. K-'d by R. G. Brown for Muncie Pulp Company and A. W. Biggs, for the State of Tennessee.

Q. Was said order ever filed for record?

A. No sir.

Q. Will you please file said order as Exhibit 4 to your deposition?

A. I do so.

It is agreed between Messrs. Carroll and Bullington, representing the Complainant, and R. G. Brown, representing Leo Oppenheimer, Trustee, that this deposition may be closed, but that, in event Col. Thos. W. Bullitt, of Louisville, Ky., Counsel for the American Surety Co., shall desire to make any cross-examination of the witness, he may do so on February 12th, 1910.

And further *despondent* saith not.

R. G. BROWN.

Sworn to ans subscribed before me this 5th day of Feby., 1910.

1125 EXHIBIT 1 TO DEPOSITION OF R. G. BROWN.

W. A. Cissna
and
Muncie Pulp Co.

Contract.

Copy.

This contract made and entered into this 21st Day of June, 1901, by and between W. A. Cissna of Chicago, Ill., party of the first part and the Muncie Pulp Co. a corporation of the State of New York, party of the second part,

Witnesseth, that the said party *og* the first part, for the consideration hereinafter named, does hereby sell and convey to the said party of the second part, all the timber of all kinds, sizes and description, upon the property known as the Dean's Island Plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas, to-wit: All of fractional section thirty-four (34): All of south half of section thirty-three (33): All of north half of section thirty-three (33): South and east of Chute: All of section thirty-two (32) South of Chute, all in Township Ten (10) North Range Ten (10) East.

Also, all of Fractional Sections Three (3), Four (4), and five (5), in Township Nine (9), Range Ten (10) East, together with all accretions to all said above described property, already made or hereafter to be made, by the Mississippi River, or otherwise, the converse being limited to such land as is now in said described Sections, and all accretions thereto and not to land that may have originally been in said sections.

1126 The consideration for the said sale and transfer of timber is the sum of Thirty Five Thousand Dollars ($35,000.00), Seven Thousand (7,000.00) Dollars of which consideration in cash in hand paid, the receipt of which is hereby acknowledged, and the balance of said consideration is represented by four notes of even date herewith, each for the sum of Seven Thousand ($7,000.00) Dollars, with five per cent interest from date until paid, due on or before One, Two, Three or Four years from the date thereof.

It is hereby contracted and agreed that all of the timber within the line of fence erected by R. L. Beedle, about the year of 1896, is to be cut and removed within two years from the date of this contract.

It is further contracted and agreed that the remaining timber, with the exception of that timber on the one thousand acres of lowland adjoining Island 37 and Centennial Island *ond* one thousand acres more or less known as Dean's Island Towhead, is to be cut and removed within five years from the date of this contract, and the timber on the said One Thousand acres of said land, and

one thousand acres more or less, known as Dean's Island Towhead, is to be cut within Seven Years from the date of this contract.

It is further contracted and agreed by and between the parties heretom that if at any time, the said party of the second part, shall cut and remove from the said property a larger amount of timber than the proportionate value of the same has already been paid for, that it will immediately pay to the said party of the first part the proportion of the purchase price covering the said timber; that at no time shall they cut and remove a greater amount of timber than they have already paid for under this contract, it being the intention hereby that whenever any timber is cut and removed frim the said property, that it shall be at all times paid for in cash.

1127 Is is further contracted and agreed that the said party of the first part reserves for his own ise and benefit all the scattering trees, except cotton wood, the cultivated land above described, and in the small pasture at the lower barn lot.

It is further contracted and agreed that the said party of the second part is to designate to the said party of the first part, or his agent, such timber accessible to the plantation as the said party of the first part is authorized to cut for fire and gin wood on said plantation, which said wood is to be amply sufficient for all the purposes of the said party of the first part, or his tenants on the said plantation, that the said party of the first part or his tenants, shall at all times have the right to cut and remove a sufficient amount of timber for fire wood purposes upon the plantation.

It is further contracted and agreed between the parties hereto, that the said party of the second part shall have a right of way over the cleared land, for the purpose of cutting and hauling the same from the timberland to the river front where the tract hereinafter described shall be located, and it is particularly agreed that the party of the second part shall have a plot of ground One hundred and fifty feet by one thousand feet on the bank of the Mississippi River upon which yo stack the said lumber and logs so cut and removed.

The said party of the second part is to have the privilege of locating this said lot upon which to stack the wood hereafter and at such place as may be convenient to said party of the second part.

It is further contracted and agreed that the said party of the second part, shall have the right of way upon which to remove the timber on Dean's Chute, between crop seasons, on cleared land.

1128 (S.) W. A. CISSNA.
(S.) MUNCIE PULP CO.,
By ROBERT GIBSON, *Agt.*

Transaction closed and noted and check delivered Aug. 7, 1901.
R. G. BROWN,
Att'y for Muncie Pulp Co.

Int. Rev. Stamp $1.00.

STATE OF TENNESSEE,
Shelby County, ss:

Personally appeared before me, A. Humphreys Kortrecht, a Notary Public, in and for said State and County at Memphis, duly commissioned and qualified W. A. Cissna, the within named bargainor, with whom I am personally acquainted and who acknowledged that he executed the within instrument for the purposes therein contained, and I do hereby so certify.

Witness my hand and Nortarial Seal at Memphis, aforesaid, this 21st day of June, 1901.

[SEAL.] (S.) HUMPHREYS KORTHRECHT, *N. P.*

STATE OF ARKANSAS,
County of Crittenden:

Certificate of Record.

I, Robert F. Ward, Circuit Clerk and Ex-Officio Recorder, of the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 28th day of August, A. D., 1901, at 9 o'clock A. M., and the same is now duly recorded with the acknowledgments and certificates thereon, in Record Book Q-2 Page 301.

In witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of August, 1901.

[SEAL.] (S.) W. F. WARD,
Circuit Clerk and ex-Officio Recorder.

1129 *Certificate of Records.*

STATE OF ARKANSAS,
County of Mississippi:

I, Charles S. Driver, Clerk of the Circuit Court and Ex-Officio Recorder for the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for Record in my office on the 6th day of November, 1901, and the same is now duly recorded in Record Book of Deeds Vol. 26, page- 463, to 466.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 6th day of November 1901.

(S.) CHAS. S. DRIVER, *Clerk.*

Clerk's Certificate of Transcript.

STATE OF ARKANSAS,
County of Crittenden:

I, R. F. Ward, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the annexed and

foregoing pages contain a true and complete transcript of the contract between W. A. Cissna and Muncie Pulp Company for same of timber as therein set forth, and as the same appears of record, on page 301 et seq. of Deed Record, Volume Q-2 of Crittenden County, Arkansas.

Witness my hand and official seal, this 2nd, day of November, 1901.

(S.) ROB'T F. WARD, *Clerk*,
By CAM'L KELL, *D. C.*

1130 EXHIBIT "2," A. J. HARRIS, JR.

MEMPHIS, TENN., 3/29/1909.

Mr. Muncie Pulp Co.

R. G. Brown & Caruthers Ewing.

1904.						
Dec.	1.	Check.				2,768.34
Dec.	17.	"				2,548.10
1905.						
Jan.	27.	"				1,778.73
Mar.	14.	"				2,481.22
Apl.	13.	"				1,199.48
May	29.	"				539.67
July	31.	"				453.12
Oct.	31.	"				.61
Error in tally						
		Total				14,647.42

1904.							
Nov.	3.	....	Cwd.	351,916	8.00		2,815.32
Dec.	2.	1147	Cwd.	346,043	8.00		2,768.34
1905.							
Jan.	5.	336	"	96,836'	8.00		774.68
"	14.	806	"	221,677'	8.00		1,773.42
Feb.	23.	1158	"	322,967'	8.00		2,583.73
Mar.	18.	290	"	71,907'	8.00		575.26
Apl.	13.	166	"	39,492'	8.00		315.94
	11.	189	"	48,127'	8.00		385.02
	14.	By Vince Beard					400.00
	18.	4	Cwd.	1,866 ft.	8.00		8.53
May	3.	512	"	144,908'	8.00		1,159.26
	26.	14	"	3,963'	8.00		31.70
Jun.	2.	150	"	39,857'	8.00		318.84
1131							
Jun.	12.	91	Cwd.	27,604 ft.	8.00		220.83
Aug.	2.	217	"	56,715 "	8.00		453.72
1906.							
Mar.	23.	69	"	12,564'	8.00		62.83
		Total					14,647.42

EXHIBIT #3, A. J. HARRIS, JR.

MEMPHIS, TENN., 3/29/1909.

Muncie Pulp Co.

Vince Beard.

1905.						
Apl.	14.	Check				292.14
Order Brown						400.00
May	4.	Check				655.01
	17.	Check				4.93
	26.	Check				17.65
Jun.	15.	"				304.63
Aug.	2.	"				252.78
1906.						
Mar.	23.	"				49.80
Total						1,976.94
1905.						
Mar.	18.	143	Cwd.	47,155′	5.00	235.77
		147	"	24,752′	3.00	74.24
Apl.	11.	100	"	34,068′	5.00	170.34
		89	"	14,059′	3.00	42.18
	13.	82	"	25,563′	5.00	127.82
		84	"	13,929′	3.00	41.79
	18.	3	"	869′	5.00	4.34
		1	"	197′	3.00	.59
1132						
May	3.	321	"	110,149′	5.00	550.75
		191	"	34,759′	3.00	104.27
	26.	8	"	2,882′	5.00	14.40
		6	"	1,081′	3.00	3.24
Jun.	2.	82	"	28,033′	5.00	140.16
		68	"	11,824′	3.00	35.47
	12.	64	"	23.095′	5.00	115.48
		27	"	4,509′	3.00	13.52
Aug.	2.	122	"	41,020′	5.00	205.11
1906.						
		95	"	15,695′	3.00	47.08
Mar.	23.	19	"	6,061′	5.00	30.30
		50	"	6,503′	3.00	19.50
Error n talley						.59
Total						1,976.94

In the Chancery Court of Tipton County, Tennessee.

STATE OF TENNESSEE

vs.

MUNCIE PULP COMPANY et al.

In this cause, the defendant Muncie Pulp Company presented a bond in compliance with the order heretofore made in this cause in the sum of Ten Thousand dollars with the American Surety
1133 Company of New York as surety, and the same is accepted and approved.

Done at Chambers in Memphis, Tenn., Jan. 6th, 1904.

F. H. HEISKELL, *Chancellor.*

1134 *Cross-examination of Mr. R. G. Brown.*

Filed Mc'h 18, 1910.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY.

Cross-examination of R. G. Brown by Col. Thomas W. Bullitt, counsel for the Muncie Pulp Company:

Q. Mr. Brown, in your original examination you stated that the Muncie Pulp Company had gone into bankruptcy in August, 1905. That you represented Leo Oppenheimer, Receiver, from August 1905, and that you had taken charge of the cutting of the timber after the 1st of October 1904, continuing then until the 1st of September, 1905. I will ask you whether that is not an error?

A. That is an error in this: I was mistaken in the year in which the Muncie Pulp Company was put into bankruptcy. It was in 1904, not in 1905, the date of the filing of the petition in bankruptcy, according to the best of my recollection now, July 31, 1904. I took charge of the cutting of this timber under an agreement with Mr. Caruthers Ewing representing the Corn Exchange National Bank, and Mrs. M. L. Kinney on or about the 1st day of October, 1904, and was in entire control of the cutting operation at Dean's Island up to about September, 1905.

Q. After September 1905, was that cutting of timber continued by the Muncie Pulp Company, or its Receiver?

A. I think not. There was a small amount of saw logs there that were not delivered at that time, which we afterwards delivered to Anderson-Tulley Company, and they paid for this little rem-

1135 nant in March 1906.

Q. My question is as to whether or not the cutting was or was not discontinued.

A. The cutting ceased in September 1905.

Q. You were shown a statement which you stated was the correct statement up to July 31, 1905, and which you filed as Exhibit "2" to your deposition. Does that statement represent all of the money that you received from the Anderson-Tulley Company?

A. It does not. There was one item which was not put upon my account, but was put on the account of Anderson-Tulley Company with Robert Gibson. This item being on that account under date of October 8th, and amounting to $2,148.55.

This check was made out to Robert Gibson, who turned the same over to me, and I deposited to the joint account of Mr. Caruthers Ewing and myself on October 15th. Since my deposition was taken, I have secured from the Memphis Savings Bank, the loose leaf from this individual ledger showing the account with that bank by R. G. Brown and Caruthers Ewing, attorneys. This sheet shows that on October 15th, 1904, I deposited $2,148.55. This money

came from the Anderson-Tully Company in the manner which I have pointed out. On October 21st, I deposited $326.44 and on October 26th, $420.50, November 2nd, $27,553, November 22, $682.71, all of which sums came from the sale of Pulp wood to the Southern Wood Supply Company, of Hickman, Kentucky. On December 1st, 1904, this bank sheet shows I deposited $3,194.30. This consisted of a check from Anderson-Tully Company for $2,-815.32 and a check from the Southern Wood Supply Company for $378.98. This check for $378.98 was improperly indorsed, and was returned to the bank and it was charged back to me on December 2nd.

1136 The proper endorsement was then put on this check, and it was again deposited and it appears as an deposit on December 9th. On December 13th, I deposited $345.75 which came from the Southern Wood Supply Company; December 27th, $2,-768.34, which came from the Anderson-Tully Company; January 7th, $697.37, which came from the Southern Wood Supply Company; January 30th, $2,548.10, which came from the Anderson-Tully Company; February 13th, $1,061.68, which came from Southern Wood Supply Company, and March 15th, $1,778.73 which came from the Anderson-Tully Company, making a total deposit up to March 15th, made by me in the Memphis Savings Bank of $16,000.00. After that time, I received from the Anderson-Tully Company at various times, as shown by that account $4,-736.32, aggregating in all with the sixteen thousand dollars, some $23,766.62. The balance of the twenty three thousand which I received from the timber on Dean's Island from the Southern Wood Supply Company.

Q. Mr. Brown, for convenience in handling, will you kindly just give the amounts separate that you received from the Anderson-Tully Company, and the amounts that you received from the Southern Wood Supply Company, state the amounts and dates separately?

A. I can give you accurately what I received from the Anderson-Tully Company, but I cannot give you accurately the amounts that I received from the Southern Wood Supply Company, except as the same are shown on this sheet of the Memphis Bank, the reason of this being that some of my papers have been lost, and among these, the bank books showing these deposits.

1137 Q. Just make that statement as I have requested from the account that you have with the bank.

A. I received from the Anderson-Tully Company, October 8th, 1904, $2,148.55; December 1st, $2,815.32; December 27th, 1904, $2,768.34; January 27th, 1905, $2,548.10; March 14th, $1,778.73; April 13th, $2,481.32; May 29th, $1,199.48; July 31st, $531.57; October 31st, $453.12; July 31st, $62.83; Total $16,795.97.

The account with the Memphis Savings Bank shows that I deposited the following amounts, all of which were received from the Southern Wood Supply Company, between October 21st, 1904 and February 23, 1905, inclusive. October 21st, 1904, $326.04; October 26th, $426.50; November 2, $420.53; November 22nd, $684.81;

December 21st, $378.98; December 28th, $345.75; January 7th, $697.37; February 23, $1,061.68; making a total of $4,341.66; in addition to the above amounts, I received other sums from the Southern Wood Supply Company, the exact date of the amounts of which I have no means of determining, but the grand aggregate of all of the money that I received from this timber will be $23,000.00 within one hundred or three hundred dollars.

Q. Now, Mr. Brown, you were shown also another account of the Muncie Pulp Company, the account with Anderson-Tully Company in pencil, Brown and Ewing, and in ink "Vince Beard" which it is said purports to show the scale of cord wood timber between March 18th, 1905, and March 23, 1906. Does that account represent any money which came into your hands on behalf of the Muncie Pulp Company, or the Receiver in Bankruptcy, or any money, which was paid to either the Muncie Pulp Company or the Receiver?

1138 A. It does not; it represents the logging, the cost of getting cut these saw logs at Dean's Island, which under the arrangement made between Mr. Ewing and myself, was to be paid to Vince Beard, five dollars a thousand for number one logs, and three dollars a thousand for number two logs. The first credit to Beard under this account is under date of March 8th, 1905. The first charge against him is April 14th, 1905, and the credits will show so many feet at five dollars and three dollars, which clearly shows it was not the purchase price of the timber, but merely handing over to Beard his expenses for getting these logs out under this arrangement between Mr. Ewing and myself.

Q. The question is put to you refers to payments as showing a sale of cordwood timber. You say that does not show the sale of timber at all. Does it have anything to do with cordwood?

A. It does not. This wood is used for pulp, is cut in cordwood lengths, which are reduced to pulp by being ground.

Q. This account with Vince Beard that I have shown you as you say, shows the payment to Vince Beard for getting out certain logs; Now is the price of logs, I mean the money, which the Muncie Pulp Company was entitled to receive, and did receive, embraced in the money that you received and deposited as stated above?

A. Yes sir, the Muncie Pulp Company received eight dollars per thousand for all of these logs, and Vince Beard received five *five* dollars thousand or three dollars a thousand, for getting them out. The Muncie Pulp Co., never received this five dollars or three dollars, it went directly to Vince Beard. The eight dollars per thousand came directly to me, and was by me turned over to Leo Oppenheimer, the Receiver, and was all of the money the Muncie Pulp Company received, and it was an extremely high price to pay

1139 for the cottonwood stumpage, much more than it was worth in the market.

Q. And the money that you received is accounted for in the statement you have made heretofore?

A. It is.

Q. Now, with the deposition of Mr. Harris, there is filed what pur-

ports to be an account of the Muncie Pulp Company and Robert Gibson with the Anderson-Tully Company. I will ask you to look at that and say whether you have any personal knowledge of the items thereon of October 8th, $2,148.55?

A. I have not.

Q. The item which I have just called is the debit or left hand column. Have you any knowledge of the item on the credit or right hand column, thereon, of $1,519.96 as of November 3rd?

A. From November 3rd to February 23rd, the items on this account show the amounts paid to Robert Gibson and Vince Beard for getting out logs between those dates. Robert Gibson was associated with Vince Beard in getting out these logs up to that date. After that date, Vince Beard alon*g* got out the logs.

Q. Now the money for the logs themselves was paid, not to the men themselves, but to yourself and accounted for in the statement that you have heretofore entered?

A. That is correct.

Q. I notice upon this same statement as of the date of October 8th, 1904, an item of $2,148.55, and an item following. What had you, if anything, to do with those items?

A. I received the item of $2,148.55, the check having been made out to Robert Gibson, and by him endorsed over to me. The next two items, $1,663.73, and $200.00, aggregating $1,863.73,
1140 were made out to Gibson, and he kept them because the logs that he had turned over from the 1st of October down to the first of December, at the proce he was to receive for getting out amounting to something like two thousand dollars.

Q. The Muncie Pulp Company did not get, then, either one of these two items?

A. It did not.

Q. What about the item- below that, were they payments to Gibson?

A. They were all payments to Gibson and were shown on the other side exactly what was paid to him.

Q. They did not pass into your hands or the Muncie Pulp Company's hands?

A. They did not.

Q. Now, Mr. Brown, from the time that you took charge of the cutting of this timber, I will ask you to state where the timber was cut from?

A. It was cut from a point about a quarter of a mile north——

Q. You mean beginning a quarter of a mile north?

A. From a quarter of a mile north from the projection of the township line of township nine north and ten north and east of what is laid down on Mr. Green's map and Mr. Martin's map, as the bank of 1876. The cutting was down from about this point up to where this bank of 1876 joins the bank of the Barney Chute, and extending eastwardly over the entire territory o*g* Barney Chute.

Q. You cut nothing south of a line running from the point that you have spoken of across to the bank of 1823, as shown on the map?

A. No sir.

1141 Q. Now, of this sixteen thousand and odd dollars of money collected by you from the Anderson-Tully Company, what proportion of that, if you could state, was the proceeds of timber cut west of what is laid down on what is Green's and Humphrey's map as the center thread of the Mississippi River in 1823, and what proportion from the land lying east of that center thread?

A. Taking Mr. Green's map to be correct to show the proportion of the territory included between the lines, I should say that about one-third of the timber was cut between the bank of the river in 1876, and that two-thirds of it was cut east of a center thread of the Mississippi River in 1823.

Q. Now, taking the amount that was collected by you from the Southern Wood Supply Company, I will ask you to make, substantially the same statement?

A. The pulp wood furnished to the Southern Wood Supply Company after I took charge of the cutting was small stuff, the tops and big limbs of the large stuff, as the cutting proceeded, and I should say that about the same proportion of the amount received from the Southern Wood Supply Company was cut east of the center thread of the Mississippi River in 1823, as laid down, as in the case of the saw timber.

Q. That is two-thirds east and one-third west?

A. About that, however that is mere approximation on my part, and I do not pretend to be accurate in it.

Q. The contract between Cissna and the Muncie Pulp Company authorized the latter to cut the whole of that territory including Dean's Island as marked on this map.

1142 Was that cutting so done?

A. Yes sir.

Q. Where was the great bulk of the timber that was cut, Mr. Brown—would you say east or west of this center thread of 18 we, taking this contract as a whole?

A. The great bulk of it was east of the center thread of the Mississippi River in 1823, because the Muncie Pulp Company began cutting quite a distance up Dean's Chute beyond the Section lines between section thirty-two and thirty-three, there being quite a quantity of timber along the chute there, and the cleared part of the land being in the southern part of the island, and next to the river. The timber men came down from the northeast part of the island in cutting the big stuff, and they ran a tram road on the southern part of the island, over beyond Sandy Chute to cut the pulp wood that was needed by the Muncie Pulp Company for operating its paper mills at Muncie, Indiana. That cutting was done in approximately the territory outlined by the broken red line placed on Mr. J. A. Green's map by Mr. Clothier, which is exhibit Number 3 to the deposition of Mr. J. A. Green. The pulp wood was cut from this territory along this tram road, for economy in hauling. It was drawn out on the flat below the tram, and loaded on this tram road.

Q. The dates upon which this cutting has been done prior to the

time that you took charge of it, and the various parts of the tract, you have no personal knowledge?

A. I have personal knowledge to this extent. I examined the title to this tract of land in the summer of 1901 for the Muncie Pulp Company. I know that the cutting began, from correspondence with the officers of the company, about March, 1902, and I went to the island in March, 1904, after the suit was instituted
1143 by the State of Tennessee, the suit now on trial. At that time, I saw what cutting had been done, and again after the bankruptcy took place in July, 1904, I was frequently at the *os; and,* and saw the cutting as it progressed from that time on.

Q. At the time that you examined it have you any knowledge at all of what timber was on hand, or where the timber came from that was on hand December 13th, 1904?

A. No sir.

Q. You do not know what part of the territory that came from?

A. I could not say except generally that the pulp wood timber came from the area embraced in the dotted broken red lines, and the saw log timber came from the territory east of the center thread of the Mississippi River.

Q. One of the orders in the case provided for Mr. Joplin to measure the timber on hand December 13th, 1905, for the State of Tennessee. Do you know whether Mr. Joplin ever did that?

A. He never did it.

Q. Mr. Green in his map for the State, and filed with his deposition, as Exhibit "BB," lays down the old tram road as extending up northwardly to about an extension of line of Trigg's one hundred acres survey. Was that tram road built as far north as it is there represented?

A. I do not think so.

Q. Where did that tram road end?

A. To the best of my belief and observation, somewhere between an eight- and a quarter of a mile north of a projection of the township line.

Q. You mean the line between townships nine and ten?

A. Between township lines nine north and ten south.

1144 Redirect examination by Mr. Bullington for the complainant.

Q. Mr. Brown, I believe that you stated that after you took charge of the cutting for the Muncie Pulp Company after this suit was filed, that the cutting extended from a point about a quarter of a mile north of the township line and on up the River.

A. The north bank.

Q. Up the bank?

A. Yes sir.

Q. And further that your estimate of the timber cut during that time would be that one third of the timber so cut was west of the center thread of the Mississippi, as laid down on Mr. Clothier's map, and two thirds on the east?

A. That is correct.

751

Q. At the time you took charge, Mr. Brown, had the timber south of the line that you have designated as the south line of where the cutting went, been cut over?

A. Yes sir, I never allowed the men to cut west of the Martin Bank after I took charge.

Q. What proportion of the land west of the center thread of the river in 1823 had been cut over prior to your taking charge?

A. All of the land from a point about between a quarter and three eighths of a mile north of the extension of the township line between townships nine north and ten north were still in the woods, between the bank of 1876, and the center of the river as it ran in 1823. All of the land south of that line had been in cultivation for a number of years, had been cut over, and all of the land west of Martin's Bank of 1876, so far north as shown by this broken red line,
1145 had been cut over before I took charge. That was the young cottonwood small in size, which was most favorable for the use in pulp wood, and had been cut by the Muncie Pulp Company for use in its business.

Q. How did the quantity of the land cut over after you took charge, and prior to your taking charge compare: That is, I mean of the land west of the Center thread of 1823?

A. Mr. Clothier has estimated the entire cut over tract between these lines as three hundred and fifty acres. I cannot pretend to make any accurate estimate, but taking his estimate to be correct, I should say that after I took charge there was more than seventy acres of that three -undered and fifty acres that was cut over by the men. Possibly as much as eighty five or ninety acres.

Recross-examination by Col. Thomas W. Bullitt:

Q. Mr. Brown, in answer to Mr. Bullington's question you spoke of the fact that at the time you took charge of the ground south of this line had been cut over. Is it, or nor true, that it had been cut eastwardly clear across the island?

A. It had; all of the merchantable timber south of that line clear across the island was taken off.

Q. And that embraces several thousand acres, does it not?

A. I should — somewhere in the neighborhood of fifteen hundred acres, anyway.

Q. The heaviest timber was all up on the island, as shown on this map?

A. Yes sir; it was very much heavier on the old island than it was between the bank of 1823 and the bank of 1876.

Q. In estimating your one-third of the cut after you took
1146 charge, being on the west side, and two thirds on the east side, of a center thread of the Mississippi River of 1823, I would like to ask you whether or not your cutting extended as far north as this map goes?

A. It extended further north than the map goes.

And further deponent saith not.

R. G. BROWN.

Sworn to and subscribed before me, this Mch. 18, 1910.
LAMAR HEISKELL, *C. & M.*

Deposition of A. J. Harris and Exhibit I Thereto.

Filed February 9th, 1910.

13271 R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP Co.

Deposition of A. J. Harris, Jr., taken inder notice duly given to the attorneys for the defendants, at the office of Brown & Anderson in the Business Mens' Club Building on Monroe Street in Memphis, Tennessee, on Monday February 7th, 1910. Said deposition to be *reas* as evidence on the behalf of the plantiff in the above styled cause.

The witness first being duly sworn by R. G. Brown, Notary Public, by consent, deposes as follows:

Direct examination by Jno. P. Bullington, counsel for complainant:

Q. Please state your name, age, residence and occupation?
A. A. J. Harris, Jr., 25 years of age. 1030 McLemore Ave., Memphis, Tennessee. Cashier and Head Book-keeper of
1147 Anderson Tulley Co.
Q. Mr. Harris, how long have you lived in Memphis?
A. All of my life.
Q. How long have you kept books for Anderson-Tulley Co.?
A. About six years.
Q. How long have you been head-book-keeper?
A. About four years.
Q. As Head Book-keeper are you in charge of the books and records of the Anderson-Tulley Company?
A. Yes sir.
Q. Please state whether or not you are familiar with the account of the Anderson-Tulley Co. and Muncie Pulp Co., L. E. Oppenheimer, Trustee and Receiver in Bakruptcy and account Muncie Pulp Co. made to Mr. R. G. Brown?
A. Yes sir.
Q. Have you ever or any time prepared a statement of the account of said Company with the parties above mentioned?
A. Yes sir.
Q. Please examine statement now handed you and state whether this statement represents the amount of cash paid to Robert Gibson as agent for the Muncie Pulp Co.?
A. Yes sir.

Q. For what was the money paid to Gibson as the agent for the Muncie Pulp Company ?

A. For logs on the Mississippi Bank on the property of the Muncie Pulp Company.

Q. Please state whether or not if you know the logs covered by this account, was taken from the land claimed by the Muncie Pulp Co. and Mr. Cissna on Island (37) on Dean's Island on the Mississippi River, Tipton County, Tenn.?

A. No sir, I do not.

1148 Q. From your own knowledge you do not know where the logs came from?

A. No sir.

Q. Please state whether or not the account you now hold covers the beginning of the transaction between the Anderson-Tulley Co., and the Muncie Pulp Co.?

A. Yes sir.

Q. And to what date does it extend?

A. Feby. 23rd, 1905.

Q. Does this account cover all transactions in which the Anderson-Tulley Co., paid money to the Muncie Pulp Company or its Agents between the dates covered by the statement?

A. Yes sir, the entire transaction is covered by this statement.

Q. By whom was this statement prepared?

A. By myself.

Q. It is correct as shown by the books of the Anderson-Tulley Co.?

A. Yes, sir.

Q. Will you please file the same marking it Exhibit "1" to your deposition?

A. Yes sir.

Q. Please now examine, Mr. Harris, the two accounts we hand you which are marked respectively Exhibit "2" and Exhibit "3" to Mr. R. G. Brown's deposition and state by whom these accounts were prepared?

A. I prepared these statements under date of March 29th, 1909, taken from the books of Anderson-Tulley Co.

Q. Are they correct accounts and show just the condition of account of Anderson-Tulle*t* Co., and Muncie Pulp Co., and its agents at that time?

1149 A. Yes sir.

Q. Will you please identify these by signing your name to them, marking them Exhibits "2" to your deposition by reference?

A. Yes sir.

Q. Do these three accounts heretofore mentioned and filed hereto as part of your deposition, cover every transaction between the Anderson-Tulley Co., and its Agents, and Represen-atives?

A. Yes sir.

Q. And they are correct as shown by the books of the Anderson-Tulley Co?

A. Yes sir.

Cross examination on part of L. E. Oppenheimer, Trustee for the Muncie Pulp Co. and on part of the American Surety Co., is waived.

And further he saith not.

A. J. HARRIS, Jr.

Sworn to and subscribed before me by consent, this 7th day of February, 1910.

R. G. BROWN, *N. P.*

The further taking of the depositions under this notice are adjourned on account of the illness of Colonel Bullitt, until Friday, February 11th, at 10 o'clock, in the same office.

1150 MEMPHIS, TENN., 3/29/1909.

Muncie Pulp Co.
Robt. Gibson.

1903.			
Oct.	15.	Check	2,500
	15.	"	500
Nov.	11.	"	600
Dec.	23.	"	1,014.51
1904.			
Jan.	23.	"	1,875.50
Feb.	27.	"	1,000.00
M'ch	4.	"	1,477.01
	24.	"	1,200.
	31.	"	127.65
May	1.	"	1,000.00
Jun.	2.	"	500.00
	13.	"	500.00
	18.	"	200.00
	25.	"	500.00
July	1.	"	512.20
	1.	"	64.89
	1.	"	1,030.00
Aug.	4.	"	2,288.70
	8.	"	1,030.00
Sept.	30.	"	2,238.89
Oct.	8.	"	88.35
	"	"	2,148.55
Nov.	3.	"	1,663.73
Dec.	1.	"	200.00
	5.	"	1,394.68
1905.			
Jan.	14.	"	1,435.28
Feb.	15.	"	100.00
1151			
Feb.	21.	Check	50.00
	12.	"	100.00
	21.	"	1,200.00
	Total		28,538.54

1904.								
Dec.	21.	$1	Cwd.	in Chute	300,000′	11.		3,300.00
		1000	"	on bank	57,345′	13.		745.48
		284	"	2 "	51,730′	11.		569.03

1904.							
Jan.	23.	360	Cwd.	132,284'	13.	.....	1,719.69
		76	"	14,165'	11.	.....	155.81
May	13.	191	"	70,243'	13.	.....	913.15
	49.	49	"	8,920'	11.	.....	98.12
July	21.	170	"	58,360'	13.	.....	758.68
		75	"	13,862'	11.	.....	152.48
	30.	457	"	185,124'	13.	.....	2,406.61
		35	"	6,400'	11.	.....	70.40
	30.	253	"	99,373'	13.	.....	1,291.84
		43	"	7,343'	11.	.....	80.81
		230	"	76,491'	13.	.....	994.38
		109	"	19,477'	11.	.....	214.24
		196	"	65,073'	13.	.....	845.94
		85	"	15,115'	11.	.....	166.26
Aug.	3.	433	"	156,088'	13.	.....	2,029.14
		188	"	34,219'	11.	.....	376.40
Oct.	1.	959	"	383,506'	13.	.....	4,985.55
		186	"	33,770'	11.	.....	368.26
		18	"	6,000'	13.	.....	78.00
		40	"	6,726'	11.	.....	73.98
Nov.	3.	812	"	303,991'	5.	.....	1,519.96
		254	"	47,925'	3.	.....	143.77
Dec.	2.	769	"	278,027'	5.	.....	1,390.14
		378	"	68,016'	3.	.....	204.04
1152							
1905.							
Jan.	5.	220	Cwd.	76,466'	5.	.....	382.33
		116	"	20,370'	3.	.....	174.81
Feb.	23.	693	"	240,852'	5.	.....	1,204.26
		465	"	82,115'	3.	.....	246.34
Error in tally						.....	.50
Total						.....	28,538.54

1153 Filed Feb'y 26/10.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY.

Affidavit of Lamar Heiskell.

Lamar Heiskell first duly sworn on his oath states that he is the Clerk & Master of the Chancery Court of Shelby County, Tennessee; that at the instance of the solicitors for the State he has searched the office of the Clerk & Master and has been unable to find the original papers constituting the record in the above entitled cause.

Affiant further states that a complete transcript of the record was made out and forwarded to the Clerk of the Supreme Court in the above entitled cause, and that therein was contained all of the proceedings had in the Court below; all the proof taken and all of the writs issued and served together with all of the pleadings and agreements of counsel that the original papers are not in his office and he has made a due and diligent search therefor in the place where the record should be and he has not the said record and cannot find

it on due search anywhere in his office or anywhere else. He does not know where it is and he believes it is lost or mislaid.

LAMAR HEISKELL, *C. & M.*

Subscribed and sworn to before me this Feb'y 26/10.

W. M. COX, *D. C. & M.*

Order Supplying Record Entered 3/2/10.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

In this cause it appearing from the affidavits of the Clerk
1154 & Master and John P. Bullington, Esq., one of the *Solcitiors* for the Plaintiff that the file in this cause has been lost, mislaid unintentionally so that it cannot be found or had, and that diligent search has been made therefor, and the Court being satisfied from the said affidavits that the said file once existed and that it has been lost or mislaid unintentionally, it is accordingly so ordered, adjudged and decreed. And the Court therefore, orders that the said file be substituted by the best evidence the nature of the case will admit of.

And, thereupon, the plaintiff presented to the Court a duly certified copy of the tr*na*-cript of the record in the Supreme Court in said cause, and a copy of the amended bill, and a copy of the record in the case of Stockley vs. Cissna in the Circuit Court of Appeals at Cincinnati duly certified. And the Court being satisfied that the said documents constituted all the record in said cause except the proofs taken after the filing of the amended bill, which proofs are in the files of the Court, it is ordered and decreed by the Court that each and all of the said copie- be filed in said cause and be substituted for the originals and have all the force and effect thereof and to be and constitute together with the depositions heretofore referred to in this cause.

Copy of Amended Bill Filed 3/4/10.

In the Chancery Court of Shelby County, Tennessee.

THE STATE OF TENNESSEE
vs.
THE MUNCIE PULP CO., W. A. CISSNA, VINCE BEARD, LEO OPPENHEIMER, Trustee in Bankruptcy of the Muncie Pulp Co., and H. W. Stockley, a resident of Tipton County, Tennessee.

To the Honorable F. H. Heiskell, Chancellor:

1155 The plaintiff states to the Court that it filed its original bill in the Chancery Court of Tipton County, Tenn., on the

15th day of September, 1903, against the first three of the named defendants hereto, the object and purpose of which was to enjoin the said defendants each and every of them, their agents, servants and employers, from further trespassing upon the lands of the plaintiff, and exercising acts of ownership of the same, or any other land belonging to it, from cutting, destroying or removing any of the standing timber situated thereon, and from removing and shipping any of the timber which had been cut and had not been removed, and from shipping any other lumber cut from said timber, and to this end, an injunction was *south* and obtained, all of which will appear from the original bill herein.

That afterwards and on the 17th day of December, a writ of injunction issued out of the aforesaid Court, which said injunction was duly served, and thereafter the defendant W. A. Cissna filed his plea in abatement to the said suit, and afterwards, and to-wit, on the 19th day of January 190*r*, the defendant, the Muncie Pulp Company filed its plea in abatement and replications of the aforesaid pleas were filed, all of which will appear from a transcript of the record.

That while the aforesaid case was pending the injunction granted was by consent modified to the extent of permitting the defendant, Muncie Pulp Company, its agents and servants, to enter upon the lands claimed by the plaintiff, and remove timber cordwood
1156 lo*ds* and lumber above described, upon its execution of a bond in the sum of $10,000.00, conditioned to pay to the plaintiff the amount of any decree that might be rendered in the case against that company, for the value of such timber, cordwood, logs and lumber, and thereafter, the said Company did enter upon the said land, and remove the above described property therefrom and it has and can produce an accurate account thereof, measured as was provided in the said consent decree, the plaintiff not being able to produce it, because of the death of the late Capt. O. K. Joplin.

Upon the bond so given, The American Surety Company of New York qualified, and the same was accepted and approved. That afterwards, the aforesaid defendant, to-wit: The Muncie Pulp Company and W. A. Cissna, filed their separate answers, the defendant Leo Oppenheimer, joining in the answer of the Company, all of which will appear from the record.

That proof was taken in the aforesaid cause by the parties litigant, and it came to be heard upon the pleadings and proofs, before Special Chancellor Thornton, who was pleased to adjudge that the Chancery Court was without jurisdiction, and from his decree, this plaintiff appealed to the Supreme Court of the State of Tennessee.

That prior to the decision of the Supreme Court of the State of Tennessee, the injunction was further, by consent modified upon the giving bond in the penalty of $15,000.00 conditioned to pay the value of the timber cut and removed from the lands of the plaintiff in the event it should be adjudged that the defendants were liable therefor.

The aforesaid cause after its removal from the Chancery Court of Tipton County, Tennessee, to the Chancery Court of Shelby

County, Tennessee, and the decision in the latter Court by
1157 Special Chancellor Thornton, came on to be heard at the April Term 1905, by the Supreme Court of the State of Tennessee, then sitting at Jackson was argured by counsel, taken under advisement by the Court, until the April Term 1907, when it was re-argured by counsel, and thereafter the Court being fully advised in the premises, adjudged that the decree of the Chancellor was erroneous and reversed and vacated the same, and also adjudged that the plaintiff was the owner of the lands mentioned and described in the pleadings, lying east of the middle thread of the Mississippi River, and the shore boundaries to the west, as the same was designated upon the map known in the record as the Humphreys map, and remanded the cause to this Honorable Court to be further proceeded with in conformity to the opinion handed down by the Court, which was made a part of the mandate, and which will appear by the record herein.

And now by way of suppliment and amendment, the plaintiff avers that the defendant H. W. Stockley, on the 10th day of June 1903, filed in the Chancery Court of Tipton County, Tennessee, his original bill of complaint against the defendant W. A. Cissna, the Muncie Pulp Company and R. Gibson, the purpose of which was to recover the possession of all of the tract of land mentioned and described in the original bill of complaint in this cause, the value of the timber cut and removed therefrom.

That this cause came on to be heard upon the pleadings and proofs, before the Hon. John S. Cooper, Chancellor presiding in said Court, and he was pleased to adjudge and decree in favor of the said Stockley, and against the defendant, all the issues joined between them.
1158 That this cause was taken by an appeal to the Supreme Court when the Court was pleased to modify the aforesaid decree so pronounced, all of which will appear from the decree entered and the opinion handed down. In the last mentioned case, the learned Chancellor adjudged the right and title of Stockley, as against the defendant thereto, in and to that particular tract of land bounded as follows:

Beginning at the north east corner of Simon Huddleston's 2000 acre tract, as hereinbefore set forth, and running thence with the north line of said Huddleston's tract N. 41 degrees W. 35 chains; thence continuing with said line north S. 82 degrees W. 34 chains; thence continuing with the said north line N. 71 degrees west 15.32 chains; thence N. 8½ W. 66 chains to the southeast corner of N. Potter's 640 — tract on Island 37; thence north 46.78 chains to the southeast corner of John Trigg's acre grant on said Island; thence due east to the present high bank of Island 37 as it now stands, and as it was left after the cut-off of 1876, said high bank having been of the Mississippi River previous to said cut-off; thence due east 40 chains to the boundary line of the State of Tennessee as hereinbefore established in this decree; thence south 14½ east 60 chains; thence south 38¼ east 69.33 chains to a point 26 chains N. 49 E. of the northeast corner of Simon Huddleston's 200 acre tract, following the boundary line of the State of Tennessee as hereinbefore estab-

lished, following the courses of the said boundary line to a point 26 chains N. 49 E. of the beginning point at Huddleston's northeast corner; thence S. 49 W. 26 chains to the beginning, said land lying and being in the 11th Civil District of Tipton County, Tennessee.

1159 And the plaintiff avers that the defendant, H. W. Stockley claims title thereto under a grant from the State of Tennessee No. 17,348, which is of record in the Register's Office of Tipton County, Tennessee, in Deed Book 67 page 450, and that grant the plaintiff avers is a cloud upon its title to a part of the public domain, and is absolutely void, and, it is entitled to have cancelled as such cloud.

And the plaintiff avers that it is the owner of all of the land particularly described in that grant, that land being part of the public domain of the State of Tennessee, except such portion thereof as was by the avulsion of 1876, restored to the defendant H. W. Stockley, as riparian owner, and to the end that its title may be settled thereto, and its rights to the property conclusively adjudged therein the plaintiff prays that so much and such parts of the said land as lies between the boundary line of the Stockley tracts and the Tennessee boundary line, the middle of the Mississippi River, as it was laid down on the map of Maj. Humphreys, be adjudged to be a part of the public domain, not only against the original defendants and those claiming under them, but as against H. W. Stockley, and to this end that copy and subpoena issue to him, requiring him to answer the allegations of this bill and set up his title, and that pendente lite, your Honor will grant an order of reference to ascertain the value of the timber cut and removed from the lands, by the defendants, their agents and servants, and segregate that part of it cut from the public domain from that part of it cut from the land of the defendant Stockley, and that Your Honor, upon final hearing, pronounce a decree settling the rights of the plaintiff and those of the defendants, and to the end that the title of the State

1160 of Tennessee be established and maintained, and the value of the property severed from the soil of Tennessee be ascertained, and a decree therefor awarded, and that the injunction heretofore issued in this cause, be made perpetual, and the plaintiff have all such other and further relief as may be suitable and proper in the premises, whether general or special, for which it will forever pray. And the plaintiff especially asks leave to waive the answer under oath, of the defendants.

(Signed) CHARLES T. CATES, JR.,
Att'y General.
CARROLL & McKELLAR,
Att'y for Plaintiff.

Demurrer of Amended Bill Filed, 3/15/10.

In the Chancery Court of Shelby County, Tennessee.

13271. R. D.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Now comes Leo Oppenheimer, Trustee in Bankruptcy for the Muncie Pulp Company, bankruptcy, and the American Surety Company, surety upon the two bonds executed by the Muncie Pulp Company in 1904, one bond being in the sum of Ten Thousand Dollars and the other bond being in the sum of Fifteen Thousand Dollars, and demurs to the amended bill filed herein by the complainant, and for cause of demurrer show:

1. That the original bill was filed by the State of Tennessee against the Muncie Pulp Company and others, claiming that the cut-off at Centennial Island in March, 1876, was an avulsion; that the boundary between the State of Tennessee and the State of Arkansas at this point was fixed by said avulsion at the middle thread of the main channel of the Mississippi River, as the same
1161 flowed at the date of the avulsion, namely, the middle thread of the main channel of March 7th 1876; that the complain-t in said bill claimed that it was entitled to recover from the Muncie Pulp Company the value of all timber which had been cut and removed from the land west of the main thread of the channel od 1876; that the bonds given by the Muncie Pulp Company, with the American Surety Company as surety thereon were expressly to account for any timber which had been cut west of the middle thread of the main channel of the Mississippi River as it flowed on March 7th 1876, or which might be cut during the pendency of the litigation from the lands lying west of the middle thread of the main channel of the Mississippi River as it flowed on March 7th 1876.

2. That afterwards, to-wit, in August, 1904, and involuntary petition in bankruptcy was filed against the Muncie Pulp Company in the Southern District of New York, which was sustained and the said corporation was adjudged to be a bankrupt in March 1905; that Leo Oppenheimer was appointed, first, Receiver, and afterwards, Trustee in Bankruptcy of the said Muncie Pulp Company; that the said Leo Oppenheimer intervened and made himself a party to the litigation, as it was constituted in August 1904.

3. That the amended bill to which this demurrer is filed, claims a recovery from the Muncie Pulp Company, Leo Oppenheimer, Trustee, and the American Surety Company for timber cut by the Muncie Pulp Company and by Leo Oppenheimer, Trustee, from territory lying west of the middle thread of the Mississippi River, as the same flowed in the year 1823.

1162 4. Wherefore, these defendants demur to the said amended bill upon the ground that the obligation of the American Surety Company is limited in terms to such damages as are claimed in the original bill; and that the Muncie Pulp Company and its Trustee in Bankruptcy are not subject to the jurisdiction of this Honorable Court for any further ir greater recovery than that claimed in the original bill, viz: The value of such timber as may have been cut west of the middle thread of the main channel of the Mississippi River, as the same flowed in March 7th 1876.

Wherefore, Leo Oppenheimer, Trustee, and the American Surety Company, demur to the said amended bill *to* the complainant and ask the judgment of this Honorable Court whether it be necessary for them, to answer further to said amended bill of complainant.

BULLETT & BULLETT.
BROWN & ANDERSON.

1163 *Deposition of Leo Oppenheimer.*

Filed March 14, 1910.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY

Deposition of Leo Oppenheimer, a witness called on behalf of the complainant in the above cause, taken before me, Walter E. Hope, a Notary Public, in and for the County and State of New York upon interrogatories on the 12th day of March, 1910, at Wall Street in the Borough of Manhattan, City and State of New York.

LEO OPPENHEIMER being first duly sworn, deposed as follows:

1. State your name and age?

A. Leo Oppenheimer, age 30.

2. State where you reside, whether or not the place of your residence is over 150 miles from the Court House in the City of Memphis, Shelby County, Tenn.?

A. I reside in New York City, which is more than 150 miles from the Court House in the City of Memphis, Shelby County, Tennessee.

3. State whether or not you know any of the parties *of* this suit the plaintiff being the State of Tennessee, the defendant being the Muncie Pulp Company, W. A. Cissna, Leo Oppenheimer, Trustee in Bankruptcy of the said Company.

A. I know of the Muncie Pulp Company through the fact that I was its receiver in bankruptcy and am now its receiver. I do not know W. A. Cissna nor the complainant in this action.

4. When, if at all, were you elected Trustee in bank-
1164 ruptcy of the Muncie Pulp Company?

A. March 6th, 1905.

5. Did you or not, have in your possession the contract between W. A. Cissna and the Muncie Pulp Company, dated sometime in the summer of 1900, which related to the purchase of standing timber on several tracts of land, and what were the terms of the sale, the length of time within which the timber was cut and removed therefrom?

A. I did not. The said contract was at one time in the possession of my attorney, Robert P. Lewis, but he informs me that it is not in his possession at the present time.

Q. State whether or not a suit of intervention was filed by W. A. Cissna against you as such trustee in the District Court of the United States for the Eastern District of New York, wherein he claimed a lien upon the timber and the proceeds of the timber, and if you shall answer such a suit was instituted, will you procure, at the expense of the State of Tennessee, a certified copy of the record of that suit in the Court where it was finally determined, have the same authenticated under the Acts of Congress, and annex the same as an exhibit to your testimony?

A. A suit of intervention was filed by W. A. Cissna against me as such trustee in the District Court of the United States for the Southern District of New York. I annex hereto, marked Exhibit "A" of this date, copies of the papers and proceedings had in connection with the said suit.

— 7. When were you elected as trustee in bankruptcy of the Muncie Pulp Company?

A. March 6th, 1905.

Q. 8. In this suit, and on page 425 transcript of the
1165 record — the Supreme Court of the State of Tennessee, there is a stipulation to the effect that on the 4th day of August, 1904, you were appointed Receiver in Bankruptcy of the Muncie Pulp Company, and you were appointed Trustee in Bankruptcy on the 6th day of March, 1905. And on Page 426 of the same transcript, there was an amended plea filed for you to the effect that the tract of land described in the bill lies wholly within the State of Arkansas and none of it lies in the State of Tennessee, except a very small insignificant part thereof to which these defendants never have and do not now assert any title.

These defendants say that, at the time this suit was commenced, to-wit: On the 15th day of December, 1903, and the date of the filing of these pleas, these defendants have not claimed any lands within the limits of the State of Tennessee, nor cut or removed timber from any lands lying within the bounds of the State of Tennessee, but all of the timber which the Muncie Pulp Company and Leo Oppenheimer have received, as receiver in Bankruptcy, and as Trustee in Bankruptcy of said company, up to the date of the filing of these pleas, was cut off of the land lying and being within the bounds of the State of Arkansas.

Intervening between the 3rd day of November, 1904, and the 23rd day of March 1906, the State of Tennessee Claims that there was cut off the lands of the State, 1,765,642 feet of timber, and that that timber was sold by the Anderson-Tully Compant and brought $14,647.42 from the date of your receivership up to the present time.

—. How much money has been paid over to you from timber sales on account of you being the receiver and Trustee of the Muncie Pulp Company?

1166 A. $20,818.05.

Q. By whom was such money paid over, and at what dates and where is the money?

A. —

Date of receipt.	Amount.	From whom received.
Oct. 10, 1904.....	$644.15	W. C. Wilson.
Ap'l 18, 1905.....	1,628.82	R. G. Brown.
June 1, 1905.....	1,199.48	Anderson-Tully Co.
June 1, 1905.....	371.80	" " "
Nov. 4, 1905.....	992.79	" " "
May 10, 1907.....	16,000.00	Memphis Savings Bank.

(Less $20. Exchange charges.)

The money is at present deposited to my credit as Trustee in the Trust Company of America, in the City of New York.

Q. If you ever had the contract between the Muncie Pulp Company and W. A. Cissna, what disposition did you make of it; and, if you can produce the original contract, and are willing to do so, will you kindly file same as a*b*d, mark it an exhibit to your deposition?

A. I never had the said contract and therefore cannot produce it.

Q. If you have lost or mislaid the original and cannot find it, or if you have no copy of it, will you kindly have the clerk of the Court where it was recorded make a certified copy of same and file that copy as part of your deposition?

A. copy of this contract was offered in evidence in the United States District Court in the proceeding before John J. Townsend as referee, and this copy appears in the record which I have annexed hereto in answer to question No. 6.

1167 Q. Did you ever have in your possession the original record in the case of State of Tennessee vs. The Muncie Pulp Company? And if so, what disposition did you make of same?

A. No.

Q. If you know of any other fact or facts which may be of benefit to any of the parties to this suit, that may be material to the matters that you have testified about in this suit, please now state such fact or facts fully and particularly.

A. No other facts occur to me at this time with respect to the matters concerning which I have testified.

LEO OPPENHEIMER.

The foregoing deposition was taken by me as stated in the caption and reduced to writing by me and I certify that I am not interested in the cause nor of kin or counsel to any of the parties. That I have sealed it up and mailed to Lamar Heiskell, Clerk & Master of the Chancery Court of Shelby County, Tennessee, without being out of my possession or altered after it was taken.

Given under my hand this 12th day of March, 1910.

[SEAL.] WALTER H. HOPE,
Notary Public.

New York City, N. Y., Commissioner.

EXHIBIT "A" TO OPPENHEIMER'S DEPOSITION.

1168 United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt.

The Petition of W. A. Cissna.

To the Honorable Judges of the United States District Court for the Southern District of New York:

Said petitioner respectfully *d*hows that on the 21st day of June 1901, the following contract was made between him and the Muncie Pulp Company, *yo*-wit:

This contract made and entered into this 21st day of June 1901, by and between W. A. Cissna of Chicago, Illinois, party of the first part, and the Muncie Pulp Company, a corporation of the State of New York, party of the second part, Witnesseth:

That the said party of the first part, for the consideration hereinafter named, does hereby sell and convey to the said party of the second part, all the timber of all kinds, size and description upon the property known as Dean's Island Plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas, to-wit: All of Fractional Section 34. All of south half of section 33. South and East of North half of Section 32 South of Chute; all in Township 10 North, Range 10 East.

All of Fractional Sections 3, 4 and 5, in township 9, North, Range 10 East, together with all accretions to ail of said above described property, already made or hereafter to be made, by the Mississippi River or otherwise, the converse being limited to such land as is now in said described sections, and all accretions thereto, and not to land that may have originally been in said sections.

1169 The cost of said sale and transfer of timber is the sum of $35,000.00 *dollars* $7,000.00 of which consideration is cash in hand paid, the receipt of which is hereby acknowledged and the balance of said consideration is represented by four notes of even date, each for the sum of $7,000.00 with five per cent interest from date until paid, due on or before one, two, three or four years from date thereof.

It is hereby contracted and agreed that all of the timber within the line of fence erected by R. L. Beedle, about the year 1896, is to be cut and removed within two years from the date of this contract.

It is further contracted and agreed that the remaining timber, with the exception of that timber on the 1,000 acres of low land adjoining Island 37 and Centennial Island and 1000 acres more or less, known as Dean's Island tow head, is to be cut and removed within five years from the date of this contract and the timber on the said 1000 acres more or less, known as Dean's Island Tow Head, is to be cut within 7 years from the date of this contract.

It is further contracted and agreed by and between the parties hereto, that if at any time the said party of the second part shall cut and remove from the said property a larger amount of timber than the proportionate value of the same has been already paid for, that it will immediately pay to the said party of the first part that pro portion of the purchase price covering the said timber that at no time shall they cut and remove a greater amount of timber than they have already paid for under this contract, it being the
1170 intention thereby that whenever any timber is cut and removed from the said property, that it shall be at all times paid for in cash.

It is further contracted and agreed that the said party of the first part reserve for his own use and benefit all the scattering trees, except cotton-wood, the cultivated land above described, and in the small pasture at the lower barn lot.

It is further contracted and agreed that the said party of second part, designate to the said party of the first part, or his agent, such timber, accessible to the plantation, as the said party of the first part is authorized to cut for fire and gin wood on said plantation, which said wood is to be amply sufficient for all the purposes of the said party of the first part or his tenants, on the said plantation; that the said party of the first part or his tenants, shall at all times have the right to cut and remove a sufficient amount of timber for fire wood purposes upon the plantation.

It is further contracted and agreed between the parties hereto that the party of the second part shall have a right of way over the cleared land for the purpose of cutting and hauling the same from the timber land to the river front, where the hereinbefore described tract shall be located; and it is particularly agreed that the party of the second part shall have a plot of ground 150 feet by 1000 feet on the bank of the Mississippi River upon which to stack said logs and timber so cut and removed.

The said party of the second part is to have the privilege of locating this said lot upon which to stack wood hereafter and at such place as may be convenient to the said party of the second part.

1171 It is further contracted and agreed that the said party of the second part shall have the right of way upon which to remove the timber on Dean's Island, between crop seasons, on cleared land.

W. A. CISSNA,
MUNCIE PULP COMPANY,
By ROBERT GIBSON, *Agent.*

Transaction closed and notes and checks delivered. August 7th, 1901.

R. G. BROWN,
Att'y for Muncie Pulp Company.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me A. Humphrey Kortrecht, a Notary Public in and for the City of Memphis, duly commissioner and qualified, W. A. Cissna, the within named bargainor, with whom I am personally acquainted and who acknowledged to me that he executed the within instrument for the purpose therein contained, and I so certify.

Witness my hand and Notarial Seal at Memphis aforesaid, this 21st day of June, 1901.

[SEAL.] A. HUMPHREY KORTRECHT,
Notary Public.

The original of said contract is in the possession of the bankrupt or is on file in this cause.

It is the same contract mentioned, acknowledged and referred to and under which the Trustee in bankruptcy of the Muncie
1172 Pulp Company, claimed rights in a petition herein filed to have the Corn Exchange National Bank and Mrs. M. L. Kinney, dismiss a suit brought by them on August 19th, 1904, in Mississippi County, State of Arkansas.

The petition of Leo Oppenheimer Trustee and all proceedings had thereunder are here referred to and made a part of this petition.

Obedient and conformable *in* the judgment of the Court the said bank and Mrs. Kinney have — all things complied with the orders and directions of the Court and have dismissed said suit, have paid the cost thereof, — have had their attorney, Caruthers Ewing, to sign and deliver all necessary papers in order that the full mandate of the Court might be obeyed.

Petitioner states that the Corn Exchange National Bank and Mrs. M. L. Kinney, who owner by endorsement and assignment of petitioner, the two notes dated June 21st, 1901, and due and payable three or four years after date, bearing interest at the rate of five per cent per annum from date, have required petitioner to pay same to them and they have reassigned same to petitioner.

Both of said notes are past due; they are unpaid; they are fully due and owing to the petitioner, as aforesaid.

At the time of the bankruptcy of the Muncie Pulp Company, there was on the lands mentioned and described in said contract timber, trees, logs etc., to an amount largely in excess of the aggregate amount due petitioner on said notes, in both principal and interest.

The trustee in bankruptcy of the Muncie Pulp Company bankrupt, has taken possession of said timber, trees and logs and conveyed all or practically all of the same, into cash.

1173 The said trustee has realized therefrom an amount exceeding the aggregate amount due petitioner, as aforesaid, that is to say, he has realized therefrom in cash, about $25,000.00.

Petitioner states that having reacquired said notes by reassignment and indorsed back to him, of all right, title and security thereto pertaining, he is advised that he has the right to propound and prove his claim in the proceeding and to have his original contract, rights and securities preserved and protected.

Petitoner states that by said contract be was and is entitled to be first paid the amount due and owing to him on and by virtue of said two notes, out of the proceeds and avails of the timber, trees and logs embraced within the terms of said contract of sale.

Petitioner avers that he is entitled to herein assert and have decreed a priority of payment out of said particular fund arising from the sale by the trustee of the timber trees and logs of the land at the time the Muncie Pulp Company became and was adjudged a bankrupt and that inasmuch as the Trustee received therefrom an amount largely in excess of petitioner's demand, that petitioner is entitled to propound and prove his debt and have the same paid in full.

Petitioner states that he has not sooner filed his claim herein because he had assigned said notes, as shown by the record, and the assignees of petitioner had been in litigation with the trustee as to their rights and the due and proper method of ascertaining same and the question was only recently settled by the Honorable Circuit Court of Appeals, Second Circuit, and it was by said Court implied — adjudged that the right here and now asserted should be asserted in this Court and cause.

1174 Petitioner as endorser of said notes to said *a* bank and Mrs. Kinney, had discharged his obligation to them, paid the amount due to each, and had said notes reassigned to him and he here produces them and files them herewith as exhibits 1 and 2 to this petition and makes them a part hereof.

Wherefore, petitioner prays that he be allowed to become a party hereto and propound and prove his claim herein.

That the two notes mentioned in the petition and exhibited herewith may be declared to be a true and lawful debt due and owing to him by the Muncie Pulp Company, bankrupt.

That said debt be declared and decreed to be a prior and preferred charge on and upon the fund realized and received by the bankrupt's estate, through Leo Oppenheimer, Trustee, or otherwise, out of the proceeds or avails of the timber, trees and logs mentioned in the contract hereinabove set out in full.

That from said fund he may be paid, under the proper orders and decrees of this Court, the amount due him on and by virtue of said notes and contract.

And that he may have all other and further relief which to the Court may seem proper in the premises.

CARUTHERS EWING,
Att'y for W. A. Cissna.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, H. H. Barker, a Notary Public in and for said County and State, W. A. Cissna, who being duly
1175 sworn, makes oath and says that the Statements of the foregoing petition are true; that he owns and holds the notes mentioned therein; that he has not within four months of the filing of the petition in bankruptcy herein received, directly or indirectly, any money or thing of value from the Muncie Pulp Company; bankrupt; that nothing has been paid him in any wise as a preference, and that he is justly entitled to the rights and relief sought by said petition, to the best of his knowledge, information and belief.

W. A. CISSNA.

Subscribed and sworn to before me, this 19th day of Feb. 1907.

H. H. BARKER,
Notary Public.

EXHIBIT "A."

*S*t a Court of Bankruptcy, Held in and for the Southern District of New York, at 45 Cedar Street, New York City, on the 24th Day of May 1909.

Before Hon. John J. Townsend, Referee in Bankruptcy.

No. 7266.

In the Matter of MUNCIE PULP COMPANY, Bankrupt.

On the petition of W. A. Cissna, filed March 27th, 1907, on the answer of Leo Oppenheimer, as Trustee in Bankruptcy of the Muncie Pulp Company filed June 8th, 1905, on the stipulation made herein dated August 29th, 1909, and the three exhibits thereto at-
1176 tached, on the affidavit of R. G. Brown, verified January 7th, 1909, and filed with the referee January 20, 1909, and the stipulation relating thereto similarly filed dated January 15, 1909; on certified copie*d* of the complainan*t* in equity of the State of Tennessee vs. W. A. Cissna, and the Muncie Pulp Company, and certified copies of the answers thereto; on the opinion of the Supreme Court of the State of Tennessee in the case of Tenn. vs. W. A. Cissna and the Muncie Pulp Company, reported in the 119 Volume of the reports of the State of Tennessee at page 47, and the map which appears in the case of *S*tockley vs. Cissna, reported in the same volume; and after hearing Edwin T. Taliaferro, Es*w*., in support of the prayer of the petition, and James N. Rosenberg and Robert P. Lewis, Esqrs., of counsel for Leo Oppenheimer, the trustee of the Muncie Pulp Company, in opposition thereto,

It is ordered that the prayer of the petition be granted and that the trustee be directed to pay the face of the two notes mentioned

in the petition, with interest thereon at 5% from June 21, 1901, to the extent that he may have funds in his hands realized from the sale by himself of the receiver of timber removed by either or cut and removed by either from the land embraced in the contract dated June 21, 1901, made and entered into between W. A. Cissna and the Muncie Pulp Company, to the extent of any interest received thereon either by the Receiver or the Trustee, less any proper charges against the same, as such funds, interest and charges may be determined by special reference to that end, and

1177 It is Further Ordered that the expense of this hearing to-wit: The Referee's indemnity and the bill of the stenographer be paid out of the said fund when the same shall have been determined as above as a first charge thereon.

J. J. TOWNSEND,
Referee in Bankruptcy.

United States District Court, Southern District of New York.

In Bankruptcy.

No. 7266.

In the Matter of MUNCIE PULP COMPANY.

Memorandum of Referee on the Petition of W. A. Cissna.

A petition in involuntary bankruptcy was filed in this District against the Muncie Pulp Company, July 30, 1904, followed August 3, 1904, by the appointment of Leo Oppenheimer, as Receiver, followed December 17th 1904, by the adjudication of the company as a bankrupt in this District, and the subsequent appointment of Leo Oppenheimer as Trustee in Bankruptcy in March 1905.

W. A. Cissna has filed with this Court a petition alleging the making of a contract between himself and the Muncie Pulp Company, on June 21, 1901, praying that two notes mentioned in the petition, and exhibited to the court, be declared a true and lawful debt and owing to him by the Muncie Pulp Company, and also declared to be a proper and preferred charge on and upon a certain fund realized and received by the Trustee in Bankruptcy out of the proceeds or avails of certain timber which was the subject matter of the contract.

1178 The trustee in bankruptcy of the Muncie Pulp Company filed an answer to this petition.

The matter has been submitted to the referee on a stipulation as to facts and proceedings, dated April 29, 1909, attached to which, as Exhibit "A", is a copy of the contract dated June 21, 1901, as Exhibit "B", a copy of an agreement dated September 23, 1904, between the company and its receiver in bankruptcy, now the trustee as parties of the first part and W. A. Cissna, and the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, as par-

ties of the second part who were at the time the endorsees of the two notes before mentioned since endorsed backed to W. A. Cissna, whereby an arrangement was made to allow the cutting of the timber embraced in the contract to proceeds, without prejudice to the rights of all the parties to the agreement exactly as though an attachment vacated by the agreement (and which will hereafter be considered) was still in force and the property seized still in the hands of the Sheriff of Mississippi County, Arkansas, and that the fund derived from timber thereafter cut should be treated as standing timber and that all the rights of the parties of the second part who were, as stated, W. A. Cissna, and the Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney, should attach to the fund and should remain as though the timber were standing on the land; as Exhibit "C", a copy of an order made by the Hon. Geo. C. Holt, in this District, under the date February 14, 1906, transferring the fund realized from the sale of the timber out from the Memphis Savings Bank to the Trustees in Bankruptcy, without prejudice to any of the rights or remedies of the Corn Exchange National Bank of Chicago, or of Mrs. M. L. Kinney.

It may here be said that the Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney were endorsed from W. A. Cissna of the two notes mentioned in the petition and that these
1179 notes have been subsequently reendorsed after maturity back to W. A. Cissna, as appears in Article 11 of the stipulation of facts considered as proved by the claimant (p. 3), which Article also stipulated that no rights under the said notes, or the contract pursuant to which they were given, were lost as far as W. A. Cissna is concerned, in his having endorsed the said notes or in his having them reendorsed to him.

There is also before the referee, by stipulation dated July 16, 1909, the affidavit of R. G. Brown of Shelby County, Tennessee, of counsel to the Trustee, explaining the circumstances under which the agreement, Exhibit "B" attached to the stipulation dated April 29, 1909, was entered into by the parties, and that these parties estimated the sum of $16,000.00, mentioned in Exhibit "B", as ample at that date to secure all the rights of the then holders of the two notes aggregating $14,000.00, and that it was not the intention of the counsel of the then holders of the notes in fixing on the amount of $16,000.00 as the fund to be deposited to waive any rights of his clients.

The material portions of the contrac- are as follows:

"That the said party of the first part (W. A. Cissna) for the consideration hereinafter named, does hereby sell and convey to the said party of the second part (Muncie Pulp Company), all the timber of all kinds, size and description upon the property known as Dean's Island Plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas.
1180 The cost of said sale and transfer of timber is the sum of $35,000.00, $7,000.00 of which consideration is cash in hand paid, the receipt of which is hereby acknowledged and the balance of said consideration is represented by four notes of even date, each

for the sum of $7,000.00 with five per cent interest from date until paid, due on or before one, two, three or four years from the date thereof.

It is further contracted by and between the parties hereto, that if at any time the said party of the second part shall cut and remove from the said property a larger amount of timber than the proportionate value of the same has been already paid for, that it will immediately pay to the said party of the first part that proportion of the purchase price covering the said timber; that at no time shall they cut and remove a greater amount of timber than they have paid for under this contract, it being the intention thereby that whenever any timber is cut and removed from the said property, that it shall be at all times paid for in cash.

Payments have been made as follows: $7,000.00 cash June 21, 1901, the first note of $7,000.00 June 21st 1902, the second note of $7,000.00, payable June 21st 1903. The remaining two notes each for $7,000.00 being the third note payable June 21, 1904 and the fourth note payable June 21, 1905, have not been paid and are the two notes mentioned in the petition of W. A. Cissna. They bear interest at the rate of 5% from their date which is June 21, 1901. These notes remain unpaid and W. A. Cissna is now the owner and holder. It will be perceived that apparently three-fifths of
1181 the total consideration of $35,000.00 specified in the contract had been paid by the Muncie Pulp Company on or before June 21, 1903.

It is also stipulated that Leo Oppenhei-er, either as Receiver or as Trustee, since the date of his appointment August 3, 1904, has cut and sold timber standing at the time of the filing of the petition, on July 30, 1904, of the value of $15,000.00 and further, that he as Receiver has sold timber to the value of $8,000.00, lying on the ground at the date of his appointment or August 3, 1904.

It is stipulated, that pursuant to the agreement, Exhibit "B" dated September 23, 1904, Leo Oppenheimer deposited from the first moneys received by him, as before stated, the sum of $16,000.00 in the Memphis Savings Bank.

At the request of the Trustees (p. 4), it is stipulated that on August 18, 1904, the Corn Exchange National Bank of Chicago, the endorsee of the third note maturing June 21, 1904, and Mrs. M. L. Kinney, the endorsee of the fourth note maturing June 21, 1905, filed a complaint in the Circuit Court of Mississippi (meaning Arkansas) against the Muncie Pulp Company, the prosecution of which was enjoined by the District Court in this District February 14, 1906, by the order known as Exhibit "V" which order was subsequently affirmed by the Circuit Court of Appeals in the Second Circuit. A summary of the complaint at the request of the Trustee appears at *pp.* 5 of the stipulation. It alleged that the plaintiffs as holders had had and were entitled to enforce a vendor's lien and an equitable lien on the said timber, and that the company was a non-resident and insolvent corporation and about to remove its
1182 property out of the State of Arkansas without leaving enough to satisfy the plaintiff's claim or the claims of its creditors.

The prayer of the complaint was for the foreclosure of the lien for a writ directing the Sheriff to impound the timber.

Upon the filing of the complaint, an attachment was issued and levied. At the request of the Trustee (p. 8) the stipulation contains in extenso the Statute of the State of Arkansas under which the attachment mentioned was issued. At the request of the Trustee (p. 9), the stipulation places before this Court the opinion of the Supreme Court of Tennessee in an action brought by the State of Tennessee against the company and W. A. Cissna, in -quity in the Chancery Court of Tipton County, Tennessee, reported 119 Cates, pp. 47, 56.

This record is material in connection with the contention of the Trustee that the present application of W. A. Cissna should be stayed until the final determination of the cause just mentioned in the Chancery Court of Tennessee, because of the claim made against the Trustee by the American Surety Company, as hereafter mentioned.

At the request of the trustee as material in connection with his last mentioned contention, the stipulation (p. 10) places before the Court a claim filed with the former referee March 14, 1905, by the American Surety Company of New York.

An examination of this claim discloses: a bond in the penal sum of $10,000.00 executed by the Muncie Pulp Company as principal and the American Surety Company of New York as surety January 6, 1904, (referred to as F) given on the dissolution of an injunction obtained by the State of Tennessee, December 15, 1903, as
1183 complainant in the action just mentioned, and conditioned that the company would pay and discharge any final judgment rendered against it for the value of any timber out from any lands adjudged to belong to the State of Tennessee which were upon the said lands on December 15, 1903. The security offered to the American Surety Company on this bond was the agreement of indemnity of the Muncie Pulp Company. The claim also discloses a bond in the penal sum of $15,000.00, dated March 9, 1904, made by the Muncie Pulp Company as principal and the American Surety Company of New York as surety (referred to as C) given on the dissolution of the same injunction in the same action, and conditioned that the company would pay and discharge any judgment from the lands described in the bill since December 15, 1903. The security offered to the American Surety Company on this bond was the agreement of indemnity of the Muncie Pulp Company.

It should be noted as before stated, that before bankruptcy three-fifths of the entire consideration of the contract between Cissna and the Muncie Pulp Company has been paid.

It should also be noted that it is stipulated at the request of the Trustee (at page 8), that at the time of the filing of the bill under the Arkansas Statute by the Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney, or on August 19, 1904, three-fifths of the timber on the land embraced in the contract had been cut out.

It should also be noted that the claim on the notes for the unpaid two-fifths of the entire consideration is $14,000.00 with interest from

June 21, 1901, at 5%. This interest item computed to June 21, 1909, is $5,000.

1184 It should also be noted, as stipulated at the request of the claimant (p. 3), that the receiver in bankruptcy subsequent to his appointment on August 3, 1904, has cut and sold timber standing at the date of the filing of the petition in bankruptcy, or July 30, 1904, of the value of $15,000.00, and has sold and disposed of timber lying on the ground on August 3, 1904, the date of his appointment, of the value of $8,000.00, making $23,000.00, which fund is or has been in the Trustee's possession with any interest that may have been paid to him by the depository. On April 15, 1907, to the extend of $16,000.00 this fund was paid over to the Trustee and is on special deposit drawing interest at the rate of 2½%. This interest computed to April 15, 1909, amounts to $800.00.

It should also be noted that as early as September 23, 1904, (see Exhibit B) attached to the stipulation of April 29, 1901), it was stipulated (subd. 7) that although the Trustee might proceed to cut or dispose of timber or remove timber already cut, the fund deriver from the timber thereafter to be cut should represent stanfing timber as though un-cut.

The contract made June 21st, 1901, between Cissna and the Muncie Pulp Company has already been interpreted by the Court of Appeals in this Circuit, (See In re Muncie Pulp Company, 151 Fed. Rep. 732.) It is claimed by the Trustee that such interpretation was obiter. However they may be, independently of this decision, my own interpretation of the contract would be the same. In effect, the interpretation given by the Circuit Court of Appeals (bottom of P. 734 and top of P. 735) is that under the contract, taken in its entirety, the Muncie Pulp Company has no right against the wish of the seller Cissna to cut and remove timber in excess of the amount of payment, and that the timber on Cissna's land was to be paid for before it was cut and removed. Or, differently

1185 stated, that as to timber "not yet cut and removed, the seller Cissna was entitled to hold the same and prevent its removal by the company until it should pay him in cash for whatever it might seek to remove. The Circuit Court expressly, at the bottom of p. 734, did not pass on the question whether or not the seller Cissna had a lien upon the timber lying on the land for the price of any timber which had been cut and removed in excess of payment. The Court also helf top of page 735, that neither the Receiver nor the Trustee had any better title to the timber or any greater right to cut or remove it than the bankrupt had.

It appears, as stated, from the facts stipulated at the request of the claimant (p. 3), that the receiver or the Trustee has cut and sold timber standing on the land at the date of the filing of thpetition in bankruptcy, to-wit: July 30, 1904, of the value of $15,000.00, and that the Receiver sold and disposed of timber to the value of $8000.00 lying upon the ground (which implies it had not been removed therefrom) at the date of the Receiver's appointment, August 3, 1904.

It also appears, as stated, that on August 19, 1904, when the bill was filed in the Circuit Court of Arkansas by the then holders of the two unpaid notes, (stipulated at the request of the Trustee (p. 8) three-fifths of the timber on the land had not been cut and that at the date there was more than $16000.00 worth of timber on the land.

I shall hold as a matter of law, in accordance with the decision of the Circuit Court of Appeals, that at least as to timber standing on the land at the date of the filing of the *filing of the*
1186 petition in bankruptcy, July 30, 1904, and as to timber cut before then but not at that date removed from the laid, which may have been cut and sold and removed and sold by either the Receiver or the Trustee, the claimant has a lien on the proceeds of the sales of both classes of timber.

I do not think such cases as In re Garcewich, S. A. B. R., 149, Pontain Buggy Co. vs. Skinner, 20 A B. R. 206, 211, and other cases apply. It is no doubt true, as urged by the trustee, that the timber sold by Cissna under the contract to the Muncie Pulp Company, was to be consumed by the latter company in its business, but it is equally true under the contract that the timber so sold was not to be removed from the land until paid for. On this record, so far as it was removed, since July 30, 1904, it was removed in disregard of the vendor's (Cissna's) rights.

This brings us to the consideration of the contention urged by the Trustee that the filing of the bill in the Arkansas Court by the then holders of the two notes, invoking the operation of the Arkansas Statute appearing at p. 8, bars the claimant from now asserting his title.

Passing over the language of the stipulation made at the *re*-request of the claimant, in the preference to the endorsement and re-endorsement of the two notes, my conclusion is, that the filing of this bill does not bar the present claim, and that it is not inconsistent therewith. The bill was filed August 19, 1904, to enforce or protect a vendor's lien not created by the Statute, which provides for the impounding of property about to be sold, concealed or removed from the State, but created by the original contract of sale. The fact, therefore, that the then holders of the notes invoked the operation of the Statute Section 365, cannot be urged as a waiver of any lien given to them by the original contract, but on the contrary is a re-assertion of the validity of that lien. This is the view of the Statute taken by the Supreme Court of Arkansas as I read
1187 its decision in Halpern vs. Clarendon Hardware Lumber Co., 64 Ark., p. 132, at the bottom of page 135, where the word "vendor" is obviously a misprint for "vendee."

This brings — to the consideration of the contention of the trustee that no order should be granted in favor of the claimant until after final judgment is rendered in the action pending in the Chancery Court of State of Tennessee brought by that State against both Cissna and the Muncie Pulp Company or at least without indemnity—to the trustee by Cissna against any liability by reason of the claim of the American Surety Company before mentioned.

The suit was brought by the State of Tennessee to recover about 1000 acres of land alleged to be in Tipton County, Tennessee, then in the possession of Cissna, claiming to own the same in fee, and against the Muncie Pulp Company as his lessee, and an injunction was asked to stay waste in cutting and removing the timber. The defense pleaded was that the lands sued for were not in the State of Tennessee but in the State of Arkansas. The issue in that cause hinges on what constituted the "middle of the Mississippi River" which was and is the boundary line between Tennessee and Arkansas, and as I understand it Cissna's title to the land in great part stands or falls as that issue may be determined. See the report of the case and maps in 119 Tenn., reports 47. The cause apparently is at issue with an option to the State to amend the bill in respect to the land in controversy (see pp. 133-134, of the reported case), but no hearing has been had.

1188 The original bill was filed in the Chancery Court of Shelby County, Tenn., January 17, 1905, a copy of the pleadings in the cause is in evidence before me under the stipulation of facts at the request of the Trustee (p. 9). These pleadings show that the bill was filed January 17, 1905. The prayer of the bill is in the usual form of an application for a writ of injunction against the defendants, who are the Muncie Pulp Company, W. A. Cissna, and Vince Beard, and for writs of attachment to impound the timber and lumber cut and on hand, as well as for the appointment of a receiver to sell and dispose of such timber so attached and impounded, as well as for a recovery of the value of the timber already cut and removed. The joint answer of the Muncie Pulp Company and Leo Oppenheimer, the Trustee in Bankruptcy, was filed March 30, 1905. The answer of W. A. Cissna was filed March 30, 1905. These three answers are those referred to by the Supreme Court of the State at p. 56 of 119 Tenn., as pleading, in the abatement to the jurisdiction of the Court that the land- sued for were not situated in the State of Tennessee but in the State of Arkansas. The Chancellor had sustained the pleas. The Supreme Court of Tennessee in the reported case reverses this decision and remanded the cause as stated supra and explained at p. 134 of the reported case.

The two bonds upon which the American Surety Company has filed its claim, were given by the Muncie Pulp Company with the American Surety Company as the latter's surety and apparently without any indemnity from any source and without Cissna joining in the bonds or being a party to the bonds or indeed requesting the bonds. Apparently the bonds were given by the Muncie Pulp Company in its own interest. The theory of the Surety Company's claim is that by reason of the execution of the bonds the amount necessary to indemnify the Surety Company against loss constitutes a charge upon the property of the Muncie Pulp Com-

1189 pany prior in dignity to any other liens thereon. As stated, this claim of the Surety Company was filed with the former referee March 14, 1904. Moreover it is obvious that the date the American Surety Company has suffered no loss by reason of the execution of the two bonds.

It seems to be needless that I should examine the merits of the controversy between the State of Tennessee and the defendants Cissna and the Muncie Pulp Company. The State of Tennessee is not before me as a party, neither would a finding by this Court that the State of Tennessee has or has not a good cause of action, be binding of the Chancery Court of Tipton County, Tennessee, which might decide precisely the contrary.

For the present purpose, however, I will assume the ultimate recovery by the State of Tennessee against Cissna and the Muncie Pulp Company, resulting in a call upon the Surety Company to fulfill its obligations under its bonds to its loss.

Even so, I do not see that such a situation is ground for the denial of the application of the claimant Cissna or a stay of any order to which *be* otherwise would be entitled.

Cissna is claiming his money from his vendee or its representatives, due under a contract between the two. His right to make that contract of sale is challenged by the State of Tennessee, as well as the right of the Muncie Pulp Company, to make the purchase. The Muncie Pulp Company to enable it to lift the injunction obtained by the State of Tennessee *proceure* the Surety Com-
1190 pany to exercise a bond of suretyship. Cissna is a stranger to this bond, except so far as he profits by the lifting of the injunction. The surety company made the bond knowing these conditions.

Even were the surety company able to prove as against the Muncie Pulp Compan*t* loss or damage by reason of its execution of the bonds, its claim would be primarily against the assets of the Muncie Pulp Company and not against the fund in controversy, the proceeds of property the title to which as between Cissna and Muncie Pulp Company belongs to Cissna, even if the title of the State of Tennessee is paramount to the latter's title.

My conclusion is that the claimant is entitled to an order against the funds in the hands of the Trustee, so far as those funds represent the proceeds of timber either removed by the Receiver or Trustee from the land or cut and removed from the land by the receiver or trustee.

Unless the parties can agree upon the amount of that fund, the order should provide for a reference to ascertain its amount.

The order should also provide that when the fund is thus ascertained, the trustee to the extent of the fund, inclusive of any interest he may have received thereon, less any expenses properly chargeable against it, should pay the face of the claimants notes with interest thereon at 5% from June 21, 1901.

1191 The order should also provide that when the fund is thus ascertained and as a first charge thereon, the expenses of this application, to-wit: The referee's indemnity and the bill of the stenographer should be paid out of the fund. I deem this equitable.

Any party desiring a review of the order granted by me *make* take this memorandum, together with the papers referred to in it,

as my certificate under General Order XXVII of the questions presented and my summary of the evidence relating thereto.

New York May 24, 1909.

J. J. TOWNSEND,
Referee in Bankruptcy.

EXHIBIT "A."

March 12, 1910.

United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP COMPANY

The answer of Leo Oppenheimer as Trustee in Bankruptcy to the petition of W. A. Cissna, respectfully, shows:

1. Admits that a contract was executed by and between W. A. Cissna and the Muncie Pulp Company as set forth in the said petition. Admits that the proceedings instituted by the Corn Exchange National Bank and Mrs. M. L. Kinney have been dismissed in accordance with the decree of the United States Circuit Court of Appeals as set up on page four of the said petition; admits that there are two notes payable to the order of W. A. Cissna,
1192 dated June 21st, 1901, payable three and four years after date, bearing interest at the rate of five per cent per annum, which were not paid by the bankrupt corporation prior to the filing the petition; and admits at the time of the bankruptcy of the Muncie Pulp Company, there was standing timber trees and cut logs, to an amount largely in excess of the aggregate amount due on the two notes, both principal and interest.

Admits that the trustee in bankruptcy took possession of standing timber, trees and logs and sold the larger portion of such property, realizing approximately twenty three thousand four hundred ($23,400.00) dollars, for the said timber, and that a small amount of the timber is still standing.

2. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegation that the Corn Exchange National Bank and Mrs. M. L. Kinney have duly endorsed the notes held by them, back to W. A. Cissna and denies that he has knowledge or information sufficient to form a belief as to whether the said W. A. Cissna paid any money to the Corn Exchange National Bank or Mrs. M. L. Kinney or paid the amount due on the said notes.

3. Denies the conclusion of law alleged in the said petition that W. A. Cissna is entitled to a first lien on the proceeds and avails, the timber, trees and logs embraced within the term of the contract of sale; and alleges that the funds belonged to the joint estate in bankruptcy and general creditors of the bankrupt estate; and that the said W. A. Cissna is not entitled to any priority of payment over other creditors with reference to the said fund, either to

the extent of the two notes referred to in the petition or any other extent.

For a separate and distinct defence, respondent alleges:

1193 That a petition in voluntary bankruptcy was filed against W. A. Cissna on the 30th day of July, 1904, and this respondent was appointed Trustee in bankruptcy of the said Muncie Pulp Company in March 1905, the said corporation having been adjudged a bankrupt in this Court on December, 17, 1904.

This respondent shows that at the time of the execution of the contract between W. A. Cissna and Muncie Pulp Company $7,000.00 was delivered to W. A. Cissna, together with four promissory notes of $7,000.00 each, maturing in one, two, three and four years time. The Muncie Pulp Company at once entered into and took possession of the timber sold to it by virtue of the contract and began to cut the said timber and remove the same up to the time of the filing of the petition in bankruptcy. Prior to the filing of the petition in bankruptcy two of the notes had been paid in full.

At the time of the filing of the petition in bankruptcy as alleged in the petition of W. A. Cissna, a considerable amount of timber, both cut and standing, was on the premises in excess of the amount due on the two notes held by W. A. Cissna, together with the interest thereon. Thereafter, and on or about the 19th day of August, 1904, the Corn Exchange National Bank of Chicago, claiming to be the owner by assignment or endorsement from the said W. A. Cissna of the promissory note of the Muncie Pulp Company which fell due on June 21, 1904, and Mrs. W. L. Kinney claimed to be the owner by assignment and endorsement from *the* W. A. Cissna of the promissory notes of the Muncie Pulp Company, due June 21, 1905, did, as joint plaintiffs file their complaint in the Circuit Court of Mississippi County, Arkansas, Osceola District against the

1194 Muncie Pulp Company. The said plaintiff alleged that the Muncie Pulp Company had cut and removed an amount of timber in excess of the proportionate amount theretofore paid for and that sufficient timber was not left standing on the land to satisfy the notes by the plaintiffs.

The said Corn Exchange National Bank of Chicago and the said Mrs. W. L. Kinney averred that the timber sold to the Muncie Pulp Company as aforesaid, both that standing and that which had been cut, was in the joint possession of the Muncie Pulp Company and of the plaintiffs through their assignor, Cissna; that the plaintiffs as holders of the promissory — aforesaid, had and were entitled to enforce a vendors lien for the purchase money and on equitable lien on the said timber.

The plaintiffs prayed for judgment for their respective debts aforesaid, with interest and the foreclosure of the vendors lien upon the timber, and for a writ directing the sheriff of Mississippi County to take possession of the said timber by way of attachment to hold the same for the satisfaction of any judgment. An attachment was accordingly issued and levied upon both the standing and cut timber.

Said action was afterwards by order of the Circuit Court trans-

ferred to the Chancery Court in Mississippi County, Arkansas. The Trustee in bankruptcy filed an answer in the said cause on the 4th day of October, 1905, and the said plaintiff was subsequently enjoined by order of the United States District Court for the Southern District of New York.

1195 This respondent shows that by the bringing of the said action in the Circuit Court of Mississippi County, Arkansas, and continuing the said cause, the said W. A. Cissna and his representatives, the Corn Exchange National Bank and Mrs. M. L. Kinney have elected to regard the transaction between the said W. A. Cissna and the Muncie Pulp Company as a sale, and has elected to regard the obligation due from the Muncie Pulp Company as a debt; and have elected to waive any claim to the title of the timber or to the possession thereof; and has elected to claim a vendors lien against the said timber, both cut and uncut, after the rights of the general creditors of the bankrupt estate and the Receiver have intervened and have elected by the said action to waive all right, claim or title of any sort against the timber, either standing or cut, or the proceeds thereform, and to ratify and adopt the position of a general creditor upon certain notes.

For a further separate defense and counterclaim, this respondent shows:

That the State of Tennessee filed a bill in equity in the Chancery Court of Tipton County, Tennessee, against the Muncie Pulp Company and W. A. Cissna.

In said bill it was alleged that the State of Tennessee was the owner and entitled to the possession of twelve hundred and fifty acres of ground upon which was growing the timber sold by W. A. Cissna to the Muncie Pulp Company as set forth in the said contract. The said bill alleged that the Muncie Pulp Company and W. A. Cissna were trespassers upon said lands, that the amount of timber cut and removed by the Muncie Pulp Company from the land belonging to the State of Tennessee was in excess of the value $25,000.00 and the State of Tennessee sought to recover the

1196 value of the timber which had been removed from the Muncie Pulp Company and W. A. Cissna. The value of the timber cut from the ground claimed by the State of Tennessee exceeds the amount of the two promissory notes of which W. A. Cissna now claims ownership.

Upon the trial of the said action a judgment was found in favor of the Muncie Pulp Company. On appeal judgment was reversed and an opinion written by the highest court of Tennessee, sustaining the major portion of the contentions of the State of Tennessee, and renders it doubtful whether the bankrupt estate can succeed in evading liability in the said action.

Prior to the filing of the petition in bankruptcy herein H. W. Stockley filed his bill in equity in the Chancery Court of Tipton County, Tennessee, against the Muncie Pulp Company and W. A. Cissna. In the said action Stockley claims to be the owner of a further portion of the ground supposed to be owned by W. A. Cissna and upon which the growing timber was sold to the Muncie Pulp

Company. In the said action a judgment has been recovered against Cissna and the Muncie Pulp Company and the cause is now pending on appeal.

Your petitioner shows that W. A. Cissna at the time of the sale of the stumpage rights guaranteed to the Muncie Pulp Company that he had good and sufficient title to the land upon which the timber was standing and that he had good right to convey the same to the Muncie Pulp Company.

This respondent is informed and verily believes that in event either of the above mentioned actions should be finally decided against the Muncie Pulp Company, said Muncie Pulp Com-
1197 pany will be liable for all timber cut and removed from the lands belonging to the State of Tennessee and the said Stockley; that the timber on the lands claimed by the State of Tennessee and the said Stockley exceeds in value the amount of the notes held by W. A. Cissna. For any amount thus recovered by the State of Tennessee, or bt H. W. Stockley against the Muncie Pulp Company, or its Trustee in bankruptcy will have a right as against W. A. Cissna to off-set the same against the proceeds of the sale of timber.

The respondent prays that he may be decreed to have an offset for any monies which he may be forced to pay the State of Tennessee, or H. W. Stocjley, or the American Surety Company, as surety on the bond given in the action instituted by the State of Tennessee as against any judgment which may be recovered by W. A. Cissna by virtue of his proceedings, and this respondent prays that W. A. Cissna be enjoined from further proceeding with this action until such a time as the liability of the trustee in bankruptcy and of the estate of the Muncie Pulp Company be determined in the proceedings now pending in Tennessee.

This respondent further shows that at the time of the filing of the petition in bankruptcy a further amount of timber has been cut and severed from the realty and was lying so cut upon the land of W. A. Cissna; and that a further portion of the timber standing at the time of the filing of the petition in bankruptcy, and that the fund received by the trustee in bankruptcy consists of the proceeds realized both from the sale of timber which was cut and that which was uncut at the time of the filing of the petition in bankruptcy.

This respondent further shows that an agreement was entered into between the Receiver in Bankruptcy and W. A. Cissna
1198 whereby the receiver was permitted to cut a certain portion of the standing timber and to sell a portion of the timber which had already been cut, and to deposit in the Memphis Savings Bank a fund against which W. A. Cissna was to establish his claim, if any such claim existed.

This respondent shows that from the first moneys realized from the sale of both the cut and uncut timber, this respondent deposited Sixteen Thousand ($16,000.00) Dollars in the Memphis Savings Bank, and that subsequently — of the United States Circuit Court of Appeals for the Southern District of New York. This fund was placed in this respondents hands to be held as a separate fund, sub-

ject to the rights, claims and equities of W. A. Cissna as such might thereafter be adjudicated.

This respondent prays that the petitioner be required to show what portion of the fund claimed by him is represented by the cut timber and the uncut timber.

The filing of this answer shall not be construed as a waiver of a right to plead any other defense of which this respondent may be advised, and the respondent reserved the right to amend this answer at any time prior to the trial of the said cause.

Wherefore this respondent prays that the petition of W. A. Cissna *de* dismissed with cost and that this Court decree that the trustee in bankruptcy is entitled to the proceeds of the timber hereinbefore set forth, and that the title to the said timber was in the trustee in bankruptcy.

——— ———,
Respondent.

1199 EXHIBIT "A."

Filed March 12th 1910.

United States District Court for the Southern District of New York.

In the Matter of THE MUNCIE PULP COMPANY, Bankrupt. William A. Cissna, Complainant.

This cause this day came on for hearing at a Regular Term of this Court, before Hon. Leonard Hand, presiding, upon motion of W. A. Cissna, claimant, to confirm the order of Hon. John J. Townsend, Referee, dated May 24th, 1909, and filed in the office of the Clerk of this Court, on the — day of May, 1909, the motion of Leo Oppenheimer, Trustee, to overrule and disaffirm said order; and the Court having fully considered said two motions the order of said Referee and the evidence upon which the same was based, namely, the petition of William A. Cissna, filed March 27th, 1907, the answer of Leo Oppenheimer, as trustee in bankruptcy and the Muncie Pulp Company, filed June 8th, 1908, the stipulation made herein dated April 29th, 1909, and three exhibits thereto attached; the affidavot of R. G. Brown, verified January 7th 1909; filed with the referee January 20th 1909, and the stipulation relating thereto, similiarly filed, dated January 16th 1909; the certified copies of the complaint in equity of the State of Tennessee against William A. Cissna, and the Muncie Pulp Company, and certified copies of the answers thereto; the opinion of the Supreme Court of the State of Tennessee, in the case of the State of Tennessee against William A. Cissna and the Muncie Pulp Company, reported in 119 vol., of the Reports of the State of Tennessee, at page, 47, and the map which appears in the case of Stockley against Cissna reported in the same volume, and after hearing Edwin T. Taliaferro, of counsel for the said William
1200 A. Cissna, and R. P. Levis of counsel for the said Leo Oppenheimer, Trustee, it is

Ordered, adjudged and decreed, that the said order of the said John J. Townsend, Referee is hereby approved ratified and confirmed in accordance with the terms and provisions of this order as hereinafter set out. It is further

Ordered, adjudged and decreed that the prayer of the petition of the said William A. Cissna, be granted, and that the Trustee in Bankruptcy, the said Leo Oppenheimer, is hereby directed to pay to the said William A. Cissna, or his attorney, or counsel of record, the amount of the two notes mentioned in the petition of Seven thousand ($7,000.00) Dollars each, with interest thereon at five (5%) per cent from June 21st, 1901, to the date of the decree and no further, to the extent that he may have in his hands realized from the sale by him or the Receiver herein of timber removed by either or cut and removed by either from the lands embraced in the contract dated June 21st 1901, made and extered into between William A. Cissna, and the Muncie Pulp Compant; it is further

Ordered, adjudged and decreed that the expenses of this hearing, to-wit: The Referee's indemnity, the bill of the stenographer, and the costs and disbursements incurred in this Court, be first paid out of said fun-s, when the same *shave* been finally determined. Ir is further

Ordered, adjudged and decreed that this order shall take effect and become operative *to* the following conditions: 1st: Before said fund, or any part thereof, shall be paid to said William A. Cissna, he shall make and execute a bond, to be approved by this Court, payable to the American Surety Company of New York City and Leo Oppenheimer, Trustee in Bankruptcy of the Muncie Pulo Company to indemnify and hold harmless the said American Surety Com-
1201 pany and Leo Oppenheimer, Trustee in Bankruptcy of the Muncie Pulp Company on two certain bonds, namely: one bond for the sum of Ten Thousand ($10,000.00) Dollars; executed by the Muncie Pulp Company, as principal, and the American Surety Company as surety, dated January 6th, 1905, given on the dissolution of an injunction by the State of Tennessee December 15th, 1903, as complainant in the action just mentioned, and conditioned that the Company would pay and discharge any final judgment rendered against it for the value of any timber cut from any lands adjudged to belong to the State of Tennessee, which were upon the said lands, on December 15th 1903, also a bond in the penal sum of Fifteen Thousand ($15,000.00) Dollars, dated March 9th, 1904, made by the Muncie Pulp Company, as principal, and the American Surety Company of New York, as surety, given on the dissolution of the same injunction in the same action and conditioned that the company would pay and discharge any judgment in said cause for the value of any timber cur and removed from the lands described in the bill, since December 13th, 1903. The said bond so to be executed by the said William A. Cissna to be made payable for only such sum as may be received by said Cissna and which sum the said American Surety Company hereafter be compelled to pay out by reason of the said two bonds above mentioned.

It is further

Provided, that the said William A. Cissna shall have the privilege of substituting a bond or bonds to the State of Tennessee in the Chancery Court of Shelby County, Tenn., covering the amount to be paid and actually received by the said Cissna, under
1202 his order, in lieu and place of that amount of the said two bonds of the said American Surety Company, and thereby releasing and discharging the same to the extent of the said bond of William A. Cissna; and in the event of such substitution, satisfactory to the State of Tennessee in said Chancery suit, as evidenced by a certified copy of an order of that Court, then and in that event, the said Trustee shall pay to the said William A. Cissna, the said two notes of seven thousand dollars each, with interest thereon at the rate of five per cent per annum, as hereinbefore provided.

Dated New York, July 15th, 1909.

LEARNARD HAND.

1203 *Deposition of Geo. L. Clothier.*

Filed Mc'h 18, 1910.

In the Chancery Court of Shelby County, Tenn.

No. 13271. R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

The Deposition of George L. Clothier, a witness for the Muncie Pulp Company, and L. Oppenheimer, trustee, taken upon notice at the office of Brown & Anderson, Memphis, Tennessee, on this the 12th day of February, 1910.

Present, representing the defendants, T. W. Bullitt, and R. G. Brown, and representing the complainant, John P. Bullington.

The said witness, GEORGE L. CLOTHIER, having been first duly sworn by R. G. Brown, Notary Public, by consent, testified as follows, to-wit:

Direct examination for the defendant by Mr. T. W. Bullitt:

Q. Give to the stenographer your name, age and your occupation?

A. George L. Clothier; my residence is Agricultural College, Mississippi, near the town of Starksville. I was born June 30th 1863, and am 47 years old, will be this coming June. My occupation is that of a teacher at the present time, teacher of forrestry and botany, and head of the department of botany and forrestry of the Mississippi Agricultural and *Medical* (Mechanical) College.

Q. Does that make you what is termed the Head Forrester *pf* Mississippi?

A. Yes sir, as far as they have foresters in Mississippi.

1204 Q. How long have you been engaged in the business of what may be termed Forrestry, in what places and what capacities and with whom?

A. I was appointed in the Forrestry Service in June, 1900.

Q. You mean the Forrestry Service of what?

A. The Forrestry Service of the National Government, the national service at Washington, and that date may be considered the beginning of my services. Prior to that I had made a special study of botany, tree planting and the growth of trees and kindred things in the line of forrestry at the Kansas Agricultural College. I graduated in 1892, and got the degree of B. A. fro- the Kansas Agricultural College in 1892, and for the Master's degree in 1988, having been assistant there in the botanical department for three years, and in 1900, I found my qualifications were not broad enough for a technical forrester, and while I was in the government service, I took a course in the Yale Forrestry Service, and graduated in 1903 with a B. A. degree.

Q. Since that time what has been your experience in Forrestry?

A. From June 1900 to August 1905, I was in the Forrestry service my work being largely traveling through the middle western states and then I had occasion on-e to go as far west as California, and to go as far east as New York, and Virginia, traveling back and forth over the country, assisting farmers in tree planting, and picking lands with a view to see whether they were suited to the tree growth or not, and making what we call planting plans for the guidance of the farmer in his work. In August 1900, I should say

1205 1905, I came to Mississippi. I figured my services with the forrestry service terminated in 1905.

Q. You mean the forrestry service of the United States Government?

A. Yes sir, but I came to Mississippi, and received the appointment from the State Agricultural College during two-thirds of a year, and was to draw my salary furing the other one-third of the year from the United States Forestry Service, and was kept on the United States Government pay roll until September, 1908, having since September, 1908, been in the service of the Mississippi Agricultural College.

Q. During that period you were engaged in the active work in the forrestry department of the government?

A. Yes sir, after 1906, mostly in Mississippi, but during that time I made one trip to Montana.

Q. Has your experience thus detailed cause- you to give attention to the character of, and the matter of the growth of and the size and age of cotton wood and willow trees especially along river banks?

A. Yes sir, it has.

Q. Tell us something about your observations in that respect?

A. Cotton wood and willow are species that may be considered pioneers. They come up on newly made ground, on sand bars along

river banks. They never germinate under the shade of other trees. They have to have open land.

Q. I am not at this moment asking you to go into their character or kind of growth, but to explain what observations you have had of that sort of growth along river banks and on islands?

1206 A. I should say I have been acquanted with it and I have notes it ever since I have been acquainted with tree growth. Ever since I began to study botany, I have noted that cotton wood and willows grow on sand bars and help to fix sand bars and make permament land, and are also a rapidly growing species.

Q. I understand that has been the part of your study, the observation of that class of timber?

A. Yes sir.

Q. Now, Mr. Clothier, did you at any time recently, at the request of counsel for the Muncie Pulp Compant, the defendant in this litigation, where your deposition is now being taken, make any examination of the ground and the tree growth on what is known as Dean's Island and opposite to what is known as Centennial Island in the Mississippi River, some 30 or 40 miles above Memphis?

A. I did. I made two trips there.

Q. When was your first trip made?

A. I began the work, I believe, on the 26th day of November, 1909, last November, and spent two or three days, the 26th, 27th and 28th on the island.

Q. Did you spend practically the whole time in the investigation that you were requested there to make?

A. Yes sir, I did.

Q. Pleas- state from whom you received your instructions and substantially what instructions were given you relative to the work that you were to do on the island?

1207 A. I received my instructions from yourself, Col. Thos. W. Bullitt, of Louisville, Ky., and those instructions were as nearly as I can remember, that I should attempt to find out, if possible, where the river bank was in 1876.

Q. *The* mean the Arkansas bank of the Mississippi River?

A. Where the Arkansas bank, the south and west bank of Dean's Island, we should sa*w*, was in 1876. In my instructions I was also told by yourself in conversation that my work there was to be absolutely without regard to *my* information that I might get outside. That I was to draw my own conclusions; that if those conclusions were against the company that you represented, you wanted to know it because it would be a benefit to the company to know if they were in the wrong, whether they were in the wro-g or not, and with those instructions I started in.

Q. Just a moment. Was anything said to you about following any particular lines, or regardless of any particular lines or survey previously made?

A. No sir, there were no lines, what we call water lines marked out at that time, where any one could point out; and no section lines other than what the inhabitants of the island could point out in this survey which they said was made a few weeks ago by Mr.

Green, purporting to represent the middle thread of the Mississippi River.

Q. Of what date?

A. Of 1823; and in making the trip over the island I paid attention to his iron posts and where that line ran in a general way.

1208 Q. Do you recall whether instructions were given Mr. Bullitt embracing the idea that the work was to be independent of and entirely regardless of any lines previously gone over by any survey?

A. Your instructions were to that effect.

Q. To ascertain by your own observations?

A. To ascertain by my own observations just what the condition of affairs is there now, at the present time, and what changes have been made in the formation of the island between 1823 and 1876.

Q. Now, was your work thus done independent of all other work that had been done by other persons?

A. It was, yes sir.

Q. Now, then, state generall- what were the things that you considered as aiding you, perhaps to determine where had been the bank of the Mississippi River at the time of the evulsion of 1876; what sort of things you looked to as enabling you to determine and ascertain the location of that bank?

A. The first idea that I adopted was to find, as near as I could, how far south the present island, the land of the island, was solid land in 1876; and I did that by hunting for the trees that were old enough by their general looks to show that they were there prior to 1876, and I began to—I do not know as it was the first tree, but the tree that I selected was near the south extremity——

Q. I was not going into those details now. I only want to get now what character of objects you looked for, what character of objects you looked for, either in soil or in growth indicative to

1209 you of the old bank of the river?

A. The first character as I have just now stated was, the age of the trees growing on the island. The second character that is evident on the island, is the succession of the banks projected towards the west and south west from the middle of the island, or about the middle of the island, towards the south west.

Q. Towards the Tennessee shore?

A. Yes sir, these banks evidently being,—that is they appear to me,—anyhow from my observations they appear to be the successive levees of the river as the water was encroaching on the banks at that time. the successive banks.

Q. That did you look for?

A. That I looked for, and after I had acquainted myself with the surroundings, I began to note that the differences of the undergrowth, the difference in the formation of the forest trees in the older part of the island varied. There were very few cotton woods, and in the newer part of the island, the cottonwoods or willows, as the case may be, were increasing in number, and the other, the species was decreasing in both number and size, I also noted the undergrowth, particularly the vines, the poison ivy is a particular vine

there, and that clings to this cotton woods, and the older the treem the more poison ivy you find, and the stronger the growth, the larger the vine, etc., I will state, that the reason for that is that the poison ivy only comes, only germinates under the shade of other trees, and in the older growth. I commenced to grow a few years after the young forests were established, and *in* the younger forests at the present time, are just in the beginning stage, and you can see the young vines all around unfer the timber, but they have not yet began to climb.

1210 Q. Pardon me for asking one or two other things as indicative of the difference in the age of the soil. Did you consider the question of elevation?

A. Well, somewhat, Colonel, but the question of elevation on an island that way is not very good, safe guide because the elevation varies so little. Of course, one of the chief things in noting how the land has been built out into the river, or into any other body of water, is to note the newness or the finesess of the particles of the soil. Sand is always laid out where the river has just occupied, and silt or find clay is where the still water has dried off, and these successive banks, where they projected out into the water were sandy, while back from each bank right at the fott of each bank, you will find a sort of flat, there must have been a lagoon, and the sand spit soil projected out into the water. That flat is very fine murky soil, and you will occasionally find willows mixed in with the cotton woods in there. That is the law in reference to the growth of species. Where you find sandy soil, you will not find willows growing. The willows sprout up on silt and clay soil, and cotton woods come up on both, but the cotton woods would be killed out by the willows, and the cotton woods remain on sandy soil, and willows are clay soil, and wherever you find willows, you will hardly find cotton woods.

Q. You took all these things into account?

A. Yes sir, and I further knew that there was a little bank there, a little reach there, that apparently seems to me now, after a study of the land, that appears to have been a sand silt in 1876. First I took it to be the bank of 1876, and I think there were eight or nine trees cut along that bank. The age of the trees though, showed that they were later on than that. That while some of these

1211 trees,—one I remember was as old as 38 years old, there was none of them old enough to indicate a permenent bank there, so I figured out that there must have been a bank, or sand-*cipt*, or one of these occasional levees the river was building on the island towards the west.

Q. Beginning generally with that point, where do they generally lie?

A. It lies right at what might be considered the mouth of Sandy Chute, and projects to the northwest, and I crossed back and forth repeatedly, back and forth between the old river bed, between that and Tennessee Chute, and it was a uniformly flat formation, and no banks in there until I got over near the Tennessee Line, where there was an old chute open, and it has thrown out sand.

Q. We are going a little more into details later on, and I shall want you to go over that again, and my present purpose is really just to indicate the general things you were looking for and observed in a general way.

A. Yes sir.

Q. Now, did you have in mind in attempting to determine which was the old bank, I mean the bank prior to the evulsion of 1876, and what was the ground made by the filling within the river bed since 1876, did you take into account any question of the difference in the elevation and in the character of the soil as well as the character of the timber?

A. Of course where the banks show there is necessarily a difference in elevation. Where this bank,—I believe the bank of 1876 is located at the present time, there is a depression which, near
1212 the bank of Sandy Chute does not show very much. There is very slight depression there, and you may pass over and not notice it, but as you go further to the northwest that depression increases to the left while the bank rises on the right, and I would say that the bank elevation varies from two to eight feet difference; and on the left I observed a piece of land that was evidently a slough. There this sand pit ran out in front and deposits there fine material, for you occasionally find sloughs that way.

Q. Did you make any survey to indicate the work that you did up there, and the lines that you followed?

A. I did on my second trip.

Q. Now, when was your second trip made?

A. It was December 28th, 29th and 30th, 1909, just before the new year.

Q. Did you make any field notes from which a map could be platted?

A. Yes sir.

Q. Have you had that map platted, and if so, by who, according to your field notes?

A. I have directed Mr. J. A. Green,—I believe those are his initials, of Covington, Tennessee, to plat it.

Q. Have you the plat on the map made by Mr. Green showing this survey?

A. Yes sir, I have.

Q. I will ask you to mark that plat "George L. Clothier, Number 1," and file it as part of your deposition?

A. I do so.

Q. Now, Mr. Clothier, did you cut down any trees on
1213 either your first or second trip there, and if so, did you make any notations as to the ages of those trees?

A. I did on my first trip, I cut seventeen trees.

Q. Did you cut any on your second trip?

A. I did not.

Q. Now, are those trees noted on your map?

A. They are noted; their positions are noted.

Q. In what way are they noted so that we may identify them?

A. They are noted here as red stars "*" and numbered, now the numbers are in blue.

Q. Now, then you numbered them in the order in which they were cut down?

A. They were numbered in the order in which they were seleteed. I do not remember whether they were cut down in that order, but they were numbered in the order in which the selection was made, and a record kept in my field note book.

Q. Now, inasmuch as the stars appearing on the map are not numbered in numerical order, I will ask you as a mere matter of identification to go over the map and to give the numbers as they appear on the map in their orderly way, the orderly way as they appear on the map, beginning at the first number that you have made towards the east, that is, on Sandy Chute?

Q. The first tree towards the east that was cut is tree number 5 shown on the map; the second tree to the west of that is number 4; the third is number 6; the fourth is number 2; and then number 3, number 7, number 8, number A, number 1 and number 9. The trees platted from my field lines are those numbered.

Q. They appear upon that line upon your map?

1214 A. Yes sir.

Q. They appear on this green line on the map?

A. Yes sir.

Q. Allow me to ask this: Number 6, the star being on the yellow line, did that tree stand on the yellow line or on the green line?

A. Its position was located with reference to the green line, but that brought it on to the yellow line, which was Mr. Green's marking for the bank of 1876, so it takes it on to Mr. Green's line.

Q. Number 6 on the map shows the correct location of that tree?

A. Yes sir, it just stood back of the bank there.

Q. Now follow out and give us the next number?

A. The second line indicating trees is Mr. Green's number three.

Q. That is the section line between line and ten?

A. The township line; Mr. Green's township line, station number 3, and that line locating these trees ran in a general northwest direction. The first tree that is located from it is tree number 10, and the next is number eleven and number twelve, the next two trees. The next trees were thirteen and fourteen and the last were fifteen and sixteen.

Q. These that you have just mentioned from ten to fifteen are on your green line?

A. Yes sir.

Q. Beginning at Green Station Number three on the township line extending between township- nine and ten?

A. Yes sir, it is on Mr. Green's line where his station Number three was marked, and I should like to add this, the first line started at Mr. Green's station 2 on his line then ran north and south.

1215 Q. His line running from a common corner of sections four and five and thirty two and thirty three extending to the bank of Sandy Chute?

A. Yes sir.

Q. Now, just give in your own way an account of what observations you made on your first trip there, and give those stating the basis upon which you ran out the green line along Sandy Chute and extending east your number six to three, seven, eight. A one and nine, included. I will ask you to give in a general way what your observations were there, and what is the meaning of that green line I refer to?

A. The first day out we followed—we began on the bank of Sandy Chute at the east line and followed it up, and continued following a bank, and we thought we were following the bank of 1876; these trees beginning at say trees 2, 3, 7, 8, 1, 9 and A were all cut and counted,—the rings counted and the age determined for the purpose of assuring myself whether that was the true bank of 1876. After that the trees along there were cut, I gave it up as not being the bank of 1876.

Q. Why?

A. Because the trees were too young.

Q. Now, beginning on the bank of Sandy Chute, did you go down the bank of Sandy Chute as far as the Mississippi river on the east?

A. Yes sir.

Q. You followed that bank all the way?

A. From the Mississippi River westward, and continued that bank, as I was satisfied to be a continuous bank. Later on I found there was a slight depression in this bank that was not noticed on the first day, and the age of the trees proved to me that we were to- far west of there.

1216 Q. Now, one moment, are you able to state with any reasonable degree of certainty, and if so, how much whether what is now called Sandy Chute, the north bank of Sandy Chute, is or is not, the bank of the old Mississippi River at the time of the avulsion, extending down from the present junction of the Mississippi River down to the point where the yellow line turns, and where your green line leaves your yellow line and goes over then from sixteen, as marked on your map?

Counsel for the complainant object to the question as leading and suggestive of the answer.

Q. I will put that question a little differently and I will withdraw the question. Please state whether or not, along what is now the north bank of Sandy Chute from the Mississippi River to the point where the yellow line on your map turns northwestwardly, where your green line diverges thereon, enabling you to say what was the old bank of the Mississippi River along that place at the time of the avulsion of 1876?

A. I will state that trees number 5, 4 and 6 show by their ages that their locations were on solid land many years prior to 1876. That would connect up this yellow line at this position here and that much of the bank was certainly land in 1876.

Q. Is there anything in the physical appearance of the ground itself on and north and south of that bank of Sandy Chute to indicate whether or not that was an old bank of the river?

1217 A. Why, I will simply state again the trees on the north side are much older, than growths started in 1876. I did not cut any trees on the south side, but the indications are that the trees on the south side of Sandy Chute are very much younger.

Q. Is there any other appearances on the banks there?

A. On the south side you mean?

Q. Any appearances on the bank on the north side of what is now Sandy Chute?

A. No appearance on that north bank. That is what is known as Tow Head island over here.

Q. How wide is Sandy Chute?

A. I should say two hundred and fifty yards.

Q. Is it filled with water?

A. No sir, sand, and growing up to young cotton woods.

Q. How much below the level of the grouns where you cut these trees is the bottom of what is now called Sandy Chute?

A. Eight or ten feet.

Q. Now, Mr. Clothier, what were the ages of the trees that you found on the north or south of Sandy Chutes to which you have referred by the number- four, five and six?

A. Tree number five was a forked cottonwood tree, with the south fork dead, very old looking tree, and the north branch still living. It was cut and rings counted from the north side, the living side, and it was ascertained to be at least sixty years old.

Q. Give the location of that tree, with reference to Mr. Green's line along Sandy Chute?

A. Tree number five was about one hundred and fifty feet southwest of Mr. Green's gas pipe stake number 6, which seemed to be the center thread of the Mississippi River in 1823; about one hundred and fifty feet.

1218 Q. How far north of the bank of Sandy Chute?

A. It was about one hundred and fifty feet north of the bank of Sandy Chute.

Q. Now, go on?

A. Tree number four was a willow tree and the rings could not be counted on the stump, but we counted nine feet eight inches about the ground, and at that place, had fifty three rings of growth, and had an addition of about three inches in diameter, indicating that it must have been at least sixty years old.

Q. How far was tree number four north of the bank of Sandy Chute?

A. When that tree was cut, it fell down in Sandy Chute, and it must have been right on the bank.

Q. Now tree number six?

A. Tree number six stood out in an open field to the north east of an old cabin, and seemed to be a part of the camp of the Muncie Pulp Company when they began their work here. It stood on a little piece of ground with a depression or slough to the southwest indicating the bank. The age of tree number six was at least fifty years old.

Q. Judging by the rings?

A. Yes sir.

Q. Now, follow out your green line and give us the ages of the trees located on that line. The first line? I say that line which is marked on the line here as line B?

A. Yes sir, tree number two stood at the stop of this bank, the first one we had taken to be the bank of 1876, which I interpret now to have been the bank of a sand-spit that extended out from the bank of 1876. Tree number two stood on that bank and was thirty-eight years old, according to annual rings. Tree num-
1219 ber three was taken on a low flat to the southwest where the land appeared to be newer at a distance of about—I have the exact distance in my records,—but I should say a distance of about seventy five paces of tree number two. Tree number three was taken and its age was at least twenty-six years. It is barely possible that tree number three is as old as thirty years. I would say that indicating of the field notes made it twenty six years, but you could not always say very well where the sap is rotted, and you could not see to count. It is probably thirty years old.

Q. Now tree number seven?

A. Tree number seven; we followed this same bank which I now interpret to be a sand-spit extending out into the river, and tree number seven was located within thirty feet of where my line went afterwards, on top of this bank; and tree number seven was at least thirty-two years old. To the southwest of tree number seven was a bank,—it was not abrupt at all, but in a space of one hundred yards the land declined there about ten feet, and on the low flat, to the southwest, tree number eight was cut. Tree number eight was cut southwest of a flat and was a formation with a slough. It was a murky, muddy soil. It was the only cottonwood I could find among those willows, and was one of the largest of the trees in the growth, and it proved to be twenty-seven years old.

Q. Counting by the rings?

A. Yes sir.

Q. Now, your tree- number- A, 1 and 9?

1220 A. Tree Number A was a willow tree cut in the same swampy area which extended northward from tree number eight and when we came to locate how far enough north, I cut the willow tree for there were no cottonwoods in there to cut. I cut tree number A, which proved to be twenty years old, and I would like—if there is no objection to me going ahead——

Q. Go ahead?

A. I would like to state, along this line, this green line between tree eight and tree A, along to the right there, were thick cottonwoods, a row of thick cottonwoods lying to the east and you could look up and down just like you were looking down a street, almost as straight as if it had been planted, an *an* open space between those trees, and a slough to the west, indicating cottonwoods shaded by early growth, indicating also cottonwoods, started on that bank, prior to the willows to the west of there, the light coming down from the west of where the open land was. After cutting the willow tree, I then found trees, all of them young, on the out-

skirts of my cutting. I moved back towards the east to find old timber, and came to tree number one, supposing it was an old one by its size, tree number one was a cottonwood tree, on an average of forty five inches on the stump. When we cut that it proved to be at least thirty five years old. This tree proved to be very much younger that I had judged it to be by its appearance. At that place where tree number one stood there is a sandy bank that gradually disappeared, just run out into the flat which extends west
1221 there to the Tennessee bank. Going back still further to the east I located tree number 9, which is about one hundred and fifty feet, I should say it was,—probably a little more, but I would estimate two hundred—east to the western extremity of the cutting, the western extension of it at this point. Tree number 9 stood alone, and stood straight, and indicated that it had very little crown on it, indicating that it had come up in a thicket and had been shaded from every side entirely and did not lay as other trees I examined, And I cut tree number 9 and it proved to be at least five years old. That ends the cutting *og* the trees that we cut, and located by this first survey, consisting of lines A, B and C on this map.

Q. Let us pause there for a moment. You stated a moment ago that your first tree you made that cutting under the impression that you were upon the banks of the river of 1876. Now, what was your final deduction as to what was that bank?

A. My final deduction was, that was the sand bar bank, or a sand bar, a natural levee there the river had thrown up, as the land had been encroaching on the river tow*rad* the west.

Q. You became satisfied that that was not the main bank, as of the date of the avulsion?

A. Yes sir.

Q. But simply represented a sand spit that had gone out there?

A. Yes sir.

Q. What was the age and size of the trees that lead you to that conclusion?

1222 A. The fact that after I had gone further east the appearance of the land got older to such an extent that I had to readjust my first impression as to the ages of the trees. By looking at it, and so the real thing hinged upon the age of the trees. They first had to convince me that this bank was not the bank of 1876.

Then of course I looked at the appearances. I observed the appearances of the trees, and found while there were a good many appearances and a good many undergrowths on apparently this sandspit, the growth on that sand spit and to the west of the Tennessee Chute was very marked, that is being open and no undergrowth to speak of at all, and this had vines and shrubbery growth.

Q. You mean that at the sand spit there were vines and shrubbery growth, while westward there were none?

A. Westward of the green line the vines in there were very small, and did not cut off the view in riding over it. As I proceeded northeast, and located the first time, I found evidences of what was again

the bank of 1876 as indicated by the age of the tree. The growth there showed very much the age of the growth of the sand bar. If you want me to state how that formation is, I will do that.

Q. I will ask you to do that a little later. Pass now, and take this yellow line there as marked on your map there, being the extension of the yellow line on the north side of Sandy Chute, and follow that out, commencing at Freen Station No. 3 in which your green line is, and follow out that yellow line and your green line running northwestwardly to the end of your green line, and state what you observed there in regard to the trees and in regard to the bank, and everything that influenced your judgment?

1223 A. I will first state that after cutting tree No. 9 there having been no survey, there was no green line to attach to. At that time, having cut tree No. 9, I crossed to the north to hunt older land. I was certain I would find land enough older to have been a permanent bank in 1876. I cross a little low sand reach after leaving tree No. 9, and then came down again on to a flat where the stumps were very thick, showing there had been a very dense stand of trees prior to the cutting. Then I came to a bank there quite suddenly from this low flat. Upon this bank I noted there were cottonwood trees left standing, left standing for some cause or other, probably defective, and I noted further I could stand on this bank and look up and down several hundred feet through the woods on that land towards the southeast, indicating that when they started to grow as young trees, they must have grown on the border of an open space, the land going to the southeast. That was the first thing that led me to believe that I had found definitely the bank of 1876 at that point. After cutting tree No. 10, the age of the tree settled the question.

Q. What was the age of tree No. 10?

A. The age of tree No. 10 was 55 years. I then followed this bank. I could not cut a tree on the low flat because it all had been worked off in the area, and my plan was to follow up, and cut a tree down lower on the flat and compare the ages of the trees, and I did that in the cases of Nos. 11, 12, 13, 14 and 15.

Q. Right at that point, let me ask you whether in cutting to the west of your line, you attempted to find and cut the oldest trees that you could find?

1224 A. I did in all of my cutting, and I attempted to cut the oldest trees I could find.

Q. Now, go on with your cutting there?

A. I located tree No. 11 right on this bank which I had followed up from Tree No. 10 to Tree No. 11 lying slightly to the southwest, and when I cut tree No. 11, and determined its age, I found it to be above 40 years. My field notes made it 42 years. My count on this, after I got into the office, makes it 47, so I would say that it was something over 40 years without question.

Q. Where was the largest or oldest tree that you were able to find west of No. 11?

A. Tree No. 12 was just a few feet from the bank of a pong that runs up and down here. The native inhabitants call it Long Pond

or Long Lake, and Tree No. 12 was on the east bank of that pond. When I cut it, as I remember, the top fell into the pond so I located it within 50 feet of the bank of the pond. This was tree No. 12. Its age was at least 25 years.

Q. Was that the oldest tree that you were able to find west of the place where you cut Tree No. 11?

A. Yes, it was the oldest looking and one of the largest in the stand.

Q. Well, go ahead.

A. Tree No. 13 was right up on this same bank, standing on the bank lying to the southwest, or more to the west herem as the bank was running north and south, and when it was cut, and the rings counted, it was found to be, by the first count, 45 years old. After it had been polished, it shows up several years older than that.

1225 Q. I will ask you to give those directly in their order. Proceed now?

A. No. 14 stood across this pond just on the west side. At this place, this Long Pond but-s up very close to this bank, and tree No. 14 was cut, and it fell towards 13, and the tops of the two trees fell in the top of each other. Tree No. 14 proved to be at least 22 years old, and it was one of the largest and oldest looking trees I could find west of thatq pond. I passed them on up to this same bank to where that bank finally disappeared as a bank, and I located tree No. 15. Tree No. 15 when it was cut the field notes showed it was 42 years old, and when it was polished, it was several years older than that. Tree No. 16, was cut to the west of Tree No. 15 across the depression that represents the north extension of this pond when the water was high. There was no water in it at that time, a kind of slough there, and the two trees were 200 feet apart. My notes give the exact measurements. Tree No. 16 was at least 16 years old.

Q. What was the largest tree that you were able to find west of tree 15?

A. That was the largest tree.

Q. Now, Mr. Clothier, have you the size of the wall that you were going on there?

A. Yes, sir. Now you spoke of having cottonwoods across the chute here. Now, after having cut 15 and 16, we rode north to Barnay Chute to ascertain just where it was located, and I followed the chute up the bank, and found this same young growth connected with the chute over here through the bank, as the bank ceased to exist, the ground filled in, and the ground disappeared as a bank, but the young growth on the left hand side was the same

1226 nature as this was here and to the right, and all the timber in here had been cut and there was nothing but stumps there, but it indicated there was a marked division, connected right up to Barnay Chute.

Q. Did you inspect any of the stumps there, in the logged area there, and ascertain, or find out from their condition their ages, or did their condition determine their ages?

A. I found two stumps along the bank, and I ascertained their

ages to be at least forty years old. When they were cut some decay had set in, and they were a number of years over forty years, I could not ascertain exactly.

Q. Mr. Clothier, did you say that you did inspect some of the stumps? What was the condition of the stumps along the line which you have been describing?

A. Well, most of them were too much decayed to see the rings, but there were one or two stumps there where some rot had taken place, in such a way as to save the heart part of the ring projecting, but if I remember, there was a slightly decayed heart.

Q. Now, I will ask you to state what stumps you were able to count, and what was the age of the trees that you thus made the count of?

A. I say here in my note "an old stump," I have not noted it, but I located it by others and it stood three hundred yards northeast of tree number nine; that would put it over on that bank.

Q. You mean the bank presented here?

A. It is on the bank here. I estimated it to be three hundred yards.

1227 Q. You mean the bank represented by the yellow and green line?

A. Yes sir, and it is forty-five years old, my notes say here. I think I counted another stump, and I could not count some of the rings; but I counted the rings on the tops, which were still there, which indicate that the stumps from the top had not decayed.

Q. Take your time.

A. I say here that the second stump, the old stump, was at least forty years old. There was another on up here, I could not locate it exactly with reference to the place, it was probably beyond the place where tree number ten was located, it was probably on the bank. Now these were the two that we cut on this first trip. Now, I will say this about the tops,—here's my statement of December 30th. I followed Squire Martin's bank from tree number ten to tree number six, and ascertained beyond a doubt that the timber to the east of this bank was at least forty years old. I counted several old tops, and they were all over forty years, over along that bank, then I took a top up here to assure myself that the timber might be younger back in this direction, eastward of the bank, and I found an old stump in what is known as "Middle pond Slough" to the south of where this iron pipe stands. I found it there, and as I remember, my notes say exactly, "I think, about forty five years old. On December 30th, I counted the rings in a tree left in a slough west of Martin's bank. The top had fallen into the slough, and this was at least forty years old. Forty feet from the stump the top was, and it was located about two hundred paces up to the bank from Green's Station Number nine. This stump was north-

1228 erly from tree number ten. On the same day I counted a tree top to the southeast of tree number ten, following along this bank. I could not say just how far it was from tree number ten, but it was between tree number ten and tree number six along

this bank. I counted the top there which was thirty eight years old, forty five feet from the stump.

Q. You say this bank, you mean that represented by the yellow line?

A. Yes sir, following down along tree No. 10 and tree No. 6, not finding any trees in there to cut, I wanted to check up and I counted the top of a tree fallen into the slough there.

Q. How old would you say that would indicate the tree was at the stump—state that with reference to both of the trees you have just mentioned when you counted the tops?

A. The tree there was 38 years. It would probably take 10 years to grow up to the height of 45 feet. I would like to correct that and say seven years. It was at lea-t 45 years old. I want to be on the safe side and not overestimate. That tree would be at least 45 years old. Just add seven years to the top age there, and it would indicate that it was at least 45 to 47 years old. Then with reference to the iron pipe there—I cannot put my hands on the notes now.

Q. What iron pipe do you refer to?

A. This iron pipe stood out in the field to the east of this bank.

Q. Let us indicate that iron pipe?

A. It is indicated on both of the map-. It is the northmost iron stake that is indicated on all of the maps.

Q. It is north of the corner of that tract line, just northwest of the 1050 acre tract in controversy in this action?

1229 A. Yes sir. The tree that was cut was to the south of that pipe in this slough there, that runs along there. There is a flat running through this part of the island, and I wanted to make sure whether it was in the river or not, so I took the furthest outpost of 1876, and counted one tree top in there, and my memory is that it was about 40 years old. It was so much older than the bank of 1876, that it indicated that this slough area was water prior to 1876.

Q. You mean that tree was 40 years at the top?

A. Yes sir. There had been three logs taken off of it, three 16 foot logs.

Q. That would indicate an age of what?

A. That would indicate an age of a little less than 50 years to the tree.

Q. These trees to which you refer as having been cut, I refer especially to the older trees, do I understand you that they were cut from area that had already been cut?

A. Do you mean my trees up to 16?

Q. Yes, I refer especially to the older trees?

A. I would have to locate them. I think I could sketch a line here and show the logged area. Trees 6, 10, 11, 13 and 15 were cut in the logged over area. Tree- 11, 13 and 16 were right on the west border of the logged over area.

Q. The west border or the north border?

A. The west border. No. 9 as previously stated in my deposition was about 200 feet I should say east of the west boundary of the logged over area, and at that point this logged over area extends furthest west. Between my line X and the line Y, this broken point,

this point here, this connection here was just in the edge of the logged over area.

1230 Q. You mean the logged over area lay to the east of there?

A. Yes sir. I could sketch in the west end of the logged over area very easily.

Q. Will you please take a pen and sketch it from the lines that you have just mentoned what you found to be the logged over area west of the bank of 1876?

A. Yes sir, I do so, marking it on my map, "Clothier Exhibit No. 1" with a broken red line, and indicated by the words "Western edge, logged area."

Q. You do not know how much older the trees may have been, if at all, that were previously cut out?

A. I do not know as to that. I could tell by saying that my knowledge of the growth of cotton wood trees, would indicate that the trees that are left there now are the same ages as the original stand that was logged.

Q. What is the ordinary age of a cotton wood tree?

A. A cotton wood tree is mature at 50 years of age, and it is very old at 80 years.

Q. Mr. Clothier, you have spoken of Martin's bank several times. You mean the bank of 1876 as marked on Martn's map, or what line do you refer to?

A. I mean this yellow line on Mr. Green's map which is marked "Bank" on Mr. Green's map where the river was in 1876 when the Centennial cut-off was made. I refer to Mr. Green's map, exhibit No. 2. The line laid down in yellow on my map which may be proven by simply superposing the two maps, one over the other.

Q. Now, as I understand, you made a survey up there?

A. I did.

1231 Q. And Mr. Green you say you platted out your map from the field notes of your survey?

A. I made a survey and left instructions for Mr. Green to plat the map. When I come back here I find this map of Mr. Green's marked Exhibit 3, J. A. Green, which has the date of my figures on it, correctly represented.

Q. As I understand you, as you have previously stated, then your survey was made simply on the ground without the aid of either the Green map or Mr. Martin's map?

A. It was made before I had seen any map of Mr. Green's last survey.

Q. Now, do you find that your survey of what you expressed the opinion to be the bank of 1876 coincides substantially with the map platted out by Mr. Green as showing Martin's bank of 1876 and appearing on his exhibits 2 and 3?

A. I find that they coincide with the measurements I took as far as my measurements extended, and also coincides with my trip which I took over a portion of this bank which I had not measured out or platted.

Q. Where are your measurements shown?

A. On this green line with A, B and C at this point and with X,

Y and Z at that part of the map. I corrected by walking from the beginning of line X back to where this line crossed A.

Q. You walked over the ground represented by the yellow line from Green's station 3 back to the yellow line on Sandy Chute?

A. Yes sir.

1232 Q. Now tracing with what you have designated as the bank of 1876, and beginning with the point *with* where it leaves Sandy Chute, state whether or not besides the timber you found evidences,—did or did not find evidences of a bank there, and whether those evidences of the bank were continuous or broken?

A. At the eastern part, the evidences were not as clear as they were further to the west and northwest; but by looking across a cotton field, and walking across it too, it was very evident that the land to the south and west of this bank was lower and richer, the cotton having grown much taller there. The timber was all removed therem and it was in a cultivated field. I traced on back and satisfied myself with absolute assurance it connected with the present bank of Sandy Chute. Then in passing further north the bank became much more distinct that way, and there were one or two places between Green's Station No. 3 in the township line here and tree No. 6, one or two places in there where there was a little fill, and there were slight depressions in this bank there, apparently bayous that ran back into the interior of the island and allowed the water to escape at times of inundation, but at the same time, the bank re-appeared on the opposite side, and without question was a continuous bank.

Q. Continuous from the mouth of Sandy Chute as far as your survey went?

A. Yes sir.

Q. Now you have spoken of the annulations upon the trees, and the fact that you made notes on the ground where you cut the timber? You have also made some reference to having them

1233 prepared since. Please state what you did, and have done since in that regard?

A. The trees were selected and cut, and off of each tree a disk cut where it could be gotten at a sound place. If the tree was unsound, the disk would have to be taken up a ways, or if the tree had become split, and in my notes I indicated the distance of each cut above the ground, each disk. These disks were cut off, but at the same time to satisfy myself, to check up myself, so that there could be no error come in between the getting of these disks out in the fields and producing them in an office or court room, I counted the rings either on the log or the stump, wherever easiest to count. The cotton wood is a very difficult tree to count the rings on, simply physical difficulties. When they are first cut, the sap exudes and interferes with any marks on it. There is not as great contract in the size of cotton woods as of oak or some other species, but with a very careful work, you can ascertain without a doubt the age of cotton woods. These disks were cut and ordered to be shipped down the Mississippi River, and each disk was labeled with a label by which I could identify them, and they were taken to Anderson & Tully's yard, and I gave

orders for the preparation of these disks, and as they came up I went out and saw them, saw that they were ag-in marked, so that there might be no mistake in the identity of the disks, and they were put into the hands of Mr. Campbell, an employee of Anderson-Tully Company to be reduced in size so that he could handle them in an office. We cut a block out of the middle of each disk, and dissected the side portions. They — then prepared and polished to be submitted as evidence in the court room.

1234 Q. Have you those disks here now?

A. The disks, or the parts of the blocks, are in that room, the adjacent room.

Q. Have you examined those disks, and are you able to state that they are the same which were cut under your directions?

A. I have examined them this morning and ascertained that they are the same.

Q. In preparing the disks so as to be able to handle them, have they been cut in such a way as to leave clear to the view, the annulations extending from the center to the outside?

A. They have been so cut.

Q. Have they been polished?

A. One half of each has been polished and finished.

Q. And one half has been left?

A. One half has been left smo-th as the tools could cut it.

Q. Does that polishing assist in bringing out the annulations, or does it cause the disappearance of the annulations?

A. I think it increases it somewhat.

Q. Have you examined and counted the annulations of those disks since they have been thus prepared, and compared them with the count which you made in the field at the time they were cut?

A. I have this morning.

Q. I will ask you now to state in tabulated form the ages of the trees shown on those disks, both by your count made in the field and your county made here indicating wherever there is a differ-

1235 ence?

A. Beginning with Tree No. "A" and taking them in numerical order, I find them to be as follows:

Tree No.	Field count.	Office count.
No. A	28	28
No. 1	35	36
No. 2	38	38
No. 3	26	33
No. 4	53	54
No. 5	67	66
No. 6	54	50
No. 7	34	32
No. 8	27	27
No. 9	35	39
No. 10	55	55
No. 11	42	47
No. 12	25	29

No. 13	45	52
No. 14	22	22
No. 15	42	50
No. 16	22	24

Out of 17 trees, the office count gives an age above the field count in nine cases, and in five counts, the field notes, the field count, and the office count tally, and in three cases the field count overestimates the office count.

Q. Which of these, the field county, or the office count, would you say was the most accurate?

A. I would regard the office count as likely to be the most accurate, because as I said the physical inability of the getting of the rings arranged so you can get at them out in the field compared with when everything is at hand.

1236 Q. The avulsion of the Mississippi River by which the old river left its banks, and the bed of the river afterwards filled, occurred in 1876. Now I will ask you whether or not the trees, the ages of which you have given as exceeding 33 years, could have been under the bank of the river, that is within the bed of the river prior to 1876?

A. I would state that they could not have been in the stream if you count the bed of the river where the water flows or where the woter stands permanently.

Q. Mr. Clothier, I will now ask you to identify the blocks or disks which you say you have prepared from the blocks taken from the trees by you; how are they marked?

A. They are marked by numbers, the cotton wood trees numbered 1 to 16 conclusively, and the one willow tree No. A. These numbers are found on them on brass tags, and also written on the boxes shown on the side, and placed on the back. I would also like to state here that I have on each of those blocks a secret number, if the blocks should ever become questioned as to the identity of the block. When the blocks were in preparation I ascertained this secret mark was on each block, the mark corresponding to it, so I am satisfied the one here are the blocks.

Q. And these blocks are numbered in accordance with the marks that you have placed on your map?

A. Yes sir, these blocks are numbered in accordance with the red stars.

Q. The secret marks to which you refer, were put there while you were on the island?

1237 A. They were put there on the island, yes sir.

Q. So you are able to identify these marks?

A. Yes sir.

Q. You said something thid morning about the formation of the successive banks on the island. Have you sufficient knowledge of island growth to explain to us how successive banks occur, and what you found in that respect on Dean's Island?

A. First, I will answer with reference to my knowledge on the subject. I have taught the subject of physiography at the Missis-

sippi College, and assisted in the department of Geology. All crocked streams tend to become more crooked until it extends across the shoulders, but it straightens out again. The cutting is always on the outside of a stream on a curve, and there is always a deposit corresponding, just about corresponding with the cut on the inside of the curve. That is, from year to year the deposit would average as much as the cut awat on the outside. This deposit is caused by the slowing up of the stream, and holds true as good as the law of gravitation, because it operated under the law of gravitation. The swiftest current flows next to the bank, and careers on across while the slow current is on the opposite side, and there is a substantial depositing and building out of land in that direction, and I should also like to state that at the time of an overflow, there will be a much larger deposit than had been depositing previously. This overflow will be carri d up on the bank and form what is called a natural levee. With reference to Dean's Island, I made a trip to the center of the island to identify the section corner of the township section- 32, 33, 4 and 5, and I found, following Mr.
1238 Green's line that at a distance (I did not take note of the distance) at a distance near what was Mr. Green's corner, near where Mr. Green had set a post one third of the distance down, indicating the bank of 1823, I found a very permanent bank along there, probably at the same place where this north and south line crossed it,—I should say that bank was 12 or 14 feet high. I also——

Q. Was there any depression south of it?

A. A depression was south of it, and I also traced this line across this way to the west township line to the west from that same section corner, and was shown the stake that Mr. Green had set marking the bank of 1823 on the west, and noted there was a bank there, but the bank was not as great there as it was here. Then pausing on over there, we come to this bank to the west marked in yellow, which is very permanent and then westerly there is a bank here on the sand bar.

Q. You mean marked in green?

A. Marked in green. So that passing from this section corner westward towards the Tennessee line there are two permanent banks, one not so permanent, and the last one being marked here.

Q. Now, what explanation, if any, do you make of these successive banks?

A. I simply explain it as I was saying before, there were periods of floods, or high waters when there were larger deposits made than in the intervening years, and then the island grew out steadily, and the bank would remain permanent that is permanent at that point for a number of years, and then there would be an increase again, successive increases so that the island—the observa-
1239 tion of the timber growth couples with the banks there show that the oldest part of the island is right up here, and goes towards the line at this section corner, the common corner of the sections.

Q. That is where you found the oldest timber?

A. Yes sir, I found cotton wood there that I estimated to be nearly 100 years old—some six or seven feet across.

Q. Now, I understand that following that line from that common corner to 4-5, 32, 33, following that line westward, you found several different classes of timber different in point of age and character. Just explain that as you found it along that line?

A. Beginning at this common corner of section 32, 33, 4 and 5, I think there were only two or three cotton wood trees in that vicinity remaining from the original cotton wood standing probably on the island 100 years ago, from the size of the trees, not having cut any of the trees. The most of the timber around this long cotton wood consisting of sycamore and elm and hackberry, and some red maples and box elder, and some ash. I do not remember seeing any pecan in there, it was right out in the island. Further east but right in a dense forest those were the species. Take the elm, and hackberry and sweet gum, they represent a type of trees that come up as a secondary growth under trees of older growth. They come up under shade. So, it is evident from the nature of the land, that the island was covered with cotton wood as every other island.

1240 Q. You mean the cottonwoods have disappeared?

A. The cottonwoods have disappeared, but after they began to attain maturity, getting along past 30 years, the *b*ackberry and sweet gum, a shade bearing species, have come in and no cottonwoods have been replace*s* to take the place of the older trees there today, except now and then scattering trees, and I suppose what had been there has been logged out.

Q. Now state whether or not that was the oldest timber you found?

A. That was the oldest timber I found; and I would also state in that connection that would indicate the permanent condition of the land. As we travel- further west we came out passing over this old bank of 1823 as it was marked by Mr. Green, there was still elm and hackberry and some sweet gum, but of a smaller size there than back here, showing they were of a younger generation. The cottonwood trees that had grown there were practically all out, having been used by the timber men, but by the stumps—the stumps were smaller than ordinarily big cottonwoods. The biggest trees I saw on the island—one cottonwood was, I estimated to be at least 8 feet in diameter at the base, and had not been used for that reason I suppose. The cottonwood stumps were not so large in here as the old cottonwoods. The brake in there was in its second stage.

Q. You mean west of what is marked as the bank of 1823?

A. West of what is marked as the bank of 1823.

Q. Now, what did you find the general character of the timber between what is marked as the bank of 1823 and what is marked as Martin's bank of 1876?

1241 A. I found that character of timber, the cottonwoods having been previously cut, to be hackberry, elm some sweet gum and a great deal of undergrowth, young stubs, a young woods and such as make a pretty bad thicket to ride through *hrose* back.

As I have testified in my deposition, farther north of this section line there is quite a depression here, and it is carried through, as I would judge, pretty well into the interior of the island. The depression again indicated to my mind that the banks of 1876 was formed as a sand bank built out into the river and this land lau behind it here was left as a slough of dead water for years afterwards, and gradually filled in. That was one of the places you remember I told you of that I found the tree top down in here. I could locate it in my notes and tell the exact age, but it was as much as 40 years old.

Q. One moment. Now, passing from what is marked as the bank of 1823 or about that, to Martin's bank, did you find any gradual change in the character of the timber, or was the general character of the timber substantially the same, or did it get older?

A. I remember there was not very much difference in the general character.

Q. Now, when you got to the bank, what you mark as Martin's bank of 1876, there, what change did you find in the timber west of there?

A. There was a marked change on the west side, having a whole brake of cottonwood in a youn*f* growing condition, the vines on the stems of the trees not being so large, and just beginning to grow, and the stand being very dense, and the soil changed from a sandy nature to a clay and murky soil, so when we got out here west of my *l*ap line, towards the Tennessee line, I went out to ascertain the line, because I could not cross it on account of
1242 water. It was knee deep out there, and I got as far as I could, and also there was a great many willow trees in this low, marshy land in here.

Q. You mean in here—you mean between Martin's bank and the Tennessee bank?

A. Yes sir.

Q. Standing on Martin's bank, or walking along Martin's bank, were you able by the eye to distinguish the character of the timber?

A. I was. The one point mentioned earlier in my testimony. There were few cottonwood trees in the left along Martin's bank, and all the land towards the west and south-west—you can distinguish those trees from all the trees aroun*f* there.

Q. I mean in point of age, did you notice a marked difference there?

A. In point of age, the general appearance was that the trees to the east were older, where there were a few cottonwoods left. That could be judged chiefly by the color of the back of the twigs, and the amount of vines that climbed upon the trees.

Q. And vindicated by the actual counting that you made?

A. Yes sir.

Q. In riding across—did I understand you at points you rode across and up and down the ground lying between Martin's bank and the Tennessee Bank?

A. Yes sir.

Q. Did you find that the soil there was as firm, or was there any difference between that soil and the soil east of Martin's bank?

1243 A. I will say—I think I have stated that before, but I will repeat. The soil to the west of Martin's bank, after we had crossed the point of the east spit there, that I have repeatedly spoken of before, which is marked by this green line representing my survey, to the west of that line the soil became marshy and sticky, and the growth was mixed with willows, a great many willows in there, and there were spots—the growth was not uniformly willow—you come to the spots in that area where the cottonwoods predominated, and spots where the willow predominated.

Q. Standing on that bank northward of the sand spit, standing on that Martin bank and walking up and down it, is there, or is there not there any difference between the timber on either side of it?

A. There is.

Q. Now, explain it?

A. The timber to the west of Martin's bank has no dead limbs to amount to anything, and the logical hypothesis is that this is thrifty young growing timber, while the timber to the east of it consists of trees, with the bark shagging off of the branches, and dead branches sticking out, and making knot holes, showing that the trees on the east there are declining in age, in their growth, I should say.

Q. You have mentioned the intermingling of the growth of the different characters of the trees was an indication of age. Please explain that?

A. The age of the land, you mean?

Q. Yes, the age of the land.

A. The cottonwood and the willow are what the forrester calls intolerant species, that is, they cannot be shaded. On the sand bar or land newly formed by the river changing its course, these trees come up in such numbers as to exclude any other trees from starting. Cottonwood and willow, both being of a feathery,

1244 germ-ation, comes up 10,000 or 15,000 to the acre, and they occupy the soil to the exclusion of any other tree at that time. As these trees increase in size and age a struggle takes place for life the stronger trees overtop the smaller ones, and finally kill out a great many, and at the age of 10 years, three-fourths of the number have perished in the struggle. This struggle benefits the trees from the timber man's standpoint by causing all the branches to be killed off, and making a straight tree, free of branches. You can therefore always tell whether they come up in a thicket. If they are free of branches, it shows that they come up in a thicket. After about 25 years of growth, these cottonwoods crowd each other so fiercely, that after a time so many of them are killed, that there is left a slight open space, enough to let in enough light that a species that can bear some shade can germinate and start there. The species like the hackberry, the sweet gum, and the elm. These kind are borne in there by various means, and they germinate under the forests of cottonwoods, and come up under the shade of

the cotton woods, and after a few years of growth under the shade of cotton woods, these attain great vigor and growth, and are very often able to grow up and whip out the cottonwoods, the more inferior of the cottonwoods, and take the position of the understudy, as we call it in the forrestry business, and after a while nothing will be left but a few of the original cottonwoods. That is the condition. Now, with reference to the ground, I think I spoke of that before, but I will state where the land is sandy that is originally sandy, there is likely to be cottonwoods, and where the soil is murky, the willows are likely to grow.

1245 Q. Does the absence of the cotton woods and the willows in that thicket which you have spoken of cast any light upon the age of the land?

A. It indicates young sand.

Q. Now, did you or not find between Martin's bank of 1876, and the Tennessee bank the presence or the absence of other timber than cotton wood and willow?

A. I find no other timber there that could be called timber, that is large enough for timber I find through out that area however, a young species of hackberry, elm that vary from the size post down to the size of your thumb. They are just starting in.

Q. Now, on the east of that bank, I understood you to sat you found a veried growth?

A. Yes sir.

Q. That indicates what?

A. That indicates an older formation.

Q. Now, Mr. Clothier, after making your trips up there in November and Deecmber, as you have stated, did you write out the general results of your work, and the impressions that were made upon your mind?

A. I did.

Q. Have you those with you?

A. I have.

Q. Did that correctly represent so far as they go, what you did up there, and observed up there, and give your conclusions?

1246 A. I will say that they did. The first report, of course, is not as explicit as I can make my testimony after having made the second trip. The second report here contains explicit statements and observations and figures, while the first report was more on general impression.

Q. I will ask you to file those reports that you state represented your views on the subject correctly?

Counsel for the complainant objects to the reports asked to be filed because they are in fact, so far as representing the opinion of the witness a repetition of the deposition, and especially the second report, because it contains excerpts and extracts from others than the witness, who are not under oath, and the volumes from which they are taken are not present.

Q. I will change the form of that question, and the question is withdrawn. I will ask you to read into your deposition, and make it as a part thereof, the observations which you made on your first

trip in November, 1909 and the conclusions, and state whether or not the observations thus made accord with the opinions which you now have?

Objected to for the same reason stated above, and on the same ground.

A. The report is as follows——

"The chief purpose of this investigation was to determine the physiographic changes of the boundaries of Dean's Island since the year 1823. The age of the trees and the species composing the fore-t give a true index to the age of the land upon which they grow. The whole island has never been logged, and where cutting has been done, the logging was done after the year 1900. A portion of the island has been cleared for agricultural purposes, but the clearing has not removed every tree of the original forest.

1247 The loggers cut the merchantable timber clean, but unmerchantable or inaccessible specimens were left scattered here and there over the most of the area logged. It is very easy to get an accurate interpretation of the record of the accretion of the island by a study of the forest.

"An accurate survey of the island would permit of exact statements of distances in chains, rods or feet; but the record left by the Mississippi River is so plain that the history of the accretion of the island can be read by the observing forester on a first trip from east to west across the island.

"In order to determine the age of any definite spot on the island, it is only necessary to determine the age of a tree that formed a part of the original or first forest of the island. The age of the tree was determined by cutting it down and counting the annual rings of growth showing in the cross section of the stem. This method has been relied upon for more than a century by foresters as the most trustworthy method of determining the age of a tree where the written records of the date of its planting are not available. Doctor C. A. Schenck, Director of the Biltmore Forest school, makes the following statements on page 43 of his book on "Forrest Measuration;

"The age of trees cut down is found by counting the annual rungs on a cross section (preferably an oblique cut) made as low above ground as possible. Allowance must be made for the stump years by which is understood the number of years required by the top bud of the seeding after sprouting to reach the stump height."

"'Ring counting in the case of even-porus hardwoods requires the use of a lens and of some coloring liquid (Amaline and ferrochloride) on a disc planed with a knife, a chisel, or a hollow planer.

'False rings are formed under the influence of late frost, early frost, drought, fire and insect pests. They do not run all around the tree."

1248 Cotton wood is an "even porous" wood, and the counting of the rings on the freshly cut stump or log is very difficult. But when seasoned out and varnished the rings are brought out quite

distinctly and are just as true an index of the annual growth of the tree as are the rings of any other species.

Another question may be legimately propounded here by the layman, and that is, how can one tell that a tree standing out in the forest srarted to grow when the land was first formed or laid bare by the river? The question is easily answered. If the tree is cottonwood or a willow, we may be certain that it started to grow either on land artificially cleared and put into cultivation or upon a river sand bar, or mud flat. Cotton wood and willow seedlings never grow in the shade of another tree.

When a stream changes its course or forms a permanent sand bar the first plants to appropriate the land are cotton woods and willows by the tens of thousands per acre.

These trees come up in the even aged stands as thick as a cane brake. In two or three years, the young plants are fifteen or twenty feet tall, and form such a dense shade that no other species is likely to gain a foothold. A fierce struggle for life ensues, in which from fifty to seventy per cent of the original plants perish by the time the stand is ten years old. The survivors may be classified into the "dominant" or largest individuals; the intermediate, or average size individuals, and the suppressed or small trees, that will soon die if not set free by the accidental death of their competitors. In such a stand, the largest trees may be three times the size of the smallest, and yet no older. The crowding of the trees in this struggle causes their side branches to die or fall off, thus reducing the leaf bearing wood. Since the leave- are the stomach of the plant, curtailment of leaf surface means that rate of growth be diminished. The thickness or width of the *animal* rings varies greatly at different periods
1249 in the life of the tree. With cotton woods growing in thickets on such alluvial soils as the islands and banks of the Mississippi River, variation in width of annual rings is a record of the struggle of each individual tree with its competitors, rather than the record of climatic adversity. With such a tremendous struggle going on constantly, many of the trees that were promising in early life, became crippled. The death of their side branches leaves holes through the bark into which fungi enter and rot out the heart of the tree. A storm blows the hollow tree down. At this stage, the cotton wood is incapable of producing young trees to take the place of the fallen member of the community because the seed of this species must have bare, unshaded soil upon which to germinate.

1250 Other species whose seeds have been carried by wind or animals, now have a chance, and so we find in an original pure cotton wood forest, at about twenty-five years of age, young specimens of dog woods, hackberry, elms, sweet gum and other species that can stand under shade.

From this time on the forest has an increasing number of other species than cotton wood and willow. Increased age of the forest mean a decrease in the number of cottonwoods per acre, until the last of the original cottonwood growth has disappeared. Both cottonwood and willow mature early and live a short life. An elm

is young when one hundred years old. Not one cottonwood in a million that germinates every reaches the age of a century.

On Dean's Island, the old portion of the island is forested where not cleared for agriculture with elm, sycamore, maple, pecan, box elder and sweet gum, to the exclusive of cottonwood. As one travels westward and southward on the island, cottonwood increased in individual specimen, and decreases regularly in age, corresponding to the gradual accretion of the island towards the southwest. This regular decrease in age, suddenly stops where the trees are all 25 to 30 years old, which correspondence to the time that the
1251 whole river bed to the southwest was laid bare by the sudden change of the stream in 1876. The deep parts of the bed no doubt contained water for eight or ten years after the evulsions of 1876.

And were the last places to be occupied by the forest. In places where still water stood for a long time, the deposits were of very fine silt, forming a sticky clay soil. On such fine ground soils, willows came up almost exclusively in pure stands and are found yet growing so closely that not even the shade bearing shrubs and trees mentioned on a previous page have made much progress in gaining a foothold. A study of the composition of the forest gives a key not only to a rate of accretion of the island, but to the kinds of deposits that were laid down, willow indicating silt, and clay while cottonwood indicates loam and sand.

An examination of the topography of the island throws some light on the question, but this is made clear only in connection with the age and composition, of the forest growth. What appeared to be successive terraces were encountered in traveling from east to west pointing southward and westward, to the middle of the stream at the time they were formed.

The trip over the island, started from the post office, and proceeded along the eastern edge of the island southward to the present thread of Sandy Chute. The route continued westward along the north bank of Sandy Chute, which bank varied from eight to fifteen feet in height. A little over a mile to the west from the southeast corner of the portion of the island, lying north of Sandy Chute, I cut an old cottonwood tree (No. 5) standing near the cabin of a negro named Le Roy Washington. This tree proved to be no less than 67 years old. It stood about 150 feet north of the north bank
1252 of Sandy Chute, and 65 paces, S. 63 degrees west from iron post No. 6, said to have been recently set to mark the middle of the Mississippi River, in 1826. Tree No. 4 was cut on the bank of Sandy Chute, in front of Bill Dooley's cabin, and found to be hollow at the butt. At about ten feet above the surface of the ground, this tree had 53 rings of sound wood, and a dot-ed core, 3¾ inches in diameter, upon which the rings, could not be counted. This tree is undoubtedly 60 years old or over. It fell down the bank of Sandy Chute.

Tree No. 6 stood out in a clearing about 30 rods, north of the north bank, of Sandy Chute, and about 50 rods, northwest of Tree No. 5. It was located about 20 rods to the east of the old camp and

garden site of the Muncie Pulp Company, when it began cutting timber in 1901.

Tree No. 6, stood forty or fifty rods to the southwest of the line, that is said by the inhabitants of the island to have been recently surveyed as the center of the river, in 1825. Tree No. 6 was at least 54 years old.

Tree No. 2, was located on a bank, that seems to be the westward continuation of the north bank of Sandy Chute, and is at the extreme southern point of whe-e the logging was done by the Muncie Pulp Company. It was about ten rods southwest of the Muncie Garden and camp site. It proved when cut, to be 38 years old.

Tree No. 3 situated on ground 3½ feet lower than tree No. 2, 55 paces southwest of tree No. 2, was 26 years old. These two trees were the largest of their class, but tree No. 2, was a refused remnant of the original stand left by the loggers while tree No. 3, stood where no cutting had ever been done. Here was proof, that the bank of which tree No. 2, grew, is at least 12 years older, than the ground 55 paces to the southwest.

1253 Following this same bank, westward, fifty or sixty rods, on an average nearing of N. 70 degrees west, I located tree No. 7, on the crest of the bank. This tree proved when cut, to be 34 years old. Tree No. 8 was chosen 134 paces southwest of Tree No. 7, on a low flat about twelve feet lower than the site of tree No. 7. It stood in a grove that consisted chiefly of willows, but a cottonwood of large size, for the sourroundings was found, and cut down, which proved to be about 27 years old. At the point where tree No. 7 stood, the bank turns toward the north, its average bearing being No. 21 degrees west.

A trip on horseback from where Tree No. 3, grew to the west and southwest showed timber of practically the same age as Tree No. 3, till a lagoon was encountered along the old Tennessee bank, in sight of the post office of Corona. The ground was flat and free from terraces, for nearly a mile to the southwest, proving that this land had been laid bare all at one time. Returning to trees No. 7 and 8, and pursuing the bank upon which tree No. 7 grew in a northerly direction, 50 to 60 rods further, this bank gradually disappears just as though it had formerly had been a tongue of land extending from Dean's Island, out into the Channel of the river.

Tree No. 1, was cut pretty well, to the north end of the bank above mentioned, and, although it was 45 inches in diameter, it proved to be not much over 35 years old. No cottonwoods, could be found on the low flat, to the southwest of the bank opposite the tree No. 1, as well as all the trees at this place were willows.

1254 Tree No. A, located 193 paces south, 85 degrees west of tree No. 1, was a willow that was one of the largest in the forest at this place. When tree No. A was cut, it proved to be not over thirty years old, 28 rings having been countind on the stump. Tree No. 9, stood about 100 paces northwest of the western edge of the cut over area on the northeast edge of the narrow slough and at the foot of a second bank lying back of the bank, that I had abandoned. Tree No. 9, was about 250 paces south, 69 degrees east

from trees No. 1. It was tall and free from limbs, with a very small crown, proving that it had grown up in a very dense thicket. The stumps of the cut trees around it confirmed this view. This tree proved to be 35 years old, showing that like tree No. 1, it stood on a sand bar, which extends out into the river prior to the evulsion of 1876. From tree No. 9—I traveled eastward about 250 paces crossing a low ridge and coming down upon another slough which looked exactly like the slough upon the edge of which tree No. 9 grew. I selected tree No. 10 at the northeast edge of this slough, where a bank rose to the height of eight or ten feet above the slough in a distance of about 100 feet. Tree No. 10 was straight and free from limbs, but leaned towards the south west. When cut, it proved to be at least 55 years old. I followed this bank, which had a general trend of north 30 degrees west, for more than a mile in a northwesterly direction. Every once and a while, I came to a cotton wood tree, these trees standing almost in a straight line, and invariably leaning in a direction at right angles away from the bank. This leaning position is proof that in early life, these trees started on the edge of the forest, which lay to the north east of them on the edge of an opening which lay to the south west of them.
1255 They leaned because they grew toward the lighted open area.
I followed this bank, and cut to the northwest of Tree No. 10. Trees Nos. 11, 13 and 15 on this bank.

Tree No. 11 was at least 42 years old.

Tree No. 13 was at least 45 years old.

Tree No. 15 was at least 42 years old.

Opposite each of those above three trees was cut a tree standing on the low flat to the southwest of the bank above described. These trees were numbered 12, 14, and 16. Tree No. 12, stood 55 paces to the southwest of tree No. 11. Tree No. 14, stood about fifty paces west of tree No. 13, and cross Long Lake, from Tree No. 13, Tree No. 16, was about sixty paces west of tree No. 15. The age of these trees were found to be as follows:

Tree No. 12—25 years old.

Tree No. 14—22 years old.

Tree No. 16—22 years old.

A search to the southwest from trees 12, 14 and 16 proved the timber to be practically of uniform age, and apparently not exceeding thirty years at any place, to the east of the old Tennessee bank, and to the west of Long Lake. From Tree No. 15, I rode across to the northwest about 250 paces to the Bank of Barnay Chute, and then followed that bank to the northwest about half a mile. The timber had been cut off of the space between Barnay Chute and Tree No. 15, to a line corresponding to a prolongation of the bank, upon which trees No. 10, 11, 13 and 15 grew, but where the cutting had ceased the timber was uniformly young, and had certainly grown up since the event of 1876. Trees Nos. 10, 11, 13 and 15, without doubt marked the location of the western bank of Dean's Island, in 1876. Tree No. 2, marks the southwestern limit of solid
1256 island at that time, while the banks between No. 2, and No. 1 was not well defined, being flanked by a mud flat or sand

bar two, or three hundred acres in area extending westward into the river bed. From Tree No. 2, eastward the bank of 1876 is well defined. It was noted that the timber east of the well defined bank upon which trees Nos. 10, 11, 13 and 15 grew, consisted of sycamores, elms, hackberry and other shade bearing species of such size that they must have been growing on the ground when the forest was logged. This proves the logged over area east of the bank to have been older land, than the low flat land to the southwest of the bank; because very few of the shade bearing species have yet attained a size larger than shrubs on the low flat land to the west. The rings on two stumps were counted that stood on top of the bank, upon which trees Nos. 10, 11, 13 and 15 grew, and one was found to have been forty-five years old, when the tree was cut, and another over forty years.

The numbers of the trees in the foregoing discussion refer to the order in which they were selected for cutting and have no other signification. All the trees cut except No. A, were cottonwoods, and the largest of their companions were chosen to be felled. I fully believe that the dicks saved will, when planed off, and varnished confirm the correctness of the field counts of the rings to within a year or two, in every case.

Q. 164. Mr. Clothier, do I understand you to say that the paper you have just read into your deposition, correctly represents, what you did, and your observations, and correctly represents the opinions, which you had entertained?

A. Yes sir, it does.

1257 Q. 165. Now, I will ask you, with reference to your second trip upon your return to your home, write out a statement of what had been done, and your observations and your opinions on the subject?

A. I did.

Q. Does that now correctly represent the facts, and your opinion on the subject?

A. Yes sir, it does.

Q. I will ask you to read that into your deposition in a similar manner?

Objected to by counsel for complainant for same reason as given above.

A. My report is as follows:

"The second trip to Dean's was made to locate the exact site of each cut November, 26, 27 and 28th, 1909, the survey having been recently made by Mr. J. A. Green, of Covington, Tenn., it was believed that the location of the trees could be plotted in their proper places on Mr. Green's map. Mr. Green had promised to meet me on the island, but the cold weather prevented his coming. I was taken by Mr. Felix Nicholson, Mr. W. A. Cissna's agent, to the section corner, to sections four and five and thirty two and thirty three, as established by Mr. Green, and from this corner I followed Mr. Green's survey westward towards the Tennessee bank to where Mr. Green had abandoned the survey on account of water standing on

the ground. Mr. Nicholson showed me Mr. Green's stake marking the bank of 1876 which bank was marked with three notes.

Mr. Green not putting in his appearance, I decided on December 29th to survey some*e* lands of my own, using one of Mr. Green's stakes as a starting point. Mr. Cissna took me to the stake on the north bank of Sandy Chute, where Mr. Green had projected a section line south from the corner pointed out to — by Nicholson the day before. This stake had two notches in it. From this stake I ran a broken line westwardly, with three turns in it, terminating this line between number A and tree number one. This line consisted of three parts, numbered respectively A, B and C. Line A ran by the needle, north 85 degrees west 81.71 chains. Line B ran by the needle north 60 degrees west, 60.61 chains. Line C ran by the needle, north 12 1/2 degrees west, 31.82 chains.

1258

I then traveled over to the east to Green's stake Martin's bank of 1876, and ran a line from this stake north-westwardly, with three turns in the line. I named the parts of this broken line X, Y and Z. Line X ran by the needle, north 27 degrees west 60.61 chains. Line Y ran by the needle, north 00 degrees west, 36.36 chains. Line Z ran by the needle north 14 degrees west, 42.42 chains.

I then returned to Mr. Green's stake on the north bank of Sandy Chute, where I had begun line A. and ran north on a section line, bearing by the needle, being north five degrees, west to section corner, shown *by* me by Mr. Nicholson as having been established by Mr. Green. The distance measured 70.68 chains. This section corner was marked by three witness trees, each having three blazes upon it. Two of these were oak, and one was hickory. One of the ash trees had been recently cut down, and by counting the rings, I found that the blaze on this tree had been made nine years ago.

In my November investigation I did not trace the bank of 1876 back to its connection with the north bank of Sandy Chute to my satisfaction, but this time I satisfied — fully as to the exact location of the bank of 1876. I had seen Mr. Green's map, and he has it correctly located, although he has not carried it as far north as I have by a little more than half a mile. The following table gives the detail of the line surveyed by me:—

1259

Beginning in section line between sections 4 and 5, at Green's stake 2, and running westwardly line A, reading of my compass, 275 degrees; reading from needle in quadrants, north 85 degrees west; bearing from true north and south, variation 5¼ degrees, north 79.75 degrees west; distance in feet 1319; distance in chains, 19.98; Remarks, Line A.

Off set to left to tree five, reading of my compass south; reading from needle in quadrants, south: distance in feet 23; distance in chains, 35, remarks to Tree 5.

Continuing Line A, reading of my compass 275 degrees; reading from needle in quadrant, north 85 degrees west; bearing, etc., north 79.75 degrees west; distance in feet, 1381; distance in chains, 20.92, remarks: Line A.

Off set to left to tree 4; reading of my compass, 180 degrees; read-

ing from needle in quadrant, south; bearing, etc., south 5¼ degrees west; distance in feet, 83; distance in chains, 1.26; remarks; to tree 4.

Continuing Line A; reading of compass, 275 degrees; reading from needle, north 85 degrees west; bearing, etc., north 79.75 degrees west; distance in feet 2693; distance in chains; 40.80; remarks, total length of line A 5393 feet.

Off set to pump in fence; reading, etc., southwest reading from need*ld*, southwest; distance in feet, 96; distance in chains, 1.45; to pump in line of wire fence.

Off set from pump to Green Stake 16 notches, reading
1260 of compass, 233 chains; reading from needle, south 43 degrees west; bearing, etc. 48½ degrees west; distance in feet, 91.3 feet; distance in chains, 1.38; remarks to Green Stake 16 notches.

Line B continued from end of Line A. Reading of compass 300 degrees. Reading from needle; north sixty degrees west; bearing, etc. 53.75 degrees west; distance 600 feet; distance in chains, 9.09; remarks. Opposite tree 4.

Off set to right to tree 6. Reading compass 38 degrees reading needle, north 36 degrees east, bearing, north 41½ degrees east; distance in feet 434.6; distance in chains 6.59; Tree 6 stood in open space.

Continuing Line B; reading compass 300 degrees; reading needle, north 60 degrees west; bearing north 54.75 degrees west; 900 feet distance. 13.64 distance in chains. To tall lone cottonwood.

Off set to left to tree 2. Reading 180 degrees; reading from needle south 3 degrees west; bearing south 8¼ degrees west, 126 feet, 1.91 distance in chains. Tree 2 stood on sandy bank.

Off set from 2 to tree 3 southwest; reading 204.5 degrees; reading from needle, 24½ chains, bearing south 29.75 degrees west 171 feet distance; 2.59 distance in chains. Tree three stood on sandy flat.

Continuing line B, reading 300 degrees reading from needle north, 60 degrees west, bearing 54.75 degrees west, 2200 feet distance, 33.33 distance in chains. Opposite tree 7.

Off set to left on tree 7. Reading 226 degrees, reading from needle south 46 degrees west, bearing south 41.25 degrees west, 38 feet distance, .58 distance in chains. Tree 7 stood 8 to 10 feet
1261 higher than tree 8.

Off set from tree 7 to tree 8 bearing changed. Reading 250 degrees, reading from needle south 70.25 west, bearing south 75½ degrees west, 468 feet in distance, distance in chains, 7.09; tree 8 stood in willow slough.

Continuing line B, 300 degrees, reading from needle north 60 degrees west, bearing north 54.75 degrees west., three hundred feet distance, distance in chains 4.55, total length of line B, 4000 feet.

Line C continued from end of line B, total length of line C 2100, readin*f* 374.5 chains, reading from needle north 12.5 degrees west, bearing north 74.25 degrees west, 2100 feet distance; 31.82 distance in chains. Line C crosses Green's township line 216½ feet from end of line B.

Off set to left to willow tree Number A, leading 258 degrees, reading from needle south 78 degrees west, bearing south 83.25 degrees west 258½ feet distance, 3.92 distance in chains. Willow stood on the edge of willow slough.

Off set to right to tree number 1, Longest tree cut. Reading 92 degrees, reading from needle, south 82 degrees east, bearing 82.75 degrees east, 352 feet distant; 5.33 distance in chains.

From tree 1 made off set eastwardlt to tree 9; reading 116 degrees; reading from needle, south 64 degrees east; bearing south 58.75 degrees east. Distance in feet, 712. Distance in chains, 10.79 tree 9 stood about one hundred and fifty feet east of the west edge of the logged area.

Left tree 9 and travelled eastwardly to where township line crosses bank of 1876.

1262 Beginning at Green's station, notch three times, marking bank of 1876, running northwest line, reading 333 degrees; reading from north 27 degrees west; bearing north 21.75 degrees west; distance in feet, 1765; distance in chains 26.74, to point near tree 10.

Off set to left to tree 10, southwest; fifteen distance .23 distance in chains; tree 10 split.

Continuing to end of line X:—333 degrees reading from beedle north 27 degrees west; bearing north 21.75 degrees west; distance in feet, 2235 feet; distance in chains, 33.86. Total length of line X, 4000 feet.

Line Y continued from the end of line X:—360 degrees leading north 00 degrees west, bearing north 5¼ degrees west, 2400 feet distance, distance in chains 36.36; total length of line Y, 2400 feet.

From end of Line Y made off set to left of tree 11; reading 255 degrees, reading from needle south 285 degrees, bearing south 89.75, 92 feet distance; distance in chains, 1.37; distance from end of line Y to tree 11.

Off set from tree 11 to tree 12, bearing changed. Reading 238 degrees, reading from needle south 58 degrees west, bearing 63.25 degrees west, 170 feet distance, distance in chains 2.58; distance between trees.

Line Z continued from end of line Y:—reading 346 degrees, reading from needle, north 14 degrees west, bearing north 8.75 degrees west. 1800 distance in feet; distance in chains, 27.2; to near tree 13.

Off set to left, to tree 13, which stood on the bank of 1876. Reading 238 degrees, reading from needle, south 58 degrees west, bearing south 63.25 degrees west, 25 feet distance; distance in chains, .38 to tree 13.

1263 Off set from tree 13 to 14, bearing changed. Reading 282 degrees, reading from needle north 78 degrees west, bearing north 72.75 degrees west, 176 feet, distance, distance in chains, 2.75 hundredths, to tree 14 across Long Lond.

Continuing lune Z to its end:—346 degrees, reading from needle north 14 degrees west, bearing north 8.75 degrees west, distance

1000 feet, distance in chains, 15.15; to station Q length of line Z, 2800 feet.

Off set from end of line Z station Q, to left to tree 15, reading 265 degrees, reading south 85 degrees west, bearing south 89.75 degrees west, 67 feet distance, distance in chains, 1.02 to tree 15.

Off set from tree 15 to 16, bearing changed. Reading 250 degrees, reading from needle south 70 degrees west bearing south 75¼ degrees west, 142 feet distance; distance in chains, 2.15 to tree 16.

December 30th, 1909, ran north from Green 2 in section line on north bank of Sandy Chute, to common section corner, of section 32, 34 and 35, and the distance was 4678 feet, following Green's line.

As a question had arisen as to the possibility that the annual rings may not express the age of a tree accurately, I have looked over the literature on the subject, in the first place, all of the volume tablets and growth tablets found in the German Books on Forestry were made from stem analysis of felled trees. A stem analysis is an effort to trace the progressive growth of a tree from youth to its maturity, making definite periods in its age. A stem analysis is made by cutting a tree and cutting it into sections of definite lengths, and counting the rings, and measuring the radii of the stem, at each progressive step in its age, as for example, every ten years. The rings are the only means that the forester has for arriving at the age of an unplanted tree, or of a section of such a tree. The Bavarian volume table for spruce are based on 40,000 stem analysis; for more than one hundred years, ring counts have been relied upon by the German Foresters as a means for determining the age of trees.

1264

Professor Hilibert Roth, who is now at the head of the Department of Forestry of Michigan University, made the following statement in 1895 in Bulletin No. 10, page 12 of the United States Division of Forestry:—"In the manner of growth, both conifers and broadleaved trees behave alike, adding each year a new layer of wood which covers the old wood in all parts of the stem and limbs. Thus the trunk continues to grow in thickness throughout the life of the tree by additions (annual rings) which in temperate climates are, barring accidents, accurate records of the tree."

In 1898, under the direction of B. E. Fernow, Chief of the National Division of Forestry, A. K. Mlodzianski, assistant in the Division of Forestry, wrote on page 29 of Forestry Bulletin No. 20 the following statement:—"The measurements by which the accretion, annual or periodic, is ascertained rely upon the fact that, in all temperate zones at least, trees form annually one layer of wood, which appears on a cross section of a tree as a ring more or less clearly defined, and on its longitudinal section made through the pith as a section of an enveloping cone. Hence by counting and measuring the rings appearing on the corresponding longitudinal sections made through the pith, not only the age, the progress in diameter, and area increase of the sections, but its height and volume can be easily and accurately ascertained."

1265 The Third English edition of the "Text book on Botany," written in the German by Strasburger, Schenck, Noll and Karston, four of the most able botanists in the world has the following statements to make with reference to annual rings: (Page 131 and 132).

"Owing to climate variations, the cambial tissue of woody plants exhibits a periodical activity which is expressed by the formation of annual rings of growth. In spring when new shoots are being formed, wider tracheal elements are developed than in the following seasons. For this reason a difference is perceptible between the early wood (Spring wood) which is composed of large elements especially active in the conveyance of water, and late wood (autumn wood) consisting of narrow elements which impart to a stem its necessary rigidity. Throughout the greater part of the temperate zone, the formation of wood ceases in the latter part of August until the following spring, when the larger elements of the spring wood are again developed. Owing to the contrast in structure of the spring and autumn wood, the limits between successive annual rings of growth become so sharply defined as to be visible even to the naked eye, and to serve as a means of computing the age of a plany."

"Under certain conditions, the number of annual rings may exceed the number of years of growth as for instance, when midsummer growth occurs, such as commonly happens in the oak, when,

1266 after the destruction of leaves by caterpillars, a second formation or spring wood is occasioned by the new outgrowths thus induced. In the wood of tropical plants the annual rings may be entirely absent. This occurs, for example, in the tropical confines of the genus araucaris, which, in this respect, shows marked contrast to the conifers of the northern zone. Any interruption of growth, such as would occur during a drought followed by a period of renewed activity, may occasion the formation of annual rings even in tropical plants."

Professor L. H. Bailey, Dean of the College of Agriculture of Cornell University, in his "Botany, an elementary text book for schools" published in 1904, makes the following statement on page 263:

"Dicotyledonous (or exogenuous) stems with open collateral bundles may increase in diameter each year. If they are perennial they may add a ring of growth to each spring. These rings may be counted on the smo-th cross-cut surface of a tree, and the exact age of the tree usually can be very closely determined." In Gray's Botany written by Dr. Asa Gray of Harvard, on page 142, we find the following statement:

"The wood of an exogenous trunk, having been the old growths covered by the new, remains nearly unchanged in age, except for decay. Wherever there is an annual suspension and renewal of growth, as in temperature climates, the annual growths are more or less distinctively marked, in the form of concentric rings on the cross section, so that the age of the tree may be known by counting them."

Dr. Franz Baur, Professor of Forestry Science in the University of Munden, Germany, makes the following statements: on pages 418 and 419 of his "Holzmeszkunde"—

1267 "Das Sicherste Mittle zur alterzbestimung eines Baumes bleit aber imner das zahlen die eizelnen Jahrringe ummittelbar uber den Wurzelstock. Es ist dieser Methode bei Anwendung der erforderlichen Vorsichtsmaszregeln ganz untruglich, weil durch vielfaltige Untersuchungen nachgewiesen werde, dasz lebende Holzpflanze Jahrich einen nunem Holzring unterder Ring auflitg, dessen Zcuszerger Teil (Herbstholz) sich dirch ein etwas Dunklar gefarbtes, dich teres und negeres Zellengewebe vordwn weitz alligen Fruhyahrsholze anszeichnet und solange deutlich erkennbar bleibt, els die Holzflanze an der betreffenden Stelle volstandig gesund ist."

"Theodor Hartig der sich als Pflanzenphysiloge viel mit dem Wachstume der Baume bechhaftighthat, stellt die Koglichkeit der Bildung von zwei Jahrringen in einemjahr oler das Ausbleiben eines Jahrringes (etwa ub einen besonders trockenen Jahr) enrschiden in Abredem indem er Seite 36 seiner Untersuchhungen uber dem Ertrag der Rothbuche bemerkt, dasz, da die Bildung des Lenegntriebes mit der des Holzringes in innigster Beziehung stehe, der Jahrestrieb nichts anderes als der uber die Spitze der vorhergehenden Jahrestriebe erwiterte Holzring sei, das Ausbleiben sines Jahrringes und das Ausbleiben der Langentriebe mithin auch der Belaugeng im Gefolge haben wurde. Hiernach ist also bei normal entwickelten lebenden Baumen das Ausbleiben das Jahresringers unmoglich, wenn sich derseleb auch in einzelnen dem wachstume unganstigen Jahren nur sehr swach entwickelt."

1268 "So fuhre aum Beispiel ein Entblattern der Baume auch eine Unterbrechung in der Bildung der Holzringe nach sich, Kopfund Schneidelbaume, welch man in Winter ihrer aste beraubt, entwickeln in darauffolgenden Jahre kaum mit der Loupe sichtbare Jahrringe. Ahnliches Weigen druch Maikafer Kahl gefressene Baume mit geringer Blatterproduktion skraft. Auch haben Th. Hartig and R. Hartig an seher unterdruck ten Stammen das Fehlen von Jahrringen in den unteran Stammtellen Nachgew iesen; solche Erscheinunden gehoren jedroch zu den Aunahmen und sind fur die frage der Altersbestimmunge zu tazaorischuen Zwecken schon deshalf bedeutungelos, weil men zu olchen Untersuchungenm keine undetruckten, sondern wuchskraftige Mittlstamme wahlen wird."

"Von ahnlich untergeordneter Bedeutung fur die Altersbestimmung acheint auch die Frage der sogennaten Schein-oder Doppelringe, das heiszt die Frage zu sein, ob sich unter gewissen Verhaltnissen zwer Holzringe in einem Jahre entwickeln. konneon. Th. Hartig Launent die Bildung von Doppelringen indem selbst bei Entwicklung eines sweiten Langentriebes (Johannestrieb) sich nie eine sweite Breitfaserschichte in demsekben Jahre, bei sorgfaltiger Behandlung des Baumquerschnittes daher auch nicht wohl ein Zweifel enstehen konne, was man als einen wirchklichen Jahrring und was nicht als einen solcehn betrachten konne. Allerdings hat man beobachtet, dasz Beispiel in abnorm trochkenen Jahren und

nach starken Frulingsfrosten unter Umstanden die Vegetation in der Art unterbrochen werden kann dasz bei einigen Holzarten Scheinringe enstehen, dieselben sind Jeldch von echten Jahrungen dranx zu unterschieden dasz sie nicht ringsum gaschlossene Kreise bilden, oder nicht in allen Baum ahen zu fiden sind und
1269 dasz sie nicht schroff, wie die chten, sondern Allmahlich in die angrenzende Holzschichte verlaufen."

Translation of the Foregoing.

The most certain means for the determination of the age of a tree, however, is the counting of the single yearly rings immediately over the collar (stump). This method is with the use of the requisite precautionary measures quite infallible because requested investigations have shown that the living woody plant, annually lays on a new wood ring under the bark whose outer part (autumn wood) distinguishes itself through a somewhat darker colored closer and narrower cell tissues from the wide celled spring wood, and remains plainly visible so long as the woody plant at the place in question is completely sound. Theodore Hartig, who as a plant physiologist concerned himself with the growth of trees, denies emphatically the possibility of the formation of two yearly rings in one year or the omission of a yearly ring perhaps in a particularly dry year, because he, on page 36 of his investigations of the Yield of Red Beech, remarks that since the formation of the long shoot stand in the most intimate relation to the wood ring, the yearly shoot being nothing else than the wood ring farther extended above the point of the previous yearly shoot, the omission of a yearly ring would have as a consequence the omission of the long shoots and consequently also the omission of the foliage. According to this then with normally developed living trees, the omission of the annual ring is impossible even if the same is only slightly developed in some years unfavorable to growth.

So far example a- defoliation of the trees brings about an interruption in the formation of the woody ring. Pollards and Schneidelbaume which one robs of their branches in winter develope in the succeeding year a yearly ring scarcely discernable with
1270 the lens. A similar behavior shows trees with small ability to produce leaves, which have been eaten bare by May beetles. Also Th. Hartig and R. Hartig have observed on very much suppressed stems the failure of the yearly ring in the lower part of the stem; such phenomena, however, belong to the exceptions and are for the question of age *of age* of determination for purposes of valuation meaningless, because one for such investigations will select no suppressed but thrifty growing average stems.

Of similar subordinate importance for the determination of age, seems also the *w*uestion of the so called false or double rings,—that is, the question whether under certain conditions two woody rings can develope in one year. Th. Hartig denies the formation of double rings, because even upon the evolution of a second long shoot, Johannsis Trieb (summer shoot) there never forms a second

layer of broad vessels in the same year, therefore with careful treatment of the cross section scarcely a *double* can arise as to what one can consider a real yearly ring and what is not such.

It is true that one has observed that for example in abnormally dry years and after severe spring frosts under some conditions vegetation can be interrupted in such a way that in some varieties of wood false rings result; these, however, can be distinguished from the true yearly rings in that they do not form completely closed circles or are not to be found at all heights of the tree and that they do not pass over abruptly as do the true rings but gradually into the bordering woody layer.

In the work of Les Forests by L. Boppe and Ant. Jolyet the subject of annual rings is discussed on pages 3 and 4 as follows:

1271 "L'arbre s'acroit en grosseur par la multiplication des cellules dans la zone generatrice. Cette multiplication se feit, chez ezzences indigenes du moins, de l'interieur vers l'exterieur dans le sens du rayon, sur une section transversale du fut; d'autre; elle est suspendue durant l'hiver; il en resulte que la masse de bois fabriquee chaque annee forme une couche ligneuse bein distincte, quie se supperpose a la precedente et l'enveloppe de toutes parts. Pn peut donc avec raison appeller couches annuelles ces couches lingneuses et deduire de leur nombre l'age de l'arbre."

"Des accidents de vegetation peuvent determiner une formation prematuree et temporaire de bois d'ete. Un peu de pratique de reconnaitre ces fausses limits d'áccroissement souvent interro, paus et al bords tourjours indecis."

Translation of the Above.

"The tree grows in size by the multiplication of cell in the generative zone. The multiplication takes place with the native species at least from the interior towards the exterior like rays on a cross-section of the trunk*l* moreover, it is suspended during winter, as a result the mass of wood produced each year forms a very distinct lingeous layer which superposes itself upon the preceding one and envelopes it in all parts. One can therefore rightly call these lingeous layers annual layers and deduce from their number the age of the tree.

Accidents of growth can determine a premature and temporary formation of summer wood. A little practice permits the recognition of these false limits of growth which are often interrupted and always with indecisive edges."

1272 Dr. Tuisko Lorcy, Professor of Forest Science in the Universi-y of Tubingen, Germany, in his great work on Forestwissemschaft in volume 2 pages 184 and 185, discusses the determination of the age of felled trees and arrived at practically the same conclusions as Dr. Baur quoted above.

It seems that there need not be any multiplication of citations beyond those quoted above. The most eminent authorities in the world agree with the doctrine set forth by——

(The balance of this answer is not to be found.)

1273 Q. Now, Mr. Clothier, in view of the objection which has just been made, I will ask you, independent of what you have just read there, as to whether or not the annulations that you find on cottonwood and willow trees form a just and accurate basis with which to estimate the age of those trees, and if so, give your reasons for it?

A. The annual rings in a climate where the trees drop their leaves and cease growth is the most accurate record that we have of the growth of trees, outside of the written record of the men who have planted the trees, the most accurate record of their growth and age, I would say. The reasons for my making this statement are as follows: When a tree starts to grow in the spring, it needs passages for the escape of water from the passages from the roots up into the leaves, and out into the tree. It constructs at that time tissues open and porous, and in the tissues are cells of large dimensions.

As soon as it has established that part of its growth, that is, the tracheal part, as it is called, it then begins to lay down tissues of smaller dimensions, and to add strength to the stem. Each annual ring therefore consists of an open porous springwood, and a denser summer wood. The escape of water from a tree must pass out through the leaves, and the cells that carry that water from the roots upward through the tree, connect with the leaves of the season's growth, for which the leaves were formed. If the leaves fall, the connection is broken, and before a connection can be established for a new growth to take place, a new set of fibrous tissues will have to be built up. In other words, in order for two rings to be formed in a single summer, it is absolutely necessary for a tree to be absolutely defoliated in the middle of a growth, and
1274 new leaves form, and a new growth started, a condition that does not happen in a thousand times. I would express that more forcibly and say once in a million times.

Q. Does the statement that you have given herein explain how the growth of a tree is made from top to bottom?

A. I have not stated in this answer, and I do not think my written report states that.

Q. I wish you would explain how these successive annual rings are formed?

A. In the first place, the solid matters of plant- are taken from soil, and must thence pass up into the leaves. The gases from the atmosphere, the chief one of which is carbonic acid gas, are absorbed by the leaves. The tree coloring matter of the leaf is taken from the plant, and the good matters are brought from the roots, and the carbonic acid gas from the air manufactures those matters into use, for the plant to use. The food is then sent back down the tree, to the various parts as needed, in the inner payer of the bark. I should have said that the passage of those food matters is through the outer layers of the wood, through that is known as the sap of the wood, while the passage down back is through the inner of the bark, just outside of what is known as the cambium layer. Additional layers of wood are laid on by the addition of those cambium layers, additional layers of bark are laid on by the addition of layers

of cambium, so that with the layers of wood is found this layer of bark. The bark sheds, sheds off and you cannot use the bark as a means of determination of the age of the tree, but you could from the heart outside, for, the wood from the heart outside is enclosed by successive rings. These successive rings cover the plant
1275 throughout, like successive garments over a body.

Q. Do I understand it to be something in the nature of a new growth that is put on the outside of the tree?

A. Yes sir.

Q. And the growth is represented by successive cones?

A. Yes sir.

Q. Do these cones constitute the annual rings?

A. Yes sir.

Q. In the statement that you made a while ago in the shape of a report that you wrote when you were at homw you referred to numerous authorities. Are those authorities that you have, and to which you have referred, well known, and are they recognized among scientific men or not?

A. They are, I have the best authorities of the science of forestry and botany in the world at my command.

Q. Have you the various authorities to which you have thus referred, and from whom you have quoted,—have you quoted them correctly?

A. I have.

Q. Have you the books present?

A. I have.

Q. Are they subject to inspection by counsel?

A. They are, they are in my suit case.

Q. Please produce them and allow counsel to examine them, if they so desire.

A. Yes sir, they are so produced.

A. Now, Mr. Clothier, in some testimony that has heretofore been taken in this case, or rather some scientific authority that has been produced heretofore, there is an intimation or statement therein, that in cottonwood, or willow trees, the annulations are not possible for the reason that false rings are likely to be formed. In
1276 other wo-ds, to indicate several rings may be formed to indicate only a year's growth. Now what have you to say, or what do you know on that subject?

A. All authorities I think that I have quoted, refer to this question of false rings. As far as my experience is concerned in counting rings on trees, I have never seen a false ring. The German scientists are very careful not to overstate the question, but some German authorities however absolutely deny the possibility of false rings. Hartig, Theodore and Roth great German scientists and botanists, deny the possibility of such rings occurring. Their denial is stated in Holzmeszkunde and in the books already referred to. As far as my own experience goes, I have never regarded the danger of false rings of any consequence whatever. I know that all the statistivs on trees that are made by the United States Government

are based upon the ring count. All the assistants in the forestry service depend on the ring count alone as to the age of the tree.

Q. Is there any distinction between trees growing in a temperate climate where they defoliate once in each year, and trees in a tropical climate where the growth may be continued?

A. These trees that grow in tropical cilmates, may not show their mark rings at all, and on the other hand, if there happened to be two dry seasons or two wet seasons in the tropics, there may be two rings form each year, and again there may be a dry season and a wet season in twelve months, and in that case, there will be one ring. Rings represent the inception of growth, and wherever that occurs, either in a tropical or temperate climate, the rings
1277 occur.

Q. In the temperate climate, in this climate, is there such a thing as a false ring, unless there is a change as to produce defoliation of a tree during the middle of the season?

A. They could be no such change in my opinion, die to climate. The only thing that there would be to cause that would be the depredation of insects which might defoliate the whole forest, and in that case, every tree in the forest would be defoliated and show the same number of rings.

Q. Now, you have been upon Dean's Island and examined its location with reference to the river, and know the character of the soil. In your opinion, is there any probability that there could have been within the last fifty or seventy five years false rings formed in the growth of cottonwood and willow trees in the old bed of the Mississippi River?

A. I would regard the chances of such an occur-ance as very remote indeed.

Q. Is there anything in the character of that soil, and the proximity of the river which would affect that question?

A. I feel certain that a drough- could not possibly occur on Dean's Island of sufficiently damaging character to cause them to drop their leaves, for the reason that the water, under flow as it is cometimes called, is never farther away than twenty feet from the surface. In a great many places on the island it is less than twenty feet, and as low as five or ten feet, and cotton wood or willow can reach twenty feet for water. The roots will go down that far for water.

Q. Is there had been at any time forces east of what we call Martin's Bank of 1876 that would have caused false rings to occur in those trees, would or would not those influences have been felt
1278 and exhibited themselves in the timber lying west of Martin's bank, and in proximity to it?

A. They would. That is, I could see no reason why they would not extend over the whole timber, and why a bank like that should be a line of demarcation between the change of growth on one side from the other, due to thees outside occur-ences. I can see no shadow of a reason why that should occur.

Q. My inquiry leads further in estimating the differences in age of the land on the east and west side of Martin's bank. Do you

draw any conclusions as to the relative ages of the trees on either side?

A. I do. The relative ages vary from 20 years and upward. The relative ages of trees on the east side and the west side the average being twenty years, older on the east side than on the west side of that bank.

Q. Mr. Clothier, if you could be shown the weather reports, the signal service reports showing the conditions of the weather in Memphis during a series of years, are you familiar enough with the subject to say that that would substantially indicate what had been the condition of the weather during the same period as far north as Green's Island?

A. I would. From my studies of the distribution of rainfall, I would say I do not believe there would be a variation of more than an inch between the two situations.

By agreement of counsel the report of the Weather Bureau of the United States, showing the rainfall at Memphis, is here offered in evidence, and may be filed at a later date to this deposition. Said report to be identified by the Weather Bureau, and the same shall be read in evidence, as though it were the deposition of the officer making the certificate.

1279 Q. Mr. Clothier, would you give us the names of some of the leading scientists whose opinions are recognized as established value in matters of forestry and tree growth, I mean those who we could reach?

A. I can.

Q. I wish you would give the names of some of them?

A. Henry S. Graves, Chief of the Forestry Service, Washington, D. C., George W. Sudworth, Forestry Service, Washington, D. C., Dr. William A. Brewer, Yale University, New Haven, Conneticut; Mr. Clifford Pinchot, Washington, D. C.; Professor Hilbert Roth, Ann Arbor, Michigan; Professor S. B. Green, St. Anthony Park, Minnesota; Professor Henry G. Miller, Seattle, Washington, particularly with reference to rings on cottonwood; Prof. Miller conducted the field observations in 1904 in which he made several ring observations on cottonwood.

Q. Mr. Clothier, please make the blocks cut by you from the trees on Dean's Island in November exhibits 1 to 16 and exhibit A to your deposition?

A. I do so, and I herewith file them.

It is agreed by counsel that these exhibits may remain in the possession of counsel for the Muncie Pulp Company and be produced in court upon the trial, said exhibits being subject at all times to inspection by counsel for the State. It is further agreed that these exhibits in the event of an appeal shall be ordered to be sent up with the record to the Supreme Court at Jackson, Tennessee.

Cross-examination:

1280 By Mr. John P. Bullington for the plaintiff:

Q. Mr. Clothier, where were you born and raised?

A. I was born in West Virginia, raised up until I was fifteen years of age, with the exception of one year that I spent in Minnesota, when I emigrated to Kansas, and I was educated in Kansas.

Q. Prior to your entry into the forestry, what was your business?

A. I was a farmer, county school teacher, superintendent of public instruction, student at college, also an assistant in the department of botany in the Kansas City Agricultural College.

Q. How many years ago did you begin the study of forestry as a specialty?

A. I took one course in forestry as a post graduate course as the Kansas City Agricultural College, following the year 1895 and I do not remember the exact year. I got my Master's Degree there in 1899. I took one course there at that time, under Professor Mason. I was also at that time, making botany a specialty.

Q. In making your surveys, which as I understand you, is marked by green lines on your map, which is fixed as exhibit X to your deposition, and exhibits 3 to the deposition of Mr. Green, what given point did you begin with?

A. I began with Mr. Green's stake No. 2 on the north bank of Sandy chute, the prolongation of that north and south section line.

Q. Your survey extended along the line that you have marked in green?

A. Yes sir, one line ran here until it terminated.

1281 Q. Prior to the making of your survey, and at the time of the making it, you had Martin's map before you?

A. I think I saw Martin's map, I think I saw several maps, but I didn't have it with me out in the field at the time of the field work.

Q. How did you happen to survey in the direction that you did?

A. I had previously cut the trees there, and I wanted to get the line on the trees.

Q. Why had you cut those trees, and under what instructions?

A. I had cut those trees under instructions of Colonel Bullard, attempting to follow up the bank of the Island, which seemed to be the bank of 1876.

Q. In following your first survey, you follow*ing* as I understand you, as nearly as possibly, that bank which appeared to be the bank of 1876?

A. The cut or the survey?

Q. The cut and the survey.

A. In following the cutting, I followed as nearly as I could as the survey was located afterwards, so as to get a definite distance to these trees, and made just as few turns as possible, so this green line was not intended to follow. The bank line along there was a considerable distance off line A, B and C. Those lines were surveyed for the different and definite purpose of indicating the trees, not to locate the bank in that particular, although they followed in a general way the dip of that bank.

Q. Then as I understand you, first in counting the trees, you sought to follow the bank as it appeared to the eye?

A. Yes sir.

1282 Q. And then in locating your line, you followed and tied to the trees?

A. Yes, sir, that is the idea.

Q. Now, then, as I understand you, from your deposition, then the banks, or the rises and falls of the land are not such that a man can, without other aid, determine which is the bank of 1876?

A. Not right at first. It takes study to do that, and it takes repeated*ly* trips *acorss* it, and the determination of the age of the trees and the general looks of the forest to definitely settle the question.

Q. Well, without the knowledge of the trees, or without knowledge, scientific knowledge of the soil, will it be possible for you to go on the land and decide which was the bank of 1876?

A. It would not.

Q. So that after all your opinion of which was the bank of 1876 was made and finally determined from your knowledge as a forester and of the soil, rather than the rise and fall of the banks?

A. Yes sir, I would say much more than that, than the rise and fall of the banks, because as I thought I stated in my answer to Col. Bullitt, the difference in the topography of that island is not (levees) sufficient to go by, and when new *leaves* are cast up the highest piece of land is next to the river, and the land back a half a mile from the river will be the lowest, and you cannot determine by the topography alone whether this is a bank *of* not. That will not settle the question whether that is the true bank or not.

Q. What other surveys did you make on this property besides the one shown by your green line?

1283 A. I ran one line from the station I started on the bank of Sandy Chute, north to Mr. Green's section *f*orner in order to get the common corner to Sections 32, 33, 4 and 5 in order to establish without a doubt, that I had been over Mr. Green's line. Mr. Nicholson, Mr. Cissna's agent, then took me out to this stake and showed me this stake, and took me over to this line westward, but he did not take me over to this line north and south, I run that line to test up and to show it was a beginning at this end, and I came out at the same place I did the day before, and I found the marks and trees where Mr. Green had just recently ran the chain through.

Q. How is that line marked on your map?

A. I did not mark it.

Q. It is, however, marked in double green lines?

A. Yes sir, I believe it is.

Q. And that line, together with your lines A, B and C and X, Y and Z represent the only survey that you made of the property?

A. Yes sir, of course, with the off sets attached.

Q. So that this map which you h-ve marked as your map, ex-

cept for those lines marked in green which you have just spoken of, represents then some other map than yours?

A. I think it says here, on this green line is marked "Clothier's Survey," and in speaking of my map, I speak of what is green.

Q. What does the other part represent and by whom made?

A. The other part represents, I suppose, Mr. Green's work. His signature *his* here, and I furnished him with a copy of my notes, and had a meeting, and consulted with him in reference to the map.

1284 Q. Have you verified the work of Mr. Green, that Mr. Green did with your notes, and can you state that that work is accurate?

A. I have verified the figures that he has placed there on those lines. I have not scaled it to test its accuracy, but the distances and bearings are correctly set out on the map.

Q. Now, Mr. Clothier, in making your survey, to what extent did you travel backwards and forwards over the land bounded on the east by the double green line, extending from the common corners of Sections 32, 33, 4 and 5 to the north bank of Sandy Chute on the south and west by your green lines, and on the north by Barney's Chute and Dean's Island?

A. Well, I will say that I made one trip from this common section corner back westward to beyond my green line, and following that township line. That was my second trip. I made a trip from this station 2 on the north bank of Sandy Chute to that section corner, Those were the only trips that I made with knowledge of my exact location in that part of the island in the vicinity o*g* this common section corner. After going out there until we could not cross on account of the mud in there, we came back to Mr. Cissna's wire fence there and to this Section 3 of Station 3. I should say, marking the bank of 1876, and we followed Mr. Green's survey to where it terminated, and then rode across to the iron point where he tied his line there as I understand. That was on my last trip.

1285 In starting in and marking this off distance, I made a trip down here until this work was finished, and I tramped backwards across the island, I could no*w* (t) say how many times I walked back and forth within that point, and I came to this point here, between say the location of Tree No. A and Green's stake 2 on the north bank of Sandy Chute. I suppose*d* I passed over that area in there eight or ten times. To the north I rode my horse back out into the Tennessee border of the Tennessee back and back, and zig-zag-ed back and forth once or twice. But the number of trips up and down the bank there—I suppose maybe there were a dozen trips going and coming altogether. I was there say six days passing up and down, and made at least twel*b*e trips going and coming, and I made one trip going and one coming each day that I passed somewhere on this bank.

Q. You mean the bank of 1876?

A. This line here, marked yellow, and called the bank of Sandy Chute.

Q. I believe you stated in your direct examination that at a pro-

longation west from the common corner of section- 32, 33, 4 and 5 at a point where Mr. Green established the Arkansas bank of Dean's Island in 1823, you found a bank from 10 to 15 feet high am I correct?

A. No, I do not remember to have made the statement how high it was; I said ten to twelve feet there; I said on this south line it was 10 to 12 feet, but on this line I do not remember to have made a statement, but if you want me now I can make a statement of how high it was.

Q. Then as I understand you at the south line from the common point where Green fixed his point as the south boundary of Dean's Island in 1823, you found the bank 10 or 12 feet?

1286 A. Yes sir, I should say that the bank was maybe 100 feet further on from where his stake was, but it was near enough to it to locate.

Q. What did you find directly south of that bank?

A. A swag.

Q. How wide was that swag?

A. That swag continued, I suppose as a swag 400 or 500 feet, and steadily rose to high land, through nowhere getting very high until we got to the immediate bank of Sandy Chute.

Q. Now, on the western line at a point where Mr. Green fixed as Dean's Island Boundary of 1823, what is your recollection about the height of that bank ober and above the land to the west?

A. About 4 or 5 feet is my recollection.

Q. Did you also find the swag in there?

A. Yes sir, the swag was in there.

Q. Did you travel from the south point I have just designated northwesterly to that point we have just spoken of?

A. No sir, I did not.

Q. Did you travel from that western point along the tongue or lick of Dean's Island as shown in Green's map of 1823?

A. I did not.

Q. Did you travel west of the nprthwestern point of Dean's Island, and from there to your trees 11 and 12?

A. Not from that point, I rode along the bank of Dean's Chute along in a general northwest direction as far as to where the logging had ceased along that north side. That was my first trip,

1287 I made that ride, but I did not attempt to ride from that point to acorss here.

Q. Did you travel east from the south section like along the southern course of Dean's Island?

A. No, not to any great length. I only went back and forth a short distance there.

Q. Was that dry land or water next to Dean's Island in the swag that you speak of?

A. Dry land.

Q. What was the stage of the river when you made the survey, about?

A. I do not remember the feet but the river was low. I am not acquainted with the record of the river, probably 10 or 12 feet, I

suppose, I do not remember. It was not high over the banks there. The bank of Dean's Island was, I should say 25 feet above the water here on this east side of the island.

Q. Mr. Clothier, what is the scale of your map?

A. This map is marked, one inch reads 10 chains.

Q. Will you take your rule and approximate the distance from the point on the south side of Dean's Island as shown by Green's map to where it is crossed by the section line, at your tree No. 5?

A. 4½ inches, which will figure up 45 chains.

Q. That is a little o*b*er a half a mile?

A. Yes sir, five chains over.

Q. Now measure from your tree No. 6 to the nearest point on Dean's Island shore as shown by Green's map?

A. Five inches and 3/10, which would be 53 chains.

Q. Now measure from your tree No. 6 to the nearest point on Dean's Island?

1288 A. 7 inches and 7/10, which would be 77 chains.

Q. Please measure from your tree No. 10 to the point where the township line extended west touches Dean's Island as shown on the map of 1823?

A. It scales out 82 chains, 8 2/10 inches.

Q. Now, Mr. Clothier, please measure from your tree No. 9 to the same point?

A. 85 chains; 8½ inches.

Q. Before you move from there, before you move your rule, give the distance from Tree No. 9, to the center thread of the river in 1823 as shown or laid down on that map along the same line?

A. It is 42 chains; 4 2/10 inches.

Q. I believe at the request of counsel for the defendant you sketched in a red broken line, the western line of the cut over territory?

A. I did.

Q. Will you please approximate as near as you can the territory between that red line and the center thread of the Mississippi River in 1823 as laid down on that map?

A. You mean approximate the area?

Q. Yes sir, the cut over area?

A. That would estimate about 612 acres, a*b*d this line narrows down here at both ends, so that I would approximately estimate that it is a little more than half of that, and that I would estimate to be about 350 acres.

Q. Mr. Clothier, what if anything, do you know of the reputation of A. L. Childs as a forester?

A. I never heard of him. I do not know who he is.

Q. What is anything, do you know of the reputation of Desire Charnay?

1289 A. I never heard of him.

Q. What, if anything, do you know of the reputation of Mr. B. E. Fernow?

A. He was Head of the United States Division of Forestry as it was called previous to Mr. Pinchot taking office and is at present a

professor of forestry in Montreal, Canada, and is one of the celebrated authorities of the profession, and a celebrated authority on the subject of forestry in America.

Q. I believe you stated that not one in a million times or a million years would a false ring occur?

A. Not one in a million.

Q. Not one time in a million would a tree have two rings in a year—or what is know as a false ring?

A. That is my feeling about the subject; my candid opinion about it.

Q. And you have never seen a false ring in your experience?

A. I never have.

Q. As I understand you, a false ring would be brought about by defoliation?

A. There would have to be an absolute defoliation, and a renewal of growth that same season, that is, by the coming out of new leaves, and there would have to be new growth established that sa-e season.

Q. Does it not occasionally happen that in the spring in this section that the sap rises in the trees and growth begins and the sap comes out, and then we have a late frost, and a late cold spell?

A. Yes sir, that frequently happens, but such a condi-
1290 tion—I have never seen such a condition that would absolutely defoliate the tree, and require new growth and new foliation.

Q. If such a condition would occur and the tree was absolutely defoliated, would or not that make a false ring?

A. I would doubt whether there would — a false ring formed at that season of the year, the spring of the year, because the growth there would continue, and there would simply be a prolongation of what had started, and to be a defoliation, there would have to be buds formed and new leaves, and I do not believe false rings would occur even if the foliage was killed in the spring by a late frost.

Redirect examination.

By Col. Thos. W. Bullitt.

Q. Tree No. 5 on your map lies in what direction from the point where the double green line crosses the bank of 1823 according to Green's map?

A. To answer that question, I would have to get a compass.

Q. Well, just take the compass and tell that?

A. I would estimate it is about south 25 degrees west.

Q. What was the age of that tree?

A. 66 years.

And further deponent sayeth not.
Signature of the witness waived.

Sworn to before me, by consent, this 12th day of February, 1910.

[SEAL.] R. G. BROWN,
Notary Public.

1291 *Motion to Amend Bill and Amendment.*

Filed 4/29/10.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

In this cause the complainant moves to amend her bill so that the first paragraph thereof shall read as follows:

"Prior to the — day of March, 1876 the Mississippi River flowed between Arkansas and Tennessee, on the West boundary of Tipton County, as shown on the map herewith filed and made a part of this bill, marked as Exhibit "A" hereto, the bend in said river as shown on the map, being known as the Devil's elbow.

1292 The course of the river in 1823 is shown by the black or brown line on said map Exhibit "A" and the middle thread of said Mississippi River as it flowed in 1823 constituted then, and now constitute*d*, the boundary line between the State of Arkansas and Tennessee.

On or about the — day of March, 1876, a sudden change was made in the direction of the main current or channel of said river, whereby in a single night or a very short time, a new channel was formed for said river, the new channel formed being shown on said map Exhibit "A," by the blue lines traced thereon and is known as the Centennial Cut-off. As a result of said sudden chan*d*e, the old bed of the Mississippi River in short time became dry land, and the State of Tennessee is now, as it was then, the owner of that part of the bed of the river lying between the low water mark on the Tennessee side, and the center of said river, as it flowed in 1823.

That portion of the old bed of the river, which is now dry land, and which prior to the cut-off or change of the channel in 1876, was between the low water mark of said river on the Tennessee side, and the middle of said stream in 1823 is the property of the State of Tennessee, and is held by it for public purposes, and the ti-ber situated thereon is the property of said State. The land above described which is now dry and the property of the State, consists of many thousand of acres of land which is valuable on account of the said timber.

And it appearing to the Court that by the order and decree of the Supreme Court of Tennessee in this cause and now entered in this Court on Minute Book — page — Complainant was granted leave to so amend her bill as to make it clear that she is suing to recover to the center of the channel of the Mississippi River in 1823, and it

1293 further appearing that said land sued for as particularly described in the 2nd paragraph of said bill does extend on its east boundary, to the line between the States of Tennessee and Arkansas,—that is, the middle thread of said river in 1823,—the Court is therefore pleased to allow said motion and to order that said amendment be and the same is hereby made, and the amend-

ment hereinafter set out shall be considered a part of said bill as though written upon the face thereof.

And upon the motion of the plaintiff herein to dismiss her amended bill, the said amended bill is hereby dismissed without prejudice to said complainant, and the original bill is amended as hereinabove set forth.

And the defendants, the Muncie Pulp Company, and Leo Oppenheimer, Trustee, consenting to the withdrawal of the original amended bill and to the filing of this amendment to the original bill, it is agreed that the demur-er filed by said defendants to the first amendment shall stand and be taken to be filed to the present amendment.

O. K.

R. G. BROWN,
A'tty for Muncie Pulp Company, & Trustee.

Stipulation.

Filed 4/29/10.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

In the above entitled cause it is agreed by counsel that for the purpose of saving the cost of takin- a supplimental deposition of J. A. Green, that the said J. A. Green will testify that he has completed the map filed with his deposition taken on the 23rd day of December, 1909, and marked "Green's Cross Exhibit #2," which exhibit is identified by the signature of the said J. A. Green.

1294 It is further agreed that since the taking of said deposition, the said J. A. Green has plotted out the survey made of these lands by G. L. Clothier, on December 29, 1909; that said map, which is marked "Green's Cross Exhibit #3" and identified by signature of J. A. Green, shows the same outline of Dean's Island, as of date 1823, the center thread of the Mississippi River in 18*we*, the bank of river in 1876, as laid down on Martin's map when Centennial Cut-off was made, and that plotted on said map and shown by two green lines is the survey made by G. L. Clothier. That said green lines *is* combination with red stars upon the map show accurately of a certain trees cut by the said Clothier, and the distance between said trees and the various lines shown on said map.

It is further agreed that said map, Green's Cross Exhibit #3, shall be admitted in evidence as a part of the depisition of J. A. Green in this cause.

W. H. CARROLL,
For Plaintiff.
R. G. BROWN,
For Def't.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
VS.
MUNCIE PULP COMPANY.

Answer of W. A. Cissna to the Original and Amended Bills or the Original Bill as Amended.

Filed March 16th, 1910.

1295 W. A. Cissna for answer to *such* much and such parts of the bill filed herein as he is advised it is material for him to answer, says:

He admits the allegations of the original bill that prior to March, 1876, the Mississippi River, as it then flowed, was the boundary line between the States of Tennessee and Arkansas and that by an avulsion of said River at a point near Dean's Island, Arkansas, the main channel of the river was altered, which left state and property lines as they were immediately prior *ot* said avulsion.

Defendants denies that the map exhibited with the bill as Exhibit A is a correct map. Defendant states that the boundary line between Tennessee and Arkansas as it existed immediately prio*t* to the avulsion of 1876 was the middle of the main channel of the said Mississippi River; defendant state*d* that he owns lands in Arkansas and within the jurisdiction of the State of Arkansas and does not own or claim to own any lands within the State of Tennessee; defendant states that at the time this bill was filed, prior thereto and now, he owned Dean's Island in Crittenden County, Arkansas, together with all accretions thereto; that to said island as it originally existed many and extensive accretions were made by the gradual shifting of the Mississippi, resulting from erosions into Tennessee soil and accretions to the Arkansas shore; that the Tennessee bank was a caving bank while the Arkansas bank was a sloping one, with the result that the river gradually shifted and changed and defendant is advised that the line between the States of Arkansas and Tennessee changed and shifted with the gradual changes of the river and that the middle of the Mississippi River as it existed in 1876, when by an avulsion the channel of the
1296 river was altered, became and was and is the boundary line between the States of Tennessee and Arkansas. Defendant states that his property at the locus in quo is identical with the — measured by the boundary line and jurisdiction of the State of Arkansas; defendant neither owns nor claims land in Tennessee and defendant denies that the property described in the bill is situated within the State of Tennessee, but on the contrary, he avers and says that it is situated in the State of Arkansas and defendant denie*d* that the State of Tennessee has any right, title, claim or interest in or to any property over which defendant asserts ownership, defendant asserting ownership only to that property lying on

the Arkansas side of the Mississippi River and being within the boundary and jurisdiction of the State of Arkansas.

Defendant states that the middle of the main channel of the Mississippi River as it existed in 1876 immediately prior to the cut-off of that year marked and defined the boundary line between the States of Tennessee and Arkansas and that defendant claiming no property situated on the Tennessee side of said line is not subject to be sued in this action and he here and now expressly disclaims ownership of any property lying within the State of Tennessee and avows and says that this disclaimer of possession, right, title, claim or interest, in or to any property situated within the State of Tennessee and defendant's claim of ownership, right, title and possession of property being limited exclusively to property in the State of Arkansas the question here involved is solely and exclusively the settlement of the boundary line between the State of Tennessee and the State of Arkansas. Defendant states and pleads that this question cannot be properly settled in an action between the State of Tennessee on the one part, as complainant, and this respondent, a citizen of the State of Arkansas, as a defendant, because the

1297 *State of Arkansas, as a defendant because the* State of Arkansas is no party to this proceeding and this proceeding should have been brought and can only be maintained, in so far as it determines or undertakes to determine the boundary line between the State of Tennessee and Arkansas in the Supreme Court of the United States and in an action to which the said States are parties.

Defendant sets up Section 2 of Article 3 of the constitution of the United States and pleads and relies thereon and avers and says that in the fixing of the boundary lines between the States of Tennessee and Arkansas a Federal question is involved and not a question peculiar to the State of Tennessee, on the one part and this defendant, a citizen of Arkansas, on the other part, and this defendant relies upon the said Section and Article of the Constitution of the United States and upon the Federal question involved herein.

Defendant states that the center of the Mississippi River as it flowed in 1823, is not the boundary line between the State of Arkansas and Tennessee. From 1823 to 1876 the center of the Mississippi River or the middle of its main channel by gradual processes was shiften and changes, erosions into the Tennessee bank or side of the river beinf followed by corresponding accretions to the Arkansas shore. These gradual changes for a period of over fifty years resulted in the enlargement of Dean's Island and a corresponding loss on the Tennessee side. The line between the State of Tennessee and Arkansas changed and shiften into these gradual changes and shiftings of the said river and this condition existed until 1876 when what is known as the Centennial Cut-Off took place and the boundary line between th State of Tennessee and Arkansas was the middle of the main channel of the cut-off. Defend-

1298 ant states that the first governmental survey of the territory in question was made in 1823 and a plan or plat thereof is herewith ex-ibuted to the Court as a part of his answer.

From 1823 to 1874 there had been gradual changes in the course and current of the river, there having been erosions into the Tennessee Bank and accretions to the Arkansas shore. In 1874, Col. E. Suter made a map or survey of the locus in quo and said map correctly states the land and river lines as they then existed and defendant says that the middle of the main channel of the River as it then existed was the boundary line between the States of Arkansas and Tennessee. There were changes made by gradual processes from 1874 to 1876, when the Cut-off took place and defendant says that the middle of the main channel of the River as it existed in 1876, just prior to the Cut-off, was and is and yet remains the line between the States of Tennessee and Arkansas. There were no material changes after the Cut-off and defendant here exhibits to the Court the Mississippi River Commission survey and plat of 1881, reflected in a map made and *prolongated* by said Commission in 1883-4 and the same correctly represents the land and river line as they existed at the time the cut-off took place.

Defendant states that the lines and calls of the land mentioned and described in the bill would, if run in 1883 have projected the land desccribed into the Mississippi River as it then flowed.

Defendant states that of the line had been run according to the calls and description in the bill in 1874, prior to the Cut-off, practically all of the land described in the bill would *would*
1299 have been cut on Dean's Island and in Arkansas, or in the bed of the river and on the Arkansas side thereof, towit, beyond the middle of the main channel.

Defendant here and now exhibits as a correct map and one which shows the land and State lines as they existed in 1874, but two years prior to the Cut-off, being a copy of the United States Engineer's map of 1874, made by C. B. Bailey and exhibited with his deposition in this cause and the same is here referred to and defendant avers and says that he claims no property which is not on the Arkansas side of the center of the main channel of the Mississippi River as it run and existed immediately prior to the Cut-off of 1876.

Defendant avers and says that the State of Tennessee by its original bill admitted and conceded that the middle of the main channel of the Mississippi River as it existed just prior to the Cut-off of 1876 was the boundary line between the States of Tennessee and Arkansas and that on plea and abatement of the subject matter of the litigation — and undertook to hold that the boundary line between the main channel of the Mississippi River as it existed in 1823.

Defendant says as to that holding that it was coram non judic- and void. No such question was before the court. The original bill conceded that the line was not as held. And as to the amendment of the bill, which changes the claim of the State of Tennessee from the center of the River of 1876 to the center of the river of 1823, defendant says that it is inconsistent with the averments of the original bill and is not well founded in law or fact and defendant here and now denies each and every averment of the bill of the amended bill.

1300 Defendant denies absolutely that he has ever cut or sold any timber upon any land belonging to the State of Tennessee and he denies he is indebted to the State of Tennessee in any sum whatever.

CARUTHERS EWING,
Solicitor for Defendant.

STATE OF TENNESSEE,
Shelby County:

Caruthers Ewing makes oath in due form of law that he is the agent and attorney of W. A. Cissna, the defendant, who is a non-resident of the State of Tennessee and who is a resident of Arkansas; that affiant is acquainted with the facts stated in the above answer and that the same are true to the best of his knowledge, information and belief.

CARUTHERS EWING.

Sworn to and subscribed before me, this 16th day of May, 1910.

W. M. COX, *D. C. & M.*

1301 No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

Order of Application to Pay in Money.

Entered May 23, 1910.

This day came the Muncie Pulp Co., Leo Oppenheimer, Trustee thereof, and the American Surety Co., and applied for an order permitting the payment into Court of the sum of $19,668.10, and tendered therein a decree to be entered in connection with said payment into Court, and W. A. Cissna appearing by his solicitor of record, objecting to the receiption by the Court, of the said money, and objecting to the entry of the decree tendered by said parties, asked leave to stay the action of the Court thereon for ten days from the entry hereof, with leave of W. A. Cisna, to apply to the Court of New York, from which the said $19,668.10 came, for a recall or modification of said order, authorizing the payment of said money into this court and for satisfactory reasons the Court declines to permit the Muncie Pulp Co., Leo Oppenheimer, Trustee, and the American Surety Co., to make said payment into Court, or enter said order, and grants leave to W. A. Cissna to make application as aforesaid, and on granting said leave the future action of the Court in this behalf if reserved.

Depositions of Filbert Roth, Henry S. Graves, Samuel B. Green, J. W. Toumey, Raphael Zon, Geo. B. Sudworth.

Filed Nov. 10, 1910.

1302 In the Chancery Court of Shelby County, Tennessee, Division I.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Stipulation of Counsel.

In this cause it is agreed and stipulated by counsel for the State of Tennessee and for the Muncie Pulp Co., and Leo. Oeppenheimer, Trustee in Bankruptcy, that for the purpose of saving costs, four interrogatories, as hereinafter set out, were submitted to Professor Filibert, Roth, Henry S. Graves, Samuel B. Green, J. W. Toumey, Raphael Zon and Geo. B. Sudworth; that said parties answered the interrogatories as hereinafter set out; and that their answers, together with the interrogatories, are to be taken and considered as their sworn depositions in this cause on behalf of the Muncie Pulp Co., Leo Oppenheimer, Trustee, and the American Surety Co., but not for any other purpose.

JOHN P. BULLINGTON,
Att'y for the State of Tenn.
R. G. BROWN &
W. H. BULLETT,
Att'ys for Muncie Pulp Co. & Leo. Oppenheimer, Trustee in Bankruptcy.
CARUTHERS EWING,
Att'y for W. A. Cissna.

In the Chancery Court of Shelby County, Tennessee, Division I.

1303 *In the Chancery Court of Shelby County, Tennessee, Division I.*

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Deposition of Filibert Roth.

Q. 1. State your name, age, residence and experience in the matter of observation of the growth of trees, particularly cottonwood and willow trees?

A. Filibert Roth, age 53, residence Ann Arbor, Mich. Ever

since 1888 I have been interested in the study of our American Woods; was engaged in this study almost exclusively for several years and employed for this purpose by the U. S. Dept. of Agriculture. In 1894 I prepared the first booklet on this subject to appear in our country, and this (Bulletin 10 U. S. Forest Service) is still used.

Q. 2. State what official and educational positions you have held, which require you to study and observe the growth of trees?

A. Special Agent in charge of investigations in timber, U. S. Dept. Agri. 1890-1898. Professor of Forestry, Cornell Univ.—1898-1901, Professor of Forestry Univ. of Mich., 1903-1910. (present) Chief Div. of Forests (R) in U. S. Depart. Interior 1901-1903. In addition I was employed by the Depart. of Agri. 1888-1900 at various special tasks in this same investigation of timber.

Q. 3. Dean's Island is an alluvial formation, about 45 miles north of Memphis, Tennessee, in the Mississippi River, prior to 1876 it was surrounded on three sides by the Mississippi River and on the fourth side by Barney Chute a bayou about 150 or 200 ft. wide, being about 1000 acres in extent, and about 8 ft. in elevation
1304 at the highest point above ordinary high-water mark. In 1876 the river cut through the neck of an ox-bow to the west of Dean's Island and, in the course of from 10 to 20 years, the river bed to the west of the island filled up and became solid land, occupied by a thicket growth of willow and cottonwood trees. Taking the above statements of the physical facts of the locus to be true, state whether or not the growth rings appearing on cottonwoods and willow trees, both on the original island and on the island subsequently formed in the abandoned channel of the Mississippi River are a correct and accurate record of the age of the trees?

A. I should accept the growth rings on cottonwood and willow trees under the conditions mentioned, as only approximate, and not as accurately correct record. And even as approximate record only if examined by a person versed in the study of such record.

I should not be at all surprised to find quite a number of false rings, clear enough to deceive any one, not familiar with the subject or not equipped with proper instruments. With "approximate"

$$\overset{v}{\underset{o}{\text{—}}}$$

in this case I mean correct to 6-8 —

Q. State whether at the location thus described there would be any probability of "false" growth rings being formed in cotton wood and willow trees. If so, under what circumstances or conditions?

A. While I have considerable experience in the counting of rings on willow and cottonwood, my experience, experiment or actual and special study of the causes of false rings in these two kinds of timber is practically nil. From my general knowledge of this matter, I should say that any serious interruption in the growth of the tree may lead to a false ring such as: cold or dry spell after
1305 an early opening in spring. Defoliation by insects. Long continued flood conditions. Heavy filling up about the roots.

FILBERT ROTH.

Deposition of H. S. Graves.

Q. 1. State your name, age, residence and experience in the matter of observation of the growth of trees, particularly cottonwood and willow trees.

A. My name is Henry Solon Graves, 39 years of age, resident of Washington, D. C., and having been in technical forest work since 1894.

Q. -. State what official and educational positions you have held which required you to study and observe the growth of trees?

A. During the years 1898-99 I was Assistant Chief of the Division of Forestry U. S. Department of Agriculture. From 1900 to 1910 Director of the Yale Forest School, New Haven, Conn. At present, Forester, U. S. Department of Agriculture.

Q. 3. Dean's Island is an alluvial formation about 45 miles north of Memphis, Tennessee, in the Mississippi River. Prior to 1876 it was surrounded on three sides by the Mississippi River and on the fourth side by Barney Chute a bayou about 150 ft. to 200 ft. being about 1000 acres in extent and about 8 ft. in elevation at the highest point above ordinary high-water mark. In 1876, the river cut through the neck of an ox-bow to the west of Dean's Island and, in the course of from 10 to 20 years the river bed to the west of the island filled up and became solid land, accompanied by a thick growth of willow and cottonwood trees.

1306 Taking the above statements of the physical facts of the locus to be true, state whether or not the growth-rings appearing on cottonwood and willow trees, both on the original island and on the land subsequently formed in the abandoned channel of the Mississippi River are a correct and an accurate record of the age of the trees?

4. State whether at the location above described there would be any probability of "false" growth rings being formed in cotton wood and willow trees. If so, under what circumstances or conditions?

A. 3 & 4. Both the anatomy and physiology of our trees prove beyond any doubt that in the northern latitudes the number of rings on a section of stem (or branch) ordinarily represent accurately the age of that section. The number of rings on a section shows only the age of the section and not that of the tree. In other words, it shows the number of years which have passed between the time that the seedling reached the height of the section and the time when the tree was cut. In order to obtain the age of the tree, therefore, either to count the rings on a section obtained right at the point where the stem of the tree and the root swelling begins, or else to add to the age of the section obtained further up the tree the number of years required for the seedling to reach the height of the point at which the section was taken.

That the ahe of trees growing in northern latitudes determined in *hit* manner is correct, had been verified by counting the rings on many tree sections throughout the world, and checking up the number of rungs with the recorded period of years that has elapsed

between the time they were planted and the time they were cut.

1307 In the case of evergreen trees in tropical and subtropical climates the number of rings, when visible at all, may not be an annual index of age.

In temperate climates, the number of rings can be absolutely relied upon in determining the age of the section only when they are sufficiently distinct and not too narrow. The only exception is the rare instance of a dying tree, in which the food material manufactured by the *drown* is not sufficient for the formation of an annual ring throughout the stem. This, however, is very exceptional and would not apply to dominant cottonwoods growing under the conditions which you describe. Every healthy cottonwood occupies as a rule a dominant place in the stand, and is therefore capable of elaborating ample food material.

Occasionally, when the normal activity of the trees is interrupted by defoliation caused by insects, severe droughts, freezing temperature, etc., so-called "false" rings may be formed in the trees. Even should such false rings be confused with true rings, the error in determining the age would not exceed, and would usually be much less than one per cent. False rings, moreover, can always be distinguished microscopically since they very seldom form a complete ring, and the demarkation between two rings produced the same year is much less pronounced than between rings of successive years.

In the location described, there would be little possibility of the trees being affected by drought, because of the short distance to the water table. Native cottonwoods and willows in any region are among our most hardy, forest-resisting trees, and consequently

1308 little subject to danger from frost. Both cottonwoods and willows leaves are subject to insect and fungue attacks, but I am unable to say whether or not the trees in the locality of which you speak have ever been seriously infected by either insects or fungi. The presence of "false" rings, therefore, in the particular section to which you refer is not very likely. If there are some false rings, they can cause but a slight error in determining the entire age of the tree, an error which under microscopic examination could be eliminated altogether.

The difficulty in determining the true age of the cross section of cottonwood would be its somewhat indistinct rings, and an error might consequently be made in the counting. Therefore, I am not willing to say that a person without any previous experience in counting rings, or knowledge of the anatomical structure of wood, can determine accurately the age of the section of the cottonwood stem by counting its rings. If, however, the age of the cottonwoods and willows on the tract to which you refer has been determined on the basis of their annual rings by some person who is thoroughly competent to distinguish true animal rings, I, myself, would be willing to accept the count as an accurate record of the age of the trees."

HENRY S. GRAVES,

Deposition of Samuel B. Green.

Q. 1. State your name, age, residence and experience in the matter of observation of the growth of trees, particularly cottonwood and willows?

A. I am fifty years old and reside in Minnesota. The cottonwoods and willows are grown widely in this section for windbreaks and post timber, and I have planted out as well as had cut large quantities of these trees.

1309 Q. 2. State what official and educational positions you have held, which required you to study and observe the growth of trees?

A. I am a graduate of the Massachusetts Agricultural College, Class 1879. Have been a Professor in the University of Minnesota twenty-two years, and Professor of Forestry in the University of Minnesota eighteen years. I am author of numerous bulletins on forestry and of two text books on forestry, entitled respectively, "Forestry in Minnesota", and "Principles of American Forestry", the former a book of 400 pages, published by the Geographical and Natural History Survey of Minnesota, and the latter a book of 334 pages, published by John Wiley & Sons, New York.

Q. 3. Dean's Island is an alluvial formation about 45 miles north of Memphis, Tennessee, in the Mississippi River, prior to 1876, it was surrounded on three side- by the Mississippi River and on the sourth side by Barney Chute, a bayou about 150 ft. or 200 ft. wide, being about 1000 acres in extent, and about 8 ft. in elevation at the highest point above ordinary high-water mark. In 1876 the river cut through the neck of an ox-bow to the west of Dean's Island and in the course of from 10 to 20 years, the river bed to the west of the island filled up and became solid land, occupied by a thick growth of willows and cottonwoods trees.

Taking the above statements of the physical facts of the *lacus* to be true, state whether or not the growth rings appearing on cottonwood and willow trees both on the original island and on the land subsequently formed in the abandoned channel of the Mississippi River are a correct and actual record of the age of the trees?

A. I am certain that the rings on the cottonwood and willow trees growing under the conditions stated are an absolutely correct and accurate record of the age of the trees.

1310 Q. 4. State whether at the location above described there would be any probability of "false" growth rings being formed in cottonwood and willow trees? If so, under what circumstances or conditions?

A. Under the conditions described in question No. 3 there would be almost no probability of the formation of false growth rings, for the reason that the trees did not suffer from drouth. I have made a considerable study of the rings of trees, and am positive that any one familiar with such matters can easily tell from a study of the rings which are false and which are true yearly records of the life of the tree. The so-called "false" rings are very narrow and often

indistinct, and so seldom occur that I have known many of our younger foresters who have never seen a case of this kind.

SAMUEL B. GREEN.

Deposition of J. W. Toumey.

Q. 1. State your name, age, residence and experience in the matter of observation of the growth of trees, particularly cottonwood and willow trees?

A. James W. Toumey, age 45 years, residence New Haven, Conn.

Q. 2. State your official and educational positions you have held, which required you to study and observe the growth of trees?

A. For two years I was head of the Department of Forestry Extension, U. S. Fore-t Service. For the past ten years Professor of Forestry in the Yale Forest School and at present the Acting Director.

1311 Q. 3. Dean's Island is an alluvial formation about 45 miles north of Memphis, Tennessee, in the Mississippi River. Prior to 1876 it was surrounded on three sides by the Mississippi River and on the fourth side by Barney Chute, a bayou about 150 ft. to 200 ft. wide, being about 1000 acres in extent, and about 8 ft. in elevation at the highest point above ordinary high-water mark. In 1876 the river cut through the neck of an ox-bow to the west of Dean's Island and in the course of from 10 to 20 years the river bed to the west of the island filled up and became solid land occupied by a thick growth of willow and cottonwood trees.

Taking the above statement of the physical fact of the *lacus* to be true, state whether or not the growth rings appearing on cottonwood and willow trees, both on the original island and on the land subsequently formed in the abandoned channel of the Mississippi River, are a correct and accurate record of the age of the trees.

A. 3. With willow and cottonwood trees the growth rings would be for all practical purposes an accurate index of the age. False rings are apt to occur in any timber but such rings are always much less distinct than the annual rings and seldom if ever completely encircle the bole. There would be no difficulty whatever in determining whether such false rings are correct. They are never as clearly demarked as the annual ring and when present are often overlooked. It would be possible to accurately determine the age by the growth rings.

Q. 4. State whether at the location above described there would be any probability of false growth rings being formed in cottonwood and willow trees. If so, under what circumstances and conditions?

1312 A. As I stated in my answer to question three, false rings might occur under all conditions but there is no reason why such rings should be confused with annual rings where they do occur.

J. W. TOUMEY.

Deposition of Geo. B. Sundworth.

Q. 1. State your name, age, residence and experience in the matter of observation of the growth of trees, particularly cottonwood and willow trees?

A. Geo. B. Sudworth, 47, Washington, D. C. I know all of the cottonwood and tree willows native to North America.

Q. 2. State *in* what *occifial* and educational positions you have held which required you to study and observe the growth of trees?

A. Graduate of the University of Michigan where special study was made of woody plants. Instructor in physiological botany in State Agricultural College of Michigan. Dendrologist in U. S. Forest Service for last 22 years. Official work in letter positions requires an intimate knowledge of North American Exotic trees.

Q. 3. Dean's Island is an alluvial formation about 45 miles north of Memphis, Tennessee in the Mississippi River, prior to 1876, it was surrounded on three sides by the Mississippi River and on the 4th side by Barney Chute, a bayou about 150 ft. or 200 ft. wide, being about 1000 acres in extent and about 8 ft. in elevation at the highest point above ordinary high water mark. In 1876 the river cut through the neck of an ox-bow to the west of Dean's Island, and in the course of from 10 to 20 years the river bed to the west of the island filled up and became solid land, occupied by a thich growth of willow and cottonwood trees.

1313 Taking the above statement of the physical fact of the *lacus* to be true, state whether or not the growth rings appearing on cottonwood and willow trees, both on the original island and on the land subsequently formed in the abandoned channel of the Mississippi River, are a correct and accurate record of the age of the trees?

A. The annual rings of tree willows and cottonwoods on the original island and on the river bed land are accurate records of ages of these trees. In my judgment the difference in age of the island and of the river bed would have no appreciable effect upon the character of the rings of trees grown in either locality. There should be no essential difference in the definition of growth rings in a tree willow and cottonwood, because both trees grow in diameter in exactly the same manner. The island may contain cedar trees because it is possible for trees to have been growing there longer.

Absolute accuracy in determining the age of the trees by counting the rings is possible only when the count is made exactly at the dividing line between root and trunk which is approximately at the surface of the ground. On inundated lands this point may lie several inches below the actual surface of the ground because of the possible deposit of silk, etc., from overflow. In such cases the proper point in the trunk for an accurate count must be discovered by experimental sectioning of the trunk down to the crown of the root. Knowledge is necessary of how exegeneous or ring-growing trees increase in height and diameter to be sure of when the correct age of the tree is found. A section made several inches above the proper point might miss of two years of the tree's height

growth and thus give a count one or two years less than the actual age of the tree.

1314 Q. State whether at the location above described, there would be any probability of "false" growth rings being formed in cottonwood and willow trees. If so, under what circumstances or conditions?

A. False rings of growth result from defoliation by insects, fungi, fire or from prolonged drought which acts similarly by killing the leaves of the trees and thus deprives it of the principal means of manufacturing food.

The length of time during which the tree remains defoliated as well also as the presence or absence of available soil moisture determine whether or not a false ring would be formed. Defoliation of trees growing in moist ground may not result in the formation of a false ring because abundant soil moisture may stimulate growth so as not to show any marked cessation of growth in the annual wood incremen-. Defoliation from any of the possible causes attended by absence of soil moisture for a long period would be likely to result in the formation of a false ring.

In my judgment, therefore, the occurence of false rings in cottonwoods and willow tree- would, under the conditions described, be impossible or exceptionally rare because such trees are naturally not subject to drouth.

Deposition of Ralph Zon.

You may register my name as one who fully holds the view that in our temperate zones the annual rings on a wood section are a true indication of its age.

RALPH ZON.

1315 *Petition of Leo Oppenheimer.*

Filed Feb. 17, 1911.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO., LEO OPPENHEIMER, Trustee.

The petitioner, Leo Oppenheimer, Receiver and Trustee in Bankruptcy of the Muncie Pulp Co., a Bankrupt, and the Muncie Pulp Co., respectfully represent unto the Court that the above styled cause was brought by the State of Tennessee against the Muncie Pulp Co., W. A. Cissna and Leo Oppenheimer, Trustee, seeking to *receive* certain lands in the possession of the defendants and alleged to belong to the State of Tennessee, and to recover the proceeds of certain timber cut by the defendants off of the land so claimed by the State of Tennessee; that the said Leo Oppenheimer has in his possession a fund growing our of the sales of timber cut from the

land sold to the Muncie Pulp Co., by W. A. Cissna, which said fund amounts to more than $19,500.00, that neither the Muncie Pulp Co., nor the said Leo Oppenheimer, as receiver and trustee, claim any part of or interest in said fund.

The Supreme Court of Tennessee, on a former appeal of this case, in effect, decided the lands in question did belong to the State of Tennessee and that the State of Tennessee was entitled to recover said lands and was entitled to recover the proceeds of the timber cut by the defendants off said lands.

On the present hearing, this Court announced its decision that it is bound by said decision of the Supreme Court of Ten-
1316 nessee and that it proposes to enter a judgment adjudging that the State of Tennessee is entitled to recover possession of the lands in controversy and is entitled to recover the proceeds of the timber cut off of the land so adjudged to belong to the State of Tennessee. There is a controversy between the State of Tennessee and said Cissna as to the exact amount of timber cut from the land so adjudged to belong to the State of Tennessee.

The Muncie Pulp Co., went into bankruptcy a number of years ago and its accounts in bankruptcy have all been wound up and settled with the exception of the controversy growing out of the present suit and it is desirable that, for the benefit of all the creditors of the Muncie Pulp Company, its accounts in bankruptcy should be finally settled and adjudged and its Trustee in Bankruptcy allowed to settle his accounts and to obtain a final complete discharge from further liability.

The petitioners further represent that this Court has jurisdiction over the State of Tennessee and the defendant W. A. Cissna and is fully competent to judge, as between them their respective rights in and to the real estate involved and in and to the proceeds of the timber cut off of the real estate so involved in the controversy; that a complete settlement of the rights of the State of Tennessee and said Cissna in and to said fund of money can be and will have to be decided by this Court, and that, upon order being entered by this Court directing that said fund be paid into this Court, said money may be ordered by the Bankrupt-y Court having the control thereof, to be so paid into this Court.

The whole of the said fund is claimed by the plaintiff, the State of Tennessee, in the above styled cause, on the grounds that it is the proceeds of timber cut from its land, and on the further ground that the defendant, W. A. Cissna, is indebted to it for timber
1317 which he authorized to be cut from the State's land in a sum largely exceeding the sum above.

That in the course of this proceeding, the said Muncie Pulp Co., executed two bonds, one in the penal sum of Ten Thousand ($10.-000.00) Dollars, and the other in the penal sum of Fifteen Thousand ($15,000.00) Dollars with the American Surety Company of New York, as surety thereon, all of which will appear from the record herein.

Petitioners desire to pay said sum into the Court in order to be relieved of further liability of holding of same, and in order to wind

up the estate of the Muncie Pulp Company, and the State of Tennessee, by its Attorney General and its counsel, desires the said sum of money to be paid into Court that the rights thereto may be adjudged in this case between the State of Tennessee and W. A. Cissna.

Petitioners aver that said sum of money belongs wholly to the State of Tennessee, or in part to the State of Tennessee, and in part to W. A. Cissna, all of it being claimed by the State of Tennessee, and all by the said Cissna, or all of it belonging to W. A. Cissna, and the petitioners claim no interest therein.

Petitioners are informed that the State of Tennessee through its Attorney General and solicitor will agree upon the payment of said sum into Court, that the money so paid in shall stand in lieu of any further liability of these petitioners and the American Surety Co., surety on the bond of the petitioners herein, and will agree that a decree herein so adjudicating may go upon the records of this Court with the consent of the counsel for the State.

Wherefore, to the end that Leo Oppenheimer, Receiver and
1318 Trustee in bankruptcy, for the Muncie Pulp Company, may be relieved from any further liabilities herein, of the necessity of further litigation over a fund in which he claims no interest, and of the necessity of further accounting for this fund, and be enabled to wind up his account, and that the surety on the bond of the Muncie Pulp Co., be relieved from further liability herein, petitioners pray leave to pay and that they be ordered and adjudged to pay the money into court held by the said Leo Oppenheimer, Receiver and Trustee in Bankruptcy for the Muncie Pulp Co., and that the aforesaid decree relieving the said Leo Oppenheimer, Receiver and Trustee in Bankruptcy for the Muncie Pulp Co., and the Muncie Pulp Co., and the American Surety Co., may be entered of record, and they be hence dismissed.

WILLIAM MARSHALL BULLETT,
BROWN & ANDERSON,
Attorneys for Petitioner.

Petition of W. A. Cissna.

Filed Feb., 27th, 1911.

In the Chancery Court of Shelby County, Tennessee.

No. 13271. R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP Co. et al.

Your petitioner, W. A. Cissna, would respectfully show to the Court that the question involved in this proceeding is the boundary line between the State of Arkansas and State of Tennessee. The *the*

853

location of said boundary line determines the rights of the
1319 parties hereto. No defendant herein has claimed or claims any land which is on the Tennessee side of the said line between said States.

Petitioner respectfully shows to the Court that whatever judgment or decree has or may be entered in this cause will be ineffectual and of no force whatever in so far as fixing or determining or locating the boundary line between said States. In this proceeding it cannot be effectively determined what land is within the limits of the soverign State of Arkansas, no party hereto.

Petitioner respectfully shows to the Court that the Supreme Court of the United States is the only Court having legal authority, and power, to determine the boundary lines between States.

Petitioner respectfully shows that on the 30th day of January 1911 the State of Arkansas presented to the Supreme Court of the United States its bill of complaint against the State of Tennessee and applied to said Honorable Court for leave to file same to the end that the true boundary line between said States should be fixed and determined by the only Court having jurisdiction of that question.

A copy of said original bill so presented to said Honorable Court is herewith exhibited to this Honorable Court.

Petitioner respectfully shows that on the 20th day of Feb. 1911, the Honorable Supreme Court of the United States granted the motion or application of the State of Arkansas and directed that its said bill be filed as appears from the attached statement of the Clerk of said Court and same was accordingly filed in said Court.

Petitioner therefore respectfully shows that there is now pending between the sovereign States of Arkansas and Tennessee, and
1320 action in the Supreme Court of the United States to have fixed and determined by said Court the exact location of the boundary line between said states and that in said Court as cause said line will be established and as established the same will bind both states and the citizens of both states and conclude all controversy in this behalf.

Wherefore, your petitioner respectfully prays that this Honorable Court enter an order directing a stay of all proceedings in this cause and suspending the reference ordered herein until the boundary lin between the sovereign States of Arkansas and Tennessee has been fixed and located by the Honorable Supreme Court of the United States, which has taken jurisdiction of that question and which can alone determine same.

Petitioner prays that this Honorable Court stay its hand until the determination of said cause of State of Arkansas vs. State of Tennessee pending as above shown and your petitioner will ever pray.

CARUTHERS EWING,
Sol. for Petitioner.

Caruthers Ewing makes oath and says that he is the agent and attorney for W. A. Cissna and that the statements made in the above

petition are true to the best of his knowledge, information and belief.

CARUTHERS EWING.

Sworn to and subscribed before me this 27th day of February, 1911.

E. M. CORBETT, *D. C. & M.*

1321 (Copy.)

Office of the Clerk.

Supreme Court of the United States.

WASHINGTON, D. C. February 21, 1911.

Caruthers Ewing, Esq., Memphis, Tenn.

DEAR SIR: The Court, yesterday, granted your motion for leave to file a bill in case of State of Arkansas, Complainant v. State of Tennessee, and ordered process to issue, returnable Oct., 9, 1911. Please send me at once $50.00 as a deposit on account of costs and sign and return the enclosed appearance form, and I will then docket the case, and thereafter hand the *H*arshal of this Court the process for service under the practice of this Court.

Yours truly,

(S.) JAS. H. McKENNEY,
Clerk Supreme Court U. S.
Per H. C. H.

In the Supreme Court of the United States.

THE STATE OF ARKANSAS
vs.
THE STATE OF TENNESSEE.

Original No. —.

Bill in Chancery.

1322 To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States:

The State of Arkansas, by Hal L. Norwood, its Attorney General, brings this bill against the State of Tennessee, and respectfully complaining, shows unto the Honorable Court:—

I.

That by deed dated the 25th day of February, 1790, the State of North Carolina ceded to the United States certain territory, and as the western boundary thereof is alone material to this proceeding, it

alone will be stated, the same being "the middle of the Mississippi River".

(Vol. 1 American State Reports, Public Land pp. 17.)

By Ch. XLVII of Acts of Congress of 1798, June 1st, the State of Tennessee was admitted to Union and the territory embraced within said State was described as "the whole of the territory ceded to the United States by the State of North Carolina." (I U. S. State at Large, p. 491.)

II.

On June 23rd, 1836, by Chapter 120 of Acts of 1836, the State of Arkansas was admitted into the Union and the description of the boundary thereof, material here, was

"beginning in the middle of the main channel of the Mississippi River"—

following proper calls until same came back—

"to the middle of the main channel of the Mississippi River; thence up the middle of the main channel of the said river to the point of beginning. (5 U. S. Stat. at Large, 50-51.)

1323 That on and prior to 1836, the Mississippi River flowed between the States of Tennessee and Arkansas in so far as is material to this controversy, about as follows:

From Pecan Point in Arkansas at or near the head of Dean's Island in the State of Arkansas, the said river flowed in a southernly direction, and thence around said Dean's Island, and at or about the southwest end thereof the river turned in a northerly direction and the main channel flowed around island 37 in the State of Tennessee, the lesser channel passing between said island and the main Tennessee shore through McKenzie Chute. The main and lesser channel met at the southern extremity of said island No 37 and said river continued due south for a distance and then made an accurate curve, going north, forming what is known as Devil's Elbow, proceeding northwardly to what is known as Brandywine Point, the said river made another acute curve around Brandywine Bar and continued in its general southernly course.

The United States caused a reconnoissance of the locus quo to be made in 1874 by Col. Chas. R. Suter, under the direction of the War Department of the United States, and a reduction of the map or plat made by him is hereinafter used for illustrative purposes from which the course and current of the river can be readily followed. The early recorded survey of the locus in quo was made in 1823 and from the land and river lines of that date the course and current of the river can be traced, and, reserving the right to have same located with greater accuracy and certainty, complainant has had traced on said plat or map prepared by Col. Suter the river as it run in 1823 indicating same as a space between the red line shaded by yellow.

1324 Attention is called to the fact that in 1874 the channel of commerce of the river (indicated by dotted line) was be-

tween Island 37 and the main Tennessee shore. This was by reason of the accretions to the west of Dean's Island, and the erosion into the opposite Tennessee shore whereby the main channel had in the course of time been deflected through McKenzie Chute, i. e., between said Island #37 and the main Tennessee shore.

With this explanation the said Suter map is here exhibited.

IV.

It will be observed that between the said river flowing around Dean's Island and the said river flowing around Brandywine Bar there is but a small neck of land some few miles.

On the 7th day of March 1876, the Mississippi River suddenly broke through and across this narrow neck or strip of land and made a new channel for the water.

The channel thus made is known as the Centennial Cut Off. Said Cut-Off was sudden and violent and a new channel of this immense river was washed out within 24 hours; farms and houses being swept away.

The waters gradually receded from the old and circuitous channel about island #37 and Devil's Elbow and that which had been before the bed of a large river became in due course comparatively dry land and now is suitable for cultivation or is covered with timber of considerable value.

V.

Since Tennessee and Arkansas were admitted into the Union many changes have occurred by accretion and erosion, in the course and current of the river prior to 1874 and 1876, some of which are as follows:

1325 (1) Considerable portions of the eastern and southeastern parts of Dean's Island were washed away.

(2) The erosions into the Tennessee bank opposite the southern and western portions of Dean's Island had caused said shore (shore) line to recede and Dean's Island to correspondingly increase by accretions whereby Tennessee lost and Arkansas gained.

(3) The Arkansas shore opposite the northern or upper end of Island #37 had considerably eroded while Island #37 was correspondingly enlarged by accretions, whereby Arkansas lost and Tennessee gained.

(4) At a point marked on the plat above exhibited Plum Island #38 the eroding was into the Tennessee shore whereby the Arkansas territory was enlarged by accretion.

(5) Between Devil's Elbow and Brandywine Point the Arkansas shore eroded and corresponding accretions were made to the territoty of the State of Tennessee.

VI.

Prior to the Centennial Cut-Off of 1876 the changes in the River at the locus in quo were gradual and imperceptible and the shifting of the middle of the main channel of the Mississippi River was gradual and imperceptible, and the boundary line between the

States of Tennessee and Arkansas followed said gradual and imperceptible changes.

The said Cut-off whereby suddenly the river made a new bed was an avulsion and left the boundary line between said States exactly as it was just preceeding said avulsion to-wit: the middle of the main channel of the Mississippi River as it then flowed.

1326 Said line has never been traced or run and with the lapse of time the difficulty of actually locating and running said line is increased wherefore it is important to the affected state that same be now run.

VII.

The Mississippi River a navigable strea-, constituted the boundary between the States of Tennessee and Arkansas and the middle of the main channel of the stream mark the true boundary between said states and the said boundary line shifted and changed with the gradual and imperceptible shiftings and changes of said river until said line became fixed by the happening of the avulsion above mentioned, and the said line as it existed at a time immediately prior to said avulsion is the true boundary between the said states.

Notwithstanding this, and notwithstanding that the Legislature of Tennessee has recognized that "the true boundary between Tennessee and Arkansas is still the center of the main channel of said river as it then flowed," (Ch. 516 Acts of Tennessee, 1907) the State of Tennessee is now claiming that the boundary line between said State is a line equidistante from the visible defined and substantially established banks within which the water flowed in the year 1823, wholly ignoring and disregarding the gradual and imperceptible changes wrought up to the time of the said Centennial Cut-off in 1876 by which gradual and imperceptible changes each of the said states lost much territory and each gained much territory.

Said claim is being so made in a similar action by the State of Tennessee against a private citizen of the State of Arkansas, to which the State of Arkansas is no party and is now fully shown in the next paragraph hereof.

1327 VIII.

On the 14th day of Nov., 1903, the State of Tennessee instituted in the Chancery Court of Tipton County, Tenn., an action against W. A. Cissna who claims to own Dean's Island and all accretions thereto, in the State of Arkansas, and the Muncie Pulp Co., which purchased the timber on said land of said Cissna. By said action the State of Tennessee sought to recover possession of a considerable tract of land lying on the Arkansas side of the middle of the main channel of the Mississippi River as it run in 1876, immediately prior to the Centennial Cut-off as well as the value of much timber cut therefrom.

The defendants in said action pleaded that all land claimed by said Cissna and all timber sold by him to the Muncie Pulp Co., and by it cut and removed same from Dean's Island, and accretions

thereto, and said defendant disclaimed title to or interest in any lands or timber in the State of Tennessee. On the issues made by the pleadings much proof was taken and the lower Court dismissed the suit of the State of Tennessee which appealed the case to the Supreme Court of the State of Tennessee. At the September Term, 1907, of said Court the judgment decree of the lower Court was reversed and the Supreme Court of Tennessee held that the boundary between the States of Tennessee and Arkansas was a line equidistante between the defined banks of the Mississippi River as it run in 1823 and directed that the cause be remanded to the lower Court to enable the complainant in that action (The State of Tennessee) to so amend its complaint as to claim title to that point and prosecute the cause in accordance with opinion of the said Court reported in the official report of said State 119 Tennessee, 47.

While the decision of the Court in said case went beyond any issue before said Court, and while the State of Arkansas
1328 could not be bound thereby, the said holding and the subsequent amendment by the State of Tennessee of its Complaint as suggested by the Court and dependency and prosecution of said suit at this time in the lower court make it necessary that in the protection of its citizens and sovereignity the State of Arkansas institute this suit that the true limit of the rightful jurisdiction of each State should be properly and lawfully determined.

Wherefore, being without remedy on the law side of this Court the State of Arkansas prays that the State of Tennessee be made a party defendant to this bill and that a subpoena be issued and served upon the proper officers of said State and that it be required to answer the allegations hereof but not on oath.

It is prayed that Your Honor by proper orders and decrees establish the true boundary line between the State of Arkansas and the State of Tennessee at a line running from the head of Dean's Island, Arkansas, with the sinuosities of the Mississippi River as it run in 1876 just prior to the Centennial Cut-off to the point where said line comes to the present channel of the said river and said line to follow the middle of the main channel as it run at said date; that the right, jurisdiction and sovereignty of the State of Arkansas to all the land and territory lying within the said western line of the State of Arkansas so established be confirmed and established by the decree of this Court.

And to the end that the said line may be definitely located and fixed by the only Court having jurisdiction to do so it is prayed that a boundary commission be appointed to ascertain and designate said boundary line between the said States of Arkansas and Tennessee, and that such boundary commission be required to make the proper examination and delineate on map prepared for that purpose *with* two lines as determined by this Court.

And that Your Honors grant the State of Arkansas such other and further and general relief to which it may be entitled.

THE STATE OF ARKANSAS,

By —— ——,

Attorney General.

1329 EXHIBIT "A" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP CO., Bankrupt.

In the Matter of WALTER ADAMS CISSNA, Petitioner.

SIR: Please take notice that on the annexed petition of Walter A. Cissna, verified the 18th day of Sept., 1907, and on all the proceedings heretofore had herein, the undersigned will move this Court, at a term thereof to be held at the Post Office Building in the Borough of Manhattan, City of New York, on the 7th day of October, 1907, at ten thirty o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order directing Leo Oppenheiner, trustee in Bankruptcy of the Muncie Pulp Co., to pay over to Walter A. Cissna, petitioner herein, the sums of Five Thousand ($5,000.00) and Nine Thousand ($9,000.00) Dollars together with accrued interest thereon out of any funds in his hands as
1330 trustee aforesaid, and in default of such relief the undersigned will move this Court to — an order referring the matters herein to a Special Master or to one of the *Reference* of the Court to hear proof on the claim of Walter A. Cissna to such sums, and to report his findings to this Court, and for such other and further relief as to the Court may seem just.

Dated New York, October 1st, 1907.

NELLANY & WILSON,
Attorneys for W. A. Cissna, Petitioner.

No. 52 Williams Street, New York City.

To Leo Oppenheimer, Esq., Trustee in Bankruptcy of Muncie Pulp Company, No. 60 Wall Street, New York City.

United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt.

In the Matter of WALTER ADAMS CISSNA, Petitioner.

1331 To the Honorable the Judges of the United States District Court of the Southern District of New York:

The petition of Walter Adams Cissna respectfully shows to this Court:

First. That heretofore and on or about the 21st day of June, 1901, your petitioner entered into a certain contract in writing for the sale of the Muncie Pulp Company of the timber on Dean's Island Plantation situated on the Arkansas Bank of the Mississippi River in the State of Arkansas, for the sum of Thirty-Five Thou-

sand ($35,000.00) Dollars, of which seven thousand ($7,000.00) Dollars was paid in cash and the balance by the execution and delivery of its four promissory notes for the sum of Seven Thousand ($7,000.00) Dollars each, maturing one, two, three and four years after date of said contract respectively. A copy of said contract is hereto annexed and made a part hereof marked "Exhibit A" and your petitioner begs leave to refer to the same for a more specific statement of the terms thereof.

Second. That in and by said contract it was expressly provided, among other things, that none of the timber should be removed from the said property until the same had been fully paid for at the time of each removal.

Third. That thereafter and on or about July 30th, 1904, a petition in bankruptcy was filed against said Muncie Pulp Co., in the United States District Court for the Southern District of New York and on December 17th, 1904, the said Muncie Pulp Co., was duly adjudged a bankrupt in said Court. That on Aug. 3rd, 1904, one Leo Oppenheimer was duly appointed and qualified as Trustee in Bankruptcy of said Company and as said Trustee took possession of all of its property.

1332 Fourth. That prior to the adjudication in bankruptcy of said Muncie Pulp Co., your petitioner, before maturity and for value negotiated to the Corn Exchange National Bank of Chicago, the note of said Muncie Pulp Company, for Seven Thousand ($7,000.) Dollars maturing June 21st, 1904, and negotiated to Mrs. M. L. Kinney of Chicago, the note of said Company for Seven Thousand ($7,000.00) Dollars maturing June 21st, 1905; that thereafter your petitioner was compelled to and did pay the two said notes, both of which were reassigned to him for value and he is now and ever since has been the owner and holder of said two notes, together with all of the rights and interests and remedies of said Corn Exchange National Bank of Chicago and said Mrs. M. L. Kinney therein.

Fifth. That subsequent to the institution of proceedings in bankruptcy as aforesaid, said Corn Exchange National Bank of Chicago and the said Mrs. M. L. Kinney, caused an action to be commenced in the Circuit Court of Mississippi County, Arkansas, Osceola District, against said Muncie Pulp Co., claiming therein that said Company had cut more timber than had been paid for and was about to remove the same, not leaving enough standing timber to satisfy either of the said two notes, and that both the cut and standing timber on said property was in the joint possession of said company and said Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney and that they were entitled to a vendors lien to the extent of their respective notes upon the timber then remaining upon said property, and prayed the foreclosure thereof. That in connection with said suit a warrant of attachment was issued and levied upon said timber remaining on said property.

1333 Sixth. That said cause was thereafter transferred to the Chancery Court of Mississippi County, Arkansas, Osceola District.

Seventh. That subsequent to the institution of said action and on the 23rd day of Sept., 1904, said Leo Oppenheimer as receiver aforesaid entered into an agreement in writing with said Corn Exchange National Bank of Chicago, and said Mrs. M. L. Kinney the plaintiffs in said suit, wherein and whereby it was agreed that an order be entered in said suit dismissing said attachment and that an -arance be entered therein by said Muncie Pulp Co., that said court in which said action was pending should need to determine the right and interest of the parties. — terms and conditions therein named and a good title thereto be given to the purchaser or purchasers thereof and that the proceeds of sale be deposited in the Memphis Savings Bank to the joint account of R. G. Brown as attorney for said receiver and Caruthers Ewing as attorney for said Corn Exchange National Bank and Mrs. M. L. Kinney, the same to remain therein pending the final determination of said action in Arkansas standing in lieu of the attached timber that in order that said agreement be made effective for all purposes the same be ratified and approved by this Court wherein said receiver was appointed.

Eighth. That thereafter and on or about the 27th day of September 1904 this Court by an order duly made and entered sanctioned said agreement so made as aforesaid.

Ninth. That pursuant to the provisions of said agreement said attachment was dismissed and said timber sold realizing the sum of Twenty-Four Thousand Five Hundred Dollars ($24,500.00) and free and clear title thereto given and the proceeds of
1334 sale to the extent of some ($16,000.00) Sixteen Thousand Dollars, were duly deposited in said Memphis Savings Bank to the joint account of said Brown and Ewing, to be held pending the final determination of said cause in the Arkansas Court.

Tenth. That notwithstanding the said agreement and sa-ction thereof as aforesaid, said Leo Oppenheimer obtained from this Court an order to show cause returnable before said court on the 16th day of Aug., 1905, directed to said Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, requiring them to show cause before said court why the said warrant of attachment issued and levied upon said timber should not be vacated and set aside and why the complainant of said action in the Court of Arkansas should not be dismissed.

Eleventh. That said Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney through their said attorney, Caruthers Ewing, appeared upon said return day in opposition to said motion and thereafter an order was duly made and entered upon said application denying said motion of said Oppenheimer without prejudice to the renewal after the application to the said Court of Arkansas for such relief.

Twelfth. That thereafter said Leo Oppenheimer as trustee in Bankruptcy of said Company made application to said Court of Mississippi County, Arkansas, Osceola District to dismiss the said suit pending therein but said application was denied.

Thirteenth. That thereafter and on or about the 7th day of Nov., 1905, said Leo Oppenheimer as trustee aforesaid obtained from this Court an order directing the Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney again to show cause why they should not be required to dismiss the said action pending in the Chancery Court of Mississippi County, Arkansas, and consent to the dissolution of the attachment herein, and why said parties
1335 or their — should not be required to sign a direction to the Memphis Savings Bank of Memphis, Tenn., to pay over to said Trustee the funds therein to the said joint account of said Brown and Ewing.

Fourteenth. That said Corn Exchange National Bank of Chicago and the said Mrs. M. L. Kinney duly appeared in opposition to said motion and thereafter an order of this Court was duly made and entered on the 14th day of Feb., 1906, by which said motion of said trustee was in all respects granted, and said parties were enjoined and restrained from further prosecution of said cause in said Chancery Court of Mississippi County, Ark., and also directed to execute the consent dissolving the attachment issued and granted in said cause and also to dismiss and proceeding by way of attachment or otherwise against said fund on deposit in said Memphis Savings Bank of Memphis, Tenn., and said parties and their attorney Caruthers Ewing were further directed to sign a direction to said Savings Bank to pay to said trustee the said fund on deposit with it to the joint account of said Brown and sais Ewing but without prejudice to the rights of the Corn Exchange National Bank of Chicago, or Mrs. M. L. Kinney against such fund in such action as they might elect to pursue in this court, and further authorize said trustee to apply for such auxiliary ancillary orders, writs, etc., as he might require to carry into effect the said provision of the order aforesaid.

1336 Fifteenth. That thereafter and on or about the — day of Feb., 1907, in compliance with said order of this court of the 14th day of Feb., 1906, said Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney, through their attorney Caruthers Ewing, dismissed the said action pending in the said Chancery Court of Mississippi County, Arkansas and consented to the dissolution of the attachment therein, and further signed a direction to the Memphis Savings Bank of Memphis, Tenn., to pay over to said trustee the fund therein to the said joint account of said Brown and Ewing. That as your petitioner is informed and believes said fund amounting to some Sixteen Thousand ($16,000.00) Dollars was thereafter transferred to Leo Oppenheimer as trustee aforesaid, and said Leo Oppenheimer as trustee now holds said fund together with accrued interest thereon from the date it came into possession awaiting the determination of this court as to whom said fund belongs.

Sixteenth. That pursuant to the terms of said agreement dated June 21st, 1901, between your petitioner and the Muncie Pulp Co., title in said timber should pass to said Company only after the same had been paid for by it, and said company had no right to

cut or remove a greater amount of timber than it had already paid for; that said company had no right under said agreement to the possession of the timber for which it had not paid, that its right to the possession of the remainder of the timber and its right to cut and remove it depended entirely upon the fact of prior payment and the taking of any of said timber by said company in excess of the amount already paid for by it was contrary to the terms of said agreement, and to your petitioner's rights in the premises.

Seventeenth. Your petitioner avers that said Muncie Pulp
1337 Co., did, prior to the institution of the bankruptcy proceeding, cut and take away timber from said property amounting to about 75 per centum standing on said property at the date of the contract between your petitioner and said Muncie Pulp Company; that said Muncie Pulp Co., paid under the terms of said contract the sum of Twenty-one Thousand ($21,000.00) Dollars, which was 60 per cent of the price agreed to be paid by said Muncie Pulp Co., for the whole of said timber, that said Muncie Pulp Co., did prior to the institution of the bankruptcy proceeding, wrongfully cut and take away timber from said property amounting in value to about Five Thousand ($5,000.00) Dollars in excess of the amount of timber for which it had paid; that such act was contrary to your petitioner's right and that said Pulp Co., acquired no right or title to such timber so cut in excess of the amount already paid for. That said timber so cut and removed from said property by said Company prior to the bankruptcy proceeding and in excess of the amount for which it had paid to-wit: about five thousand ($5,000.00) dollars was the property of your petitioner and that the proceeds thereof rightfully belong to him and he claims and asserts a vendor's equitable *line* for said amount against any moneys now in the hands of said Leo Oppenheimer as Trustee aforesaid.

Eighteenth. Your petitioner avers that there was a large part of said timber left standing and uncut on said property and cut and still on land at the date of said bankruptcy proceedings, to-wit, about two million four hundred and twenty thousand five hundred and fifty-five feet, which timber was thereafter sold under the terms of an agreement between the trustee in bankruptcy herein and the Corn Exchange National Bank and Mrs. Kinney, dated
1338 Sept. 23, 1904. A copy of said contract is hereto annexed and made a part hereof, marked Exhibit "B," to which your petitioner begs leave to refer for a more specific statement of the terms thereof. After providing for the sale of such timber and the deposit of the fund in an agreed bank, the seventh paragraph of said agreement reads as follo*ed*:

"It is further stipulated, understood and agreed that the fund derived from the sale of the pulp wood and the saw logs now under attachment shall stand in lieu of the property attached, and that all the rights, claim and title of any and all the parties to this agreement shall be and remain exactly as though the attachment was still in the hands of the Sheriff of Mississippi County, Arkansas.

It is also understood, stipulated and agreed that the fund derived

from the saw log- to be hereafter cut by Gibson & Beard, shall stand for and represent the timber as standing timber and that all the rights, title, interests, lien or claim that the party of the second part or any of then now have in and to this standing timber shall attach to said fund and shall be and remain just as though the timber were standing on the land."

Nineteenth. And your petitioner avers that a part of the money realized from the sale under said agreement of Sept. 23, 1904, amounting in the aggregate to about Nine Thousand ($9,000) Dollars with accrued interest being the amount of said two notes for Seven Thousand ($7,000.00) Dollars each, maturing subsequently to the bankruptcy herein, less the Five Thousand ($5,000.0-) Dollars referred to in paragraph 17 as the amount of timber over and above the amount paid for prior to said bankruptcy now in the possession and custody of Leo Oppenheimer as trustee belong ro and is the property of your petitioner.

1339 Twentieth. That by a decision of the United States Circuit Court of Appeals, Second District, rendered Jan. 2, 1907, the case of in re Muncie Pulp Company, your petitioner's right in said fund now in possession and custody of Leo Oppenheimer as Trustee aforesaid, are set forth as follows:

"At the time this agreement was made and ratified by the Bankruptcy Court, the situation was as follows: The petitioner as assignees had succeeded to all the rights of Cissna. As to the timber which had been cut and removed in exfess of payment already made there was a question whether or not the seller had a vendor's lien for its price upon what timber was left. That question need not now be considered. It will be disposed of in the appropriate tribunal and may or may not thereafter ne brought here for review.

As to the timber not yet cut, and removed, the seller under the contract was entitled if he chose to hold the same and prevent its removal by the company until it should pay him cash for whatever it might seek to remove. The general language, "sale and transfer" is clearly qualified by the special clause and the Muncie Pulp Co., had no right against the wish of the seller *or* to cut and remove timber in excess of the amount of payment; it was on his land and was to be paid for before it was cut and removed. Neither the receiver or the trustee had any title to it or any greater right to cut and remove it than the bankrupt had. In re New York Economical Co., 49 C. C. A., 133, 110 Fed., 514.

Of the proceeds of the sale under the agreement approved by the Court, the profit over and above all possible claim of the seller belongs to the trustee representing the profit which has come to the bankrupt's estate under one of the bankrupt's contracts. The Sixteen Thousand Dollars represents two items: the respective amounts of which are not yet determined: the first is the value at con-

1340 tract rates of the timber cut and removed with Cissna's assent in excess of payment before payment. As to that some Court must ascertain the precise amount and determine whether such amount is a lien upon the $16,000.00 which now represents the timber not cut and removed at the date of failure. The residue of the

$16,000.00 belongs to the seller, (or his assignees) representing as it does the timber which he had not parted with at the time of the failure which he was entitled to hold until he received cash for it, and which he parted with only in reliance upon the agreement with the receiver which the bankruptcy court approved. The appropriate court to ascertain these respectice amounts and to determine the question above set forth is the bankruptcy court in the Southern District of New York."

Wherefore, the petitioner prays that an order be entered herein directing Leo Oppenheimer as trustee in bankruptcy of the Muncie Pulp Co., to show cause if any he has why said sum- of Five Thousand Dollars and Nine Thousand Dollars together with accrued interest thereon should not be paid to your petitioner out of any fund in the hands of said trustee, or why an order should not be made referring the matters herein to a special master or to one of the referees of this court to hear proof on your petitioner's claim, and to report his findings to the Court as soon as practicable.

And your petitioner respectfully prays for such other or further relief as to the Court may seem just and proper. For all of which your petitioner has made no previous application.

WALTER ADAMS CISSNA.

NELLANY & WILSON,
Attorneys for Petitioner.
CARUTHERS EWING,
Of Counsel.

1341 UNITED STATES OF AMERICA,
State of Tennessee, County of Shelby:

Walter Adams Cissna, being duly sworn, deposes and says:

That he is the petitioner above named, that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated to be alleged on information and belief*m* and as to those matters he believes it to be true.

WALTER ADAMS CISSNA.

Sworn to before me this 18th day of Sept., 1907.

S. E. CHILDERS,
Notary Public.

My commission expired on May 6th 1908.

EXHIBIT "A."

W. A. CISSNA
vs.
MUNCIE PULP CO.

1342 This contract was made and entered into this 21st day of June, 1901, by and between W. A. Cissna of Chicago, Ill.,

party of the first part, and the Muncie Pulp Co., a corporation of the State of New York, party of the second part, Witnesseth:

That the said party of the first part for the consideration hereinafter named does hereby sell and convey to the said party of the second part all the timber of all kinds sizes and descriptions upon the property known as the Deans Island plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas, to-wit: all of fractional section 34; all of south half of section 33; all of north half of section 33 south and east of Chute; all of section 32*m* south of chute; all in township 10, north, range 10, east.

Also all of the fractional sections 3, 4 and 5 in the township 9 north, range 10 east, together with all accretions of said above described property already made or hereafter to be made by the Mississippi River or otherwise, the conveyance being limited to such land as is now in said described section, and all accretions thereto and not to land that may have originally been in said section.

The consideration for the said sale and transfer of timber is the sum of $35,000.00, $7,000.00 of which consideration is cash in hand paid, the receipt *pf* which is hereby acknowledged and the balan*ve* of said consideration is represented by 4 notes of even date herewith each for the sum of $7,000.00 with 5% interest from date until paid, due on or before 1, 2, 3, or 4 years from the date hereof.

It is hereby contracted and agreed that all of the timber within the line of fence erected by R. L. Reedle about the year 1898, is to be cut and removed within two years from the date of this contract.

1343 It is further contracted and agreed that the remaining timber with the exception of that timber on the 1,000 acres of low land adjoining island 37 and Centennial Island, and 1,000 acres, more or less, known as Deans Island Towhead, is to be cut and removed within 5 years from the date of this contract, and the timber on the said 1,000 acres of said land and 1,000 acres more or less, known as Deans Island Towhead, is to be cut within 7 years from the date of this contract.

It is further contracted and agreed by and between the parties hereto, that if at any time the said party of the second part shall cut and remove — the said property a larger amount of said timber than the proportionate value of the same has already been paid for, that it will immediately pay to the said party of the first part that proportion of the purchase price covering the said timber, that at no time shall they cut and remove a greater amount of timber than they have already paid for under this contract, it being the intention hereby that whenever any timber is cut and removed from the said property that it shall be at all times paid for in cash.

It is further contracted and agreed that the said party of the first part reserves for his own use and benefit all the scattering trees except cottonwood and cultivated land above described and in the small pasture at the lower barn lot. It is further contracted and agreed that the said party of the second part is to designate to the said party of the first part or his agent such timber accessible to the plantation as the

said party of the first part is authorized to cut for fire and gin wood on the said plantation, which said wood is to be amply sufficient for all the purposes of the said party of the first part or his tenants on the said plantation; that the said party of the first part, or his ten-
1344 ants, shall at all times have the right to cut and remove a sufficient amount of timber for fire-wood purposes upon the plantation.

It is further contracted and agreed between parties hereto that the party of the second part shall have a right of way over the cleared land for the purpose of cutting and hauling same from the timber land to the river front, where the hereinafter described tract shall be located and it is practically agreed that the party of the second part shall have a plot of ground 150 by 1,000 ft. on the bank of the Mississippi River upon which to stack said logs and timber so cut and removed.

The said party of the second part is to have the privilege of locating this said lot upon which to stack wood hereafter and at such place as may be convenient to the said party of the second part.

It is further contracted and agreed that the said party of the second part shall have the right of way upon which to remove the timber on Deans Chute between crop season on cleared land.

W. A. CISSNA.
MUNCIE PULP COMPANY,
By ROBERT GIBSON, *Agent.*

Transaction closed and notes and check delivered Aug. 7, 1901.

R. G. BROWN,
Att'y for Muncie Pulp Company.

1345 STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, A. Humphreys Kortrecht, a notary public in and for said State and County mentioned, duly commissioned and qualified, W. A. Cissna, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and notarial seal at Memphis aforesaid, this 21st day of June, 1901.

[SEAL.] A. HUMPHREYS KORTRECHT,
Notary Public.

EXHIBIT "B."

This agreement made and entered into this the 23rd day of September, 1904, by and between the Muncie Pulp Co., of Muncie, Ind., and Leo Oppenheimer, receiver in bankruptcy, represented by their attorney, R. G. Brown, and the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, and W. A. Cissna, parties of the second part, -presented by their attorney, Caruthers Ewing.

Witnesseth That Whereas an attachment has been levied upon

certain pulp wood and saw logs of the property of W. A. Cissna at Dean's Island, Mississippi County, Arkansas, in the suit of the said Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney vs. the Muncie Pulp Co., in the Circuit Court of said Mississippi County, Ark.

And whereas, the said parties of the second part claim that they have a vendor's lien or equitable lien on the standing timber on the land of W. A. Cissna, sold by him to the Muncie Pulp Co., for the payment of two notes of $7,000.00 each given for the pur-
1346 chase price of said timber by the Muncie Pulp Co., dated June 21st, 1901, and payable with 5% interest from date, on the 21st day of June 1904, and 1905 respectively, and a vendor's or equitable lien for the payment of said note also on the timber attached.

Now, therefore, for the purpose of preserving the property and the rights of all the parties interested therein in statu quo it is agreed as follows:

First. An order shall be entered in the case now pending in the Circuit Court of Mississippi County, Arkansas, dismissing the attachment, and appearance for the Muncie Pulp Co., shall be entered therein.

Second. The parties in interest now desire to make sale of the pulp wood now under attachment in the Southern Wood Supply Co., the "new" wood for $2.50 per cord and the "drowned" wood for $1.85 per cord, delivered on the bank. The purchase price of said pulp wood less $1.00 per cord for hauling same, shall be deposited by the buyer in the Memphis Savings Bank to the joint account of R. G. Brown and Caruthers Ewing attorneys subject to their joint check as hereafter provided. The hauling of said pulp wood at a dollar per cord shall be paid to Robert Gibson and Vince Beard.

3.

The parties in interest are to make delivery of the saw logs attached and now on the banks to Anderson-Tully Co., under the contract existing with that company by the Muncie Pulp Co., and $5.00 per 1,000 feet of the purchase price of the said logs shall be paid by the purchasers into the Memphis Savings Bank to the joint account of R. G. Brown and Caruthers Ewing as above provided.

1347

4.

It is further agreed that Robert Gibson and Vince Beard shall be allowed to proceed with their contract with the Muncie Pulp Co., to get out the saw-logs on said land and to make delivery of same to the Anderson-Tully Co., in accordance with its contract with the Muncie Pulp Co., provided that the purchasers shall deposit $8.00 per 1,000 feet on the purchase price of all logs delivered in the Memphis Savings Bank as provided in paragraphs 2 and three.

5.

It is further agreed that the purchaser of said pulp wood and saw logs shall have clear title to said timber so far as the title and claims of the parties to this agreement are concerned.

Said payment of $8.00 per 1,000 on the saw logs to be hereafter cut shall continue until the sum of $10,000 shall have been paid in from this source, and until the amount in bank shall be $16,000.00.

7.

It is further stipulated, understood and agreed that the funds derived from the sale of the pulp wood and the saw logs now under attachment shall stand in lieu of the property attached and that all the right, claim and title of any and all the parties to this agreement shall be and remain exactly as though attachment were still in force and the physical property seized was still in the hands of the Sheriff of Mississippi County, Ark.

It is also understood and stipulated and agreed that the fund derived from the saw log- to be hereafter cut by Gibson & Beard shall stand for and represent the timber as standing timber and that all the rights, title, interests, liens or claims that the parties of the second part or any of them now hand in and to this standing timber shall attach to said fund and shall remain just as though the timber was standing on the land.

1348 8.

It if further agreed that the proper order shall be entered in the United States District Court for the Southern District of New York in Bankruptcy authorizing and ratifying this agreement, and that in the event this is not done this agreement shall be null and void.

In Testimony whereof the parties have hereunto set their hands and seals this day and date first above written.

CORN EXCHANGE NATIONAL BANK
OF CHICAGO.
MRS. W. A. KINNEY &
W. A. CISSNA,
By CARUTHERS EWING, *Attorney.*
LEO OPPENHEIMER,
Receiver Muncie Pulp Co.,
By R. G. BROWN, *Attorney.*

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, H. H. Barker, a notary public in and for Shelby County, Tennessee, duly commissioned, qualified and acting, Caruthers Ewing, who makes oath that he is the attorney for the respondent, the Corn Exchange National Bank, and Mrs. M. L. Kinney, and that the matter- stated in said answer to the petition of Leo Oppenheimer, Trustee, are within his personal knowledge except

those that necessarily appear to be stated on information and belief; that Caruthers Ewing further makes oath that he is authorized to make verifications of the statements made in said answer, and that neither of his clients, to-wit, the defendants to said petition, are within the State of Tennessee.

1349 Said Caruthers Ewing makes oath that the statements made in the answer except those matters which are necessarily made as on information and belief, are true, and as to those matters which appear to be stated without personal knowledge of respondent affiant has been informed and believes that the same are true.

CARUTHERS EWING.

Sworn and subscribed before me, this 8th day of Jan. 1906.

[SEAL.] H. H. BARKER,
Notary Public.

My commission expires May 11, 1907.

EXHIBIT "B" TO ANSWER OF W. A. CISSNA'S PETITION.

United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP CO., Bankrupt.

The answer of Leo Oppenheimer, as Trustee in Bankruptcy to the Petition of W. A. Cissna, respectfully shows:

I. Admits that a contract was executed by and between W. A. Cissna and the Muncie Pulp Co., as set forth in the said petition; admits that the proceedings instituted by the Corn Exchange National Bank and Mrs. M. L. Kinney have been dismissed in accordance with the decree of the United States Circuit Court of

1350 Appeals, as set out on page four of the said petition; admits that there are two notes payable to the order of W. A. Cissna, dated June 21st, 1901, payable 3 and 4 years after date, bearing interest at the rate of 5% per annum, which were not paid by the bankrupt corporation prior to the filong of the petition, and admits that at the time of the bankruptcy of the Muncie Pulp Co., there were standing, trees and cut logs to an amount largely in excess of the average amount due on the two notes both principal and interest.

Admits that the Trustee in Bankruptcy took possession of standing timber, trees and logs, and sold the larger portion of such property realizing approximately 23,400.00 — for said timber, and that a small amount of the timber is still standing.

II. Denies that he has knowledge, or information sufficient to form a belief as to the truth of the allegation that the Corn Exchange National Bank and Mrs. M. L. Kinney have duly endorsed the notes held by them back to W. A. Cissna, and denies that he has knowledge or information sufficient to form a belief as to whether the said W. A. Cissna paid any money to the said Corn Exchange National Bank or Mrs. M. L. Kinney, or paid the amount due on the said note.

III. Denies the conclusion of law alleged in the said petition that W. A. Cissna is entitled to a first lien on the proceeds and avails, the timber, trees and logs embraced within the term of the contract of sale, and alleges that the fund belonging to the joint estate in bankruptcy and the general creditors of the bankrupt's estate, and that the said W. A. Cissna is not entitled to any priority of payment over other creditors with reference to the said fund either to the extent of the two notes referred to in the petition, or any other extent.

1351 For a separate and distinct defense, respondent alleges:

That a petition in involuntary bankruptcy was filed against Muncie Pulp Co., on the 30th day of July, 1904 and this respondent was appointed trustee in bankruptcy of the said Muncie Pulp Co., in March 1905, the said corporation havin*f* been adjudged a bankrupt in this court on Dec. 17th, 1904.

This respondent shows that at the time of the execution of the contract between W. A. Cissna and Muncie Pulp Co., $7,000.00 was delivered to W. A. Cissna, together with 4 promissory notes of $7,000.00 each, maturing in one, two, three and four years time. The Muncie Pulp Co., at once entered into and took possession of the timber sold to it by virtue of the contract and began to cut the said timber and remove the same up to the time of the filing of the petition in bankruptcy. Prior to the filing of the petition in bankruptcy two of the notes had been paid in full.

At the time of the filing of the petition in bankruptcy as alla*g*ed in the petition of W. A. Cissna, a considerable amount of timber, both cut and standing was on the premises in excess of the amount due on the two notes held by W. A. Cissna, together with the interest thereon. Thereafter and on or about the 19th day of Aug., 1904, the Corn Exchange National Bank of Chicago, claimi-g to be the owner by assignment or endorsement from the said W. A. Cissna of the promissory note of the Muncie Pulp Co., which fell due on June 2nd, 1904 and Mrs. M. L. Kinney, came to be the owner by assignment and endorsement from the Muncie Pulp Company, of the promissory note of the Muncie Pulp Co., due June 23, 1905,

1352 did as joint plaintiffs file their complaint in the Circuit Court of Mississippi County, Arkansas, Osceola District, against the Muncie Pulp Co. The said plaintiffs alleged that the Muncie Pulp Co., had cut and removed an amount of timber in excess of the proportionate amount theretofore paid for and that sufficient timber was not left standing on the land to satisfy the notes held by the plaintiffs.

The said Corn Exchange National Bank of Chicago and the said Mrs. M. L. Kinney averred that the timber sold to the Muncie Pulp Co., as aforesaid, both that standing and that which had been cut, was in the joint possession of the Muncie Pulp Co., and of the plaintiffs through their assignor Cissna, that the plaintiffs as holders of the promissory notes aforesaid had and were entitled to enforce a vendor's lien for the purchase money and an equitable lien on the said timber.

The plaintiffs prayed for judgment for their respective debts aforesaid, with interest, and the foreclosure of the vendor's lien upon the timber, and for a writ directing the Sheriff of Mississippi County

to take possession of the said timber by way of attachment. To hold the same for the satisfaction of any judgment. An attachment was accordingly issued and levied upon both the standing and cut timber.

Said action was afterwards by order of the Circuit Court transferred to the Chancery Court in Mississippi County, Arkansas. The Trustee in bankruptcy filed an answer in said cause on the 4th day of October, 1905, and the said plaintiffs were subsequently enjoined by the order of the United States District Court for the Southern District of New York.

This Respondent shows that by the bringing of the said action in the Circuit Court of Mississippi County, Arkansas, and continuing the said cause, the said W. A. Cissna and his representatives the Corn Exchange Bank and Mrs. M. L. Kinney, have elected
1353 to regard the transaction between the said W. A. Cissna and the Muncie Pulp Co., as the same and have elected to regard the obligation due from the Muncie Pulp Co. as a debt, and have elected to waive any claim to the title of the timber or to the possession thereof; and has elected to claim the vendor's lien against the said timber both cut and uncut after the rights of the general creditors of the bankrupt estate and the receiver have intervened, and have elected by the said action to waive all rights, claim or title of any sort against the timber either standing or cut or the proceeds therefrom, and to ratify and adopt the position of a general creditor upon certain notes.

For a further separate defense and counter-claim this respondent shows:

That the State of Tennessee filed a bill in equity in the Chancery Court of Tipton County, Tennessee, against the Muncie Pulp Co., and W. A. Cissna.

In said bill it was alleged that the State of Tennessee was the owner and title to the possession of 1,250 acres of ground upon which was growing the timber sold by W. A. Cissna to the Muncie Pulp Co., as set forth in the said contract. The said bill alleged that the Muncie Pulp Co., and W. A. Cissna were trespassers upon said land; that the amount of timber cut and removed by the Muncie Pulp Co., from the land belonging to the State of Tennessee was in excess of the value of $25,000.00, and the State of Tennessee sought to recover the value of the timber which had been removed from the Muncie Pulp Co. and W. A. Cissna. The value of the timber cut from the ground claimed by the State of Tennessee exceeds the amount in the two promissory notes of which W. A. Cissna now claims ownership.

1354 Upon a trial of the said action a judgment was found in favor of the Muncie Pulp Co. On appeal 6th judgment was reversed and an opinion written by the highest Court of Tennessee sustained the major portion of the contention of the State of Tennessee and renders it doubtful whether the bankrupt estate is evading liability in said action.

Prior to the filing of the petition in bankruptcy herein H. W. Stockley filed his bill in equity in the Chancery Court of Tipton County, Tennessee, against the Muncie Pulp Co., and W. A. Cissna.

In the said action Stockley claims to be an owner of a further portion of the ground supposed to be owned by W. A. Cissna and upon which the growing timber was sold to the Muncie Pulp Co. In that said action a judgment has been recovered against Cissna and the Muncie Pulp Co., and the cause is now pending an appeal.

Your petitioner shows that W. A. Cissna at the time of the sale of the stumpage rights guaranteed to the Muncie Pulp Co., that he had good and sufficient title to the land upon which the timber was standing, that he had good right to convey the same to the Muncie Pulp Co.

This respondent is informed and verily believes that in the event of either of the above mentioned actions should be finally decided against the Muncie Pulp Co., said Muncie Pulp Co., will be liable for all timber cut and removed from the land belonging to the sate State of Tennessee and the said Stockley tjay the timber on the lands claimed by the State of Tennessee and the said Stockleu exceeds in value the amount of the notes held by W. A. Cissna. For any amount thus recovered by the State of Tennessee or by H. W. Stockley against the Muncie Pulp Co., in the suit aforesaid the Muncie Pulp Co., or its Trustees in Bankruptcy will have a right as against W. A. Cissna to off set the same against the proceeds of the sale of timber.

1355 The respondent prays that he may be decreed to have and offset for any moneys which he may be forced to pay the State of Tennessee or H. W. Stockley, or the American Surety Co., as surety, on the bond given in the action instituted by the State of Tennessee as against any judgment which may be recovered by W. A. Cissna by virtue of this proceeding and this respondent prays that W. A. Cissna be enjoined from further proceeding with this action until such a time as the liability of the trustee in bankruptcy and of the estate of the Muncie Pulp Co., be determined in the proceeding now pending in Tennessee.

This respondent further shows that at the time of the filing of the petition in bankruptcy certain of timber had been cut and severed from the realty and was lying so cut upon the land of W. A. Cissna and in the possession of the Muncie Pulp Co., and that a further portion of the timber remained standing at the time of the filing of the petition in bankruptcy and that the fund received by the trustee in bankruptcy consists of the proceeds realized both from the sale of the timber which was cut and that which was uncut at the time of the filing of the petition in bankruptcy.

This respondent further shows that an agreement was entered into between the receiver in bankruptcy and W. A. Cissna whereby the receiver was permitted to cut a certain portion of the standing timber and to sell off the timber which had already been cut and to deposit in the Memphis Savings Bank a fund against which W. A. Cissna was to establish the claim if any such claim existed. This respondent shows that from the first moneys realized from the sale of both the cut and uncut timber this respondent deposited $16,000.00 in the Memphis Savings Bank, and that subsequently, by order of the United States District Court for the Southern District

of New York this sum was placed in this respondent's hand to be held as a separate fund subject to the right, claim and
1356 equities of W. A. Cissna as such claims might be thereafter adjudicated.

This respondent prays that the petitioner be required to show what portion of the fund claimed by him is represented by the cut timber and the uncut timber.

Filing this answer shall not be construed as a waiver of a right to plead any other defense of which this respondent may be advised, and the respondent reserves the right to amend his answer at any time prior to the trial of the said cause.

Wherefore, this respondent prays that the petition of W. A. Cissna be dismissed with cost and that this Court decree that the Trustee in Bankruptcy is entitled to the proceeds of the timber hereinbefore set forth, and that the title to the said timber was in the Trustee in Bankruptcy.

LEO OPPENHEIMER,
Respondent.

CITY & COUNTY OF NEW YORK:

—— ——, being duly sworn says that he is the — in this action; that he has read the foregoing—and knows the contents thereof; that the same is true of—who acknowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

LEO OPPENHEIMER.

Sworn to before me this 5th day of June 1908.

M. J. SHOOLBRED,
Notary Public, Kings County.

Certificate filed in N. Y. County.

1357 EXHIBIT "C" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court for the Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt. W. A. CISSNA, Claimant.

Stipulation.

Upon the trial or any hearing of the above named cause, either before the United States District Court for the Southern District of New York, or before any Referee of said Court,

It is hereby stipulated and agreed that the following facts may be considered as proven upon the part of the said W. A. Cissna, claimant.

First. That said W. A. Cissna and the said Muncie Pulp Co., on the 21st day of June, 1901, entered into and executed a contract, a

copy of which said contract is hereto attached and made a part hereof, marked Exhibit A.

1358 Second. That the said W. A. Cissna is now the owner and holder of two promissory notes, executed under said contract, of date June 21st, 1901, due respectively June 21st 1904 and June 21st, 1905, for the sum of Seven Thousand ($7,000.00) Dollars each, bearing interest from date at the rate of five (5%) per cent per annum till paid.

Third. That no right- under said note and said contract were lost by the said W. A. Cissna in endorsing one of said notes to the Corn Exchange Bank of Chicago, and one of said notes to M. L. Kinney, and in subsequently having said notes re-indorsed to the said W. A. Cissna. It being understood, howeverm that when said notes were re-endorsed to the said Cissna by the said Bank and the said M. L. Kinney, that the same were past due.

Fourth. That Leo Oppenheimer *was* receiver in bankruptcy, after his appointment sold and disposed of timber to the value of Eight Thousand ($8,000.00) Dollars which was cut and lying upon the ground at the time of his said appointment as receiver, and after his appointment as trustee he cut, sold and disposed of timber to the value of $15,000.00 which was in the tree at the time of his said appointment That said timber *was* sold by said trustee was a part of the timber mentioned in said Court Marked Exhibit A.

Fifth. That a certain agreement a copy of which is hereto attached, marked exhibit B, and made a part hereof, was duly signed and executed by the parties purporting to sign the same and was approved, ratified and confirmed by an order of this Court.

Sixth. That on the hearing or trial of the above named cause the said W. A. Cissna shall have the right to read into and as a part of the evidence, any portion or all of the record of appeal of the United States Circuit Court of Appeals, for the second Circuit, being in the nature of a petition, to review the order of the

1359 District Court of tje United States for the Southern District of New York, subject to objections for competency or relevancy.

The following facts shall be conceded as proven on behalf of the said Leo Openheimer, Trustee.

First. That out of the proceeds of the sale of said timber there was deposited with the Trustee, Leo Oppenheimer, as a trust fund, to meet the claims of said Cissna the sum of $16,000.00 which he now holds for that purpose.

That it was the intent and agreement of the said Oppenheimer as Trustee, and said Cissna, that the said $16,000.00 should be set aside because at that time it was estimated that the sum of $16,-000.00 would be sufficient in any event to pay off and discharge the two notes held by the said Cissna together with the interest thereon in the event that the Court should hold that he should be entitled to the payment thereof.

Second. That the said sum of $16,000.00 reached the hands of the trustee, the said Leo Oppenheimer, on the — day of April ,1907,

and did not draw interest previous to that time, and since that time has drawn interest at the rate of 2½% per annum.

Third. That immediately after execution of said contract, marked exhibit A, the Muncie Pulp Co., at once began to cut said timber and remove the same and continued to do so up to the time of the filing of petition in bankruptcy herein.

1360 Fourth. That on or about the 18th day of Aug., 1904, the Corn Exchange Bank of Chicago came to be owner by assignment or endorsement from the said W. A. Cissna of the promissory note of the Muncie Pulp Co., which fell due June 21st, 1904; and Mrs. M. L. Kinney came to be owner by assignment and endorsement from W. A. Cissna of the promissory note of the Muncie Pulp Co., due June 21st, 1905, did as joint plaintiffs commence a certain suit in the Circuit Court of Mississippi County, Arkansas, Osceola District, against the said Muncie Pulp Co.

Upon hearing hereof the said Trustee shall have the right to read in or as a part of the evidence any part or all of the proceedings of said last suit hereinbefore mentioned, subject to objections for competency and relevancy.

Fifth. That the trustee in bankruptcy filed an answer in the said cause on the 4th day of Oct., 1905, and the said plaintiffs, namely, the said Corn Exchange National Bank of Chicago and the said Mrs. M. L. Kinney, were subsequently enjoined by order of the United States District Court for the Southern District of New York from proceeding further with said suit. Upon the hearing hereof this said trustee shall have the right to read into or as a part of the evidence any part or all of the proceedings in said suit commenced in Arkansas, and also in said injunction proceedng subject to objections for re-evancy and competency.

Sixth. The State of Tennessee filed a bill in equity in the Chancery Court of Tipton County, Tennessee, against the Muncie Pulp Co., and W. A. Cissna. That a judgment was rendered in said proceeding in said Chancery Court and on appeal to the Supreme Court of Tennessee was reversed as shown by the opinion and decree of the Court.

1361 That all of the proceedings in said suit last mentioned or any part thereof, including the opinion of the Supreme Court may be read in evidence on the trial of this cause, subject to objection for competency and relevancy.

Seventh. That prior to the filing of the petition in bankruptcy herein one H. W. Stockley filed his bill in equity in the Chancery Court of Tipton County, Tennessee, against the said Muncie Pulp Co., and the said W. A. Cissna, That a judgment was rendered therein against the said Cissna and the said Muncie Pulp Co., and which judgment on appeal to the Supreme Court of Tennessee was reversed.

That all of the proceedings in said last mentioned suit, together with the opinion of the said Supreme Court or any part thereof, may be offered in evidence on the hearing hereof subject to the objections for competency and relevancy.

Eighth. Either the said Cissna or the said Oppenheimer, Trustee,

shall have the right upon the hearing of this cause to introduce as evidence any part of the proceeding or records or opinions of any Court in any of said suits hereinbefore mentioned, subject to objections for competency and relevancy.

January 4, 1909.

CARUTHERS EWING,
Attorney for W. A. Cissna,
By EDWIN T. TALIAFERRO, *Of Counsel.*
JAMES, SCHELL & ELKINS,
Attorneys for Trustee.

1362 EXHIBIT "A."

(Copy.)

Contract.

W. A. Cissna
and
Muncie Pulp Co.

This contract *was* made and entered into this 21st day of June, 1901, by and between W. A. Cissna of Chicago, Illinois, party of the first part, and the Muncie Pulp Co., a corporation of the State of New York, party of the second part, witnesseth:

That the said party of the first part, for the consideration hereinafter named, does hereby sell and convey to the said party of the second part, all of the timber of all kinds, sizes and descriptions upon the property known as the Dean's Island Plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas, to-wit: All of Fractional Section Thirty-Four (34); all of the South half of Section Thirty-Three (33); all of the south half of Section Thirty-Three (33) south and east of Chute; all of section thirty-two (32) south of Chute; all in township Ten (10) north, Range Ten (10) East.

Also all of fractional sections three (3), four (4) and five (5) in township nine (9) north, range ten (10) east, together with all accretions to all of said above described property, already made or hereafter to be made, by the Mississippi River or otherwise, the converse being limited to such land as is now in said described sections, and all accretions thereto, and not to land that may have originally been in said sections.

1363 The consideration for the said sale and transfer of timber is the sum of Thirty-Five Thousand ($35,000.00) Dollars, Seven Thousand ($7,000.00) Dollars of which consideration is cash in hand paid, the receipt of which is hereby acknowledged, and the balance of said consideration is represented by four notes of even date, herewith, each for the sum of Seven Thousand ($7,000.00) Dollars, with five per cent interest from date until paid, due on or before one, two, three or four years from date hereof.

It is hereby contracted and agreed that all of the timber within

the line of fence erected by R. L. Beeld, about the year 1896, is to be cut and removed within two years from date of this contract.

It is further contracted and agreed that the remaining timber, with the exception of that timber on the one thousand acres of low land adjoining island 37 and Centennial Island and one thousand acres more or less known as Dean's Island Tow-Head, is to be cut and removed within five years from the date of this contract, and the timber on the said one thousand acres of said land and one thousand acres more or less, known as Dean's Island Tow-Head, is to be cut within seven years from the date of this contract.

It is further contracted and agreed by and between the parties hereto that if at any time the said party of the second part shall cut and remove — the property a larger amount of timber than the proportionate value of the same has been already paid for, that it will immediately pay to the said party of the first part that proportion of the purchase price covering the said timber; that at no time shall they cut and remove a greater amount of timber than they have already paid for under this contract, it being the intention hereby that whenever any timber is cut and removed from the said property that it shall be at all times paid for in cash.

1364 It is further contracted and agreed that the said party of the first part reserved for his own use and benefit all the scattering trees, except cottonwood, the cultivated land above described, and in the small pasture at the lower barn lot. It is further contracted and agreed that the said party of the second part is to designate to the said party of the first part, or his agents, such timber accessable to the plantation, as the said party of the first part is authorized to cut, for fire and ginwood, on said plantation, which said wood is to be amply sufficient for all of the purposes of the said party of the first part, or his tenents on the said plantation; that the said party of the first part, or his tenants, shall at all times have the right to cut and remove a sufficient amount of timber for fire wood purposes upon the plantation.

It is further contracted and agreed between the parties hereto that the party of the second part shall have a right of way over the cleared land for the purpose of cutting and hauling the same from the timber land to the river front, where the hereinafter described tract shall be located. And it is particularly agreed that the party of the second part shall have the plot of ground one hundred and fifty feet by one thousand feet on the bank of the Mississippi River, upon which to stack said logs and timber so cut and removed.

The said party of the second part is to have the privilege of locating the said lot upon which to stack wood hereafter, and at such place as may be convenient to said party of the second part.

It is further contracted and agreed that the said party of the second part shall have the right of way upon which to remove the timber on Dean's Chute between Crops season on cleared land.

W. A. CISSNA,
MUNCIE PULP COMPANY,
By ROBERT GIBSON, *Agent.*

1365 Transactions closed and notes and checks delivered, August 7, 1901.

R. G. BROWN,
Att'y for Muncie Pulp Co.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, A. Humphreys Kortrecht, a notary public in and for said county and State at Memphis, duly commissioned and qualified, W. A. Cissna, the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and notarial seal at Memphis, aforesaid, this 21st day of June, 1901.

[SEAL.] A. HUMPHREY KORTRECHT,
Notary Public.

EXHIBIT "B."

This agreement made and entered into this the 23rd day of Sept., 1904, by and between the Muncie Pulp Co., of Muncie, Indiana, and Leo Oppenheimer, Receiver in Bankruptcy, represented by their attorney, R. G. Brown, and the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney and W. A. Cissna, parties of the second part, represented by their attorney, Caruthers Ewing.

1366 Witnesseth: That whereas an attachment has been levied upon certain pulp wood and saw logs on the property of W. A. Cissna on Dean's Island, Mississippi County, Arkansas, in a suot of the said Corn Exchange National Bank of Chicago and Mrs. M. L. Kinney, the Muncie Pulp Co., in the Circuit Court of said Mississippi County, Arkansas,

And, whereas, the said parties of the second part claim that *that* have a vendor's lien or equitable lien on the standing timber on the land of W. A. Cissna, sold by him to the Muncie Pulp Co., for the payment of two notes of thirty thousand dollars each, given for the purchase price of said timber by the Muncie Pulp Co., dated June 21, 1901, and payable with 5% interest from date, on the 21st day of June, 1904, and 1905, respectively, and a vendor's or equitable lien for the payment of said notes also on the timber attached.

Now, therefore, for the purpose of preserving the property and the rights of all the parties interested therein in statu quo it is agreed as follows:

1.

An order shall be entered in the case now pending in the Circuit Court of Mississippi County, Arkansas, dismissing the attachment and appearance for the Muncie Pulp Company shall be entered herein.

2.

The parties in interest now desire to make sale of the pulp wood now under attachment to the Southern Wood Supply Co., the "new" wood for $2.50 per cord, and the "drowned" wood for $1.85 per cord, delivered on the bank.

1367 The purchase price of said pulp wood, less $1.00 per cord for handling same, shall be deposited by the buyer in the Memphis Savings Bank to the joint account of R. G. Brown and Caruthers Ewing, attorneys subject to their joint check, as hereafter provided. The hauling of said pulpwood at $1.00 per cord shall be paid to Robert Gibson & Vince Beard.

3.

The parties in interest are to make delivery of the saw logs attached and now on the bank, to the Anderson-Tully Co., under the contract existing with that company by the Muncie Pulp Company and $5.00 per thousand feet of the purchase price of the said logs shall be paid by the purchasers in the Memphis Savings Bank, to the joint account of R. G. Brown and Caruthers Ewing, as above provided.

4.

It is further provided that Robert Gibson and Vince Beard shall be allowed to proceed with their contract with the Muncie Pulp Company to get out the saw logs on said land and to make delivery of the same to the Anderson-Tully Co., in accordance with its contract with the Muncie Pulp Co., provided that the purchasers shall deposit $8.00 per thousand feet of the purchase price of all logs so delivered in the Memphis Savings Bank as provided in paragraph two and three.

5.

It is further agreed that the purchasers of said pulp wood and saw logs shall have clear title to said timber so far as the titles and claims of the parties to this agreement are concerned.

6.

Said payment of $8.00 per thousand on the saw logs to be hereafter cut shall continue until the sum of $10,000.00 shall have been paid in from this source, and until the amount in bank shall be $16,000.00.

1368 7.

It is further stipulated, understood and agreed that the funds derived from the sale of the pulp wood and the saw logs now under attachment shall stand in lieu of the property attached, and that all the rights, claim and title of any and all parties to this agreement shall be and remain exactly as though the attachment were still in

force and the physical property siezed was still in the hands of the Sheriff of Mississippi County, Ark.

It is also understood, stipulated and agreed that the fund derived from the saw logs to be hereafter cut by Gibson & Beard, shall stand for and represent the timber as standing timber and that all the right, title, interests, liens or claims that the parties of the second part or any of them now have in and to the standing timber shall attach to said fund and shall be and remain just as though the timber were standing on the land.

8.

It is further agreed that the proper order shall be entered in the United States District Court for the Southern District of New York, in Bankruptcy, authorizing and ratifying this agreement; and that in the event this is not done this agreement shall be null and void.

In testimony whereof the parties have hereunto set their hands and seals this day and date first above written.

CORN EXCHANGE NATIONAL BANK
OF CHICAGO.
MRS. M. L. KINNEY,
W. A. CISSNA,
By CARUTHERS EWING, *Att'y.*
1369 LEO OPPENHEIMER,
Receiver Muncie Pulp Co.,
By R. G. BROWN, *Att'y.*

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, H. H. Barker, a Notary Public in and for Shelby County, Tennessee, duly commissioned, qualified and acting, Caruthers Ewing, who makes oath that he is attorney for the respondents, the Corn Exchange National Bank and Mrs. M. L. Kinney, and that the matter- stated in said answer to the petition of Leo Oppenheimer, Trustee, are within his personal knowledge, except those that necessarily appear to be stated on information and belief; said Caruthers Ewing further makes oath that he is authorized to make verifications of the statement made in said answer and that neither *his* claims, to-wit: the defendants to said petition, are within the State of Tennessee.

Said Caruthers Ewing makes oath that the statements made in the answer, except those matters which are necessarily make as on information and belief, are true, and that as to those matters which appear to be stated without the personal knowledge of respondents, affiant has been so informed and he believes the same are true.

CARUTHERS EWING.

Sworn and subscribed to before me, this 8th day of Jan., 1906.

[SEAL.] H. H. BARKER,
Notary Public.

EXHIBIT "D" TO ANSWER OF W. A. CISSNA TO PETITION.

1370 At Court of Bankruptcy held in and for the Southern District of New York, at 45 Cedar Street, New York City, on the 24th day of May, 1909, before Hon. John J. Townsend, Referee in Bankruptcy.

No. 7266.

In the Matter of MUNCIE PULP COMPANY, Bankrupy.

On the petition of W. A. Cissna, filed March 27th, 1907, on the answer of Leo Oppenheimer as Trustee in Bankruptcy of the Muncie Pulp Company, filed June 8th, 1908; on the stipulation made herein dated April 29th, 1909, and the three exhibits thereto attached; on the affidavit of R. G. Brown, verified January 7th, 1909, and filed with the Referee January 20, 1909, and the stipulation relating thereto similarly filed, dated Jan. 16, 1909; on certified copies of the complaint in equity of the State of Tennessee vs. W. A. Cissna and the Muncie Pulp Company, and certified copies of the answers thereto; on the Opinion of the Supreme Court of the State of Tennessee in the case of the State of Tennessee vs. W. A. Cissna and the Muncie Pulp Company, reported in the 119 Volume of the Reports of the State of Tennessee at page 47, and the map which appears in the case of Stockley vs. Cissna, reported in the same Volume; and after hearing Edwin E. Taliaferro, Esq., in support of the prayer of the petition, and James N. Rosenberg and Robert P. Levis, Esqrs., of counsel of Leo Oppenheimer, the Trustee of the Muncie Pulp Company, in opposition thereof.

It is ordered That the prayer of the petition be granted, and that the Trustee be directed to pay the face of the two notes mentioned in the petition, with interest thereon at 5% from June 21,
1371 1901, to the extent that he may have funds in his hands realized from the sale by himself or the receiver of timber removed by either of cut and removed by either from the land embraced in the contract dated June 21, 1901, made and entered into between W. A. Cissna and the Muncie Pulp Co., to the extent of any interest received thereon either by the Receiver or the Trustee, less any proper charges against the same, as such funds, interest, and charges may be determined by special reference to that end; and,

It is further ordered that the expenses of this hearing, to-wit: the Referee's indemnity and the bill of the stenographer, be paid out of the said fund when the same shall have been determined as above as a first charge thereon.

J. J. TOWNSEND,
Referee in Bankruptcy.

United States District Court, Southern District of New York.

In Bankruptcy. No. 7266.

In the Matter of MUNCIE PULP COMPANY, Bankrupt.

Memorandum of Referee on the Petition of W. A. Cissna.

A petition in involuntary bankruptcy was filed in this District against the Muncie Pulp Company, July 30, 1904, followed Aug. 3, 1904, by the appointment of Leo Oppenheimer as Trustee in Bankruptcy in March, 1905.

1372 W. A. Cissna has filed with the Court a petition alleging the making of a contract between himself and the Muncie Pulp Co., on June 21st, 1901, praying that two notes mentioned in the petition and exhibited in the Court be declared a true and lawful debt, due and owing him, by the Muncie Pulp Co., and also declared to be a prior and preferred charge on and upon a certain fund realized and received by the Trustee in Bankruptcy out of the proceeds, or avails, of certain timber which was the subject matter of the contract.

The Trustee in bankruptcy of the Muncie Pulp Co., filed an answer to this petition.

The matter has been submitted to the Referee on a stipulation as to facts and surroundings dated April 29th, 1909, attached to which as Exhibit "A" is a copy of the contract dated June 21, 1901; as exhibit "B" a copy of an agreement dated Sept. 23, 1904, between the Company and its receiver in bankruptcy, now the trustee, as parties of the first part, and W. A. Cissna, and the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, as parties of the second part, who were at the time the endorsement of the two notes before mentioned since endorsed back to W. A. Cissna whereby an arrangement was made to allow the cutting of timber embraced in the contract without prejudice to the rights of all the parties to the agreement exactly as though an attachment vacated by the agreement (and which will hereinafter be considered) was still in force and the property seized still in the hands of the Sheriff of Missisippi County, Arkansas, and that the fund derived from timber thereafter cut should be treated as standing timber, and that all the rights of the parties of the second part who were, as stated, W. A.

1373 Cissna and the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, should attach to the fund and should remain as though the timber was standing on the land; as exhibit "C," a copy of an order made by the Hon. Geo. C. Holt, in this District, under date Feb. 14th, 1906, transferring the fund realized from the sale of the timber cut from the Memphis Savings Bank to the Trustee in Bankruptcy, without prejudice to any of the rights or remedies of the Corn Exchange National Bank of Chicago or of Mrs. M. L. Kinney.

It may here be said that the Corn Exchange National Bank of

Chicago, and Mrs. M. L. Kinney were endorsers from W. A. Cissna of the two notes mentioned in the petition and that these notes had been subsequently re-endorsed after maturity back to W. A. Cissna as appeared in article 11 of the stipulation of facts considered as proven by the claimant (p. 3) which article also stipulates that no rights under the said note, or the contract pursuant to which they were given were lost so far as W. A. Cissna is concerned, on his having endorsed said notes or in his having re-endorsed to him.

There is also before the Referee by stipulation dated June 16, 1909, the affidavit of R. G. Brown, of Shelby County, Tennessee, of Counsel for the Trustee, explaining the circumstances under which the agreement, exhibit "B" attached to the stipulation dated April 29, 1909, was entered into by the parties, and that these parties estimated the sum of $16,000.00 mentioned in the exhibit "B" as ample at that date to secure all the right of the then holders of the two notes aggregating $14,000.00, and that it was not the intention of counsel of the then holders of the notes in fixing on the amount of $16,000.00 as the fund to be deposited, to waive any rights of his clients.

1374 The material portion- of the contract are as follows:

"That the said party of the first part (W. A. Cissna) for the consideration hereinafter named, does hereby sell, and convey to the said party of the second part (Muncie Pulp Co.) all the timber of all kinds, sizes and descriptions upon the property known as Deans Island Plantation, and particularly described as being in the Counties of Mississippi and Crittenden, State of Arkansas.

The cost of said sale and transfer of timber is the sum of Thirty five ($35,000.00) Thousand Dollars, Seven Thousand ($7,000.00) Dollars of which consideration is cash in hand paid, the receipt of which is hereby acknowledged, and the balance of said consideration is represented by four (4) notes of even date, each for the sum of Seven Thousand ($7,000.00) Dollars, with 5% interest from date until paid, due on or before 1, 2, 3, or 4 years from date thereof.

It is further contracted and agreed by and between the parties hereto that *is* at any time the said party of the second part shall cut and remove from the said property a larger amount of timber than the proportionate value of the same has already been paid for, that it will immediately pay to the said party of the first part that proportion of the purchase price covering the said timber; that at no time shall they cut and remove a greater amount of timber than they have already paid for under this contract, it being the intention thereby that whenever any timber is cut and removed from the said property that it shall be at all times paid for in cash."

1375 Payments have been made as follows: $7,000.00 cash June 21st, 1901, the first note of $7,000 payable June 21st, 1902, the second note of $7,000.00 payable June 21st, 1903, the remaining two notes each for $7,000.00 being the third note payable June 21, 1904, and the fourth note, payable June 21st 1905, have not been paid, and are the two notes mentioned in the petition of W. A. Cissna. They bear interest at the rate of 5% from their date, which is June 21st, 1901. These notes remain unpaid and W. A. Cissna

is now the owner and holder. It will be perceived that apparently three-fifths of the total consideration of $35,000.00 specified in the contract had been paid by the Muncie Pulp Co., on or before June 21st, 1903.

It is also stipulated that Leo Oppenheimer, either as receiver or trustee, since the date of his appointment, Aug. 3, 1904, has cut and sold timber standing at the time of the filing of the petition on July 30, 1904, of the value of $15,000.00, and, further, that as receiver has sold timber to the value of $8,000 lying upon the ground at the date of his appointment, or Aug. 3, 1904.

It is also stipulated that pursuant to the agreement, exhibit "B," dated Sept. 23, 1904, Leo Oppenheimer, deposited from the first moneys received by him as before stated the sum of $16,000.00 in the Memphis Savings Bank.

At the request of the Trustee (p. 4) it is stipulated that on Aug. 18, 1904, the Corn Exchange National Bank of Chicago, the endorsee of the third note maturing June 21, 1904, and Mrs. M. L. Kinney, the endorsee of the fourth note maturing June 21, 1905, filed a complaint in the Circuit Court of Mississippi (meaning Arkansas) against the Muncie Pulp Co., the prosecution of which was enjoined 1376 by the District Court of this District Feb. 14*m* 1906, by the order known as exhibit "C," which order was subsequently affirmed by the Circuit Court of Appeals in Second Circuit. A summary of the complaint, at the request of the trustee, appears at pp. 5-7 of the stipulation. It alleges that the plaintiffs as holders of the two notes had and were entitled to enforce a vendor's lien and an equitable lien on the said timber and that the company was a non-resident and insolvent corporation and about to remove its property out of the State of Arkansas without leaving enough to satisfy the plaintiffs' claim or the claim of its creditors. The prayer of the complaint was for the foreclosing of the liens and for a writ directing the Sheriff to impound the timber.

Upon the filing of the complaint an attachment was issued and levied. At the request of the trustee (p. 8) the stipulation contained in extenso the statute of the State of Arkansas under which attachment mentioned was issued. At the request of the trustee (p. 9) the stipulation places before this Court the opinion of the Supreme Court of Tennessee in an action brought by the State of Tennessee against the Company and W. A. Cissna in equity in the chancery Court of Crittenden County, Tennessee, reported 119th Tenn. pp. 47, 56.

This record is material in connection with the contention of the trustee that the present application of W. A. Cissna should be stayed until the final determination of the cause mentioned in the Chancery Court of Tennessee because of the claim made against the Trustee by the American Surety Company, as hereafter mentioned.

At the request of the trustee as material in connection with his last mentioned contention the stipulation (p. 10) places before the Court a claim filed with the former Referee March 14th, 1905, by the American Surety Co., of New York.

1377 An examination of this claim discloses: a bond in the penal sum of $10,000.00 executed by the Muncie Pulp Co., as principal, and the American Surety Co., of New York, as surety, Jan. 6, 1904 (referred to as F) given on the dissolution of an injunction obtained by the State of Tennessee Dec. 15, 1903, as complainant in the action just mentioned and conditioned that the company would pay and discharge any judgments rendered against it for the value of any timber cut from any land adjudged to belong to the State of Tennessee which were upon the said land on Dec. 15, 1903. The security offered to the American Surety Co., on this bond was the agreement of indemnity of the Muncie Pulp Co. The claim also discloses a bond in the penal sum of $15,000.00 dated March 9, 1904, made by the Muncie Pulp Co., as principal and the American Surety Co., of New York, as surety (referred to as C) given on the dissolution of the same injunction in the same action and conditioned that the company would pay and discharge any judgment in said cause for the value of any timber cut and removed from the land described in the bill, since Dec. 15, 1903. The security offered to the American Security Co., on this bond was the agreement of indemnity of the Muncie Pulp Co.

It should be noted as before stated that before the Bankruptcy three-fifths of the entire consideration of the contract between Cissna and the Muncie Pulp Company had been paid.

It should also be noted that it is stipulated at the request of the trustee (at p. 8) that at the time of the filing of the bill under the Arkansas Statutes by the Corn Exchange National Bank of Chicago, and Mrs. M. L. Kinney, or on Aug. 19th, 1904, three-fifths of the timber on the land embraced in the contract had not been cut.

1378 It should also be noted that the claims on the notes for the unpaid two-fifths of the entire consideration is $14,000.00 with interest from June 21, 1901 at 5%. This interest item computed to June 21, 1909 is $5,600.00.

It should also be noted as stipulated at the request of the claimant (p. 3) that the receiver in bankruptcy subsequent to the appointment on Aug. 3, 1904, has cut and sold timber standing at the date of the filing of the petition in bankruptcy on July 30, 1904, of the value of $15,000.00 and has sold and disposed of timbers lying on the ground on Aug. 3, 1904, the date of his appointment, of the value of $8,000.00, making $23,000.00 which fund is or has been in the trustee's possession with any interest that may have been paid to him by the depository. On April 15, 1907, to the extent of $16,000.00 this fund was paid over to the trustee and is on special deposit drawing interest at the rate of 2½%. This interest computed April 15, 1909, amounts to $800.00.

It should also be noted that as early as Sept. 23, 1904, (see exhibit B attached to the stipulation of April 29, 1909) it was stipulated, (subd. 7) that although the trustee might proceed to cut or dispose of timber or remove timber already cut, the fund derived from timber thereafter to be cut should represent standing timber as though uncut.

The contract made June 21, 1901, between Cissna and the Muncie

Pulp Co., has already been interpreted by the Court of Appeals in this Circuit (see in re Muncie Pulp Company 151 Fed. Rep. 732). It is claimed by the trustee that such interpretation was obiter. However, this may be, independently of this decision, my own interpretation of the contract would be the same.

1379 In effect the interpretation given by the Circuit Court of Appeals (bottom of p. 734 and top of p. 735) is as under the contract taken in its entirety, the Muncie Pulp Co. had no right against the wish of the seller, Cissna, to cut and remove timber in excess of the amount of payment, and that the timber on Cissna's land was to be paid for before it was cut and removed. Or differently stated that as to timber "not yet cut and removed" the seller Cissna was entitled to hold the same and prevent its removal by the company until it should pay him in cash for whatever it might seek to remove. The Circuit Court expressly at the bottom of p. 734 did not pass on the question whether or not the seller Cisna had a lien upon the timber lying upon the land for the price of any timber which had been "cut and removed" in excess of payment. The Court also held (top of p. 735) that neither the receiver or the trustee had any better title to the timber or any greater right to cut or remove it than the bankrupt had.

It appears as stated from the facts stipulated at the request of the claimant (p. 3) that the receiver or the trustee had cut and sold timber on the land at the date of the filing of the petition in bankruptcy, to-wit: July 30th, 1904, of the value of $15,000.00 and that the receiver sold and disposed of timber to the value of $8,000.00 lying upon the ground (which implies it had not been removed therefrom) at the date of the receiver's appointment Aug. 3, 1904.

1380 It also appears, as stated, that on Aug. 19, 1904 when the bill was filed in the Circuit Court of Arkansas by the then holders of the two unpaid notes (stipulated at the request of the trustee p. 8) three-fifths of the timber on the land had not been cut and that at that date there was more than $16,000.00 worth of timber on the land.

I shall hold as a matter of law in accordance with decision of Court of appeals that at least as to timber standing on the land at the date of filing of the petition in bankruptcy July 30, 1904, and as to timber cut before then, but not at that date removed from the land, which may have been cut and sold or removed and sold by either the receiver or trustee the claimant has a lien on the proceeds of the sale of both classes of timber.

I do not think such cases as In re Garcewich 8 A. B. R., 149, Pontiac Buggy Co. vs. Skinner, 20 A. B. R., 206, 211, and other like cases apply. It is no doubt true as urged by the trustee that the timber sold by Cissna under the contract to the Muncie Pulp Co., was to be consumed by the latter company in its business, but it — equally true under the contract that the timber so sold was not to be removed from the land until paid for. On this record so far as it was so removed since July 30, 1904, it was removed in disregard of the vendor (Cissna) rights.

This brings me to the conclusion of the contention urged by the trustee that the filing of the bill in the Arkansas Court by the then holders of the two notes invoking the operation of the Arkansas Statutes appearing at page 8, of the facts stipulated at the request of the trustee bars the claimant from now asserting his title.

1381 Passing over the language of the stipulation made at the request of the claimant in reference to the endorsement and re-endorsement of the two notes, my conclusion is that the filing of this bill does not bar the present claim and that it is not inconsistent therewith. The bill was filed Aug. 19, 1904, to endorce or protect a vendor's lien not created by the Statute which provides merely for the impounding of property about to be sold, concealed or removed from the State, but created by the original contract of sale. The fact, therefore, that the then *g*olding of the note invoked the operation of the statute (secion 265) cannot be urged as a waiver of any lien given to them by the original contract, but on the contrary is a reassertion of the validity of that lien. This in view of the statutes taken by the Supreme Court of Arkansas as I read its decision in Halpern vs. Clarendon Hardware Lumber Co., 64 Ark., p. 132, at the bottom of page 135, where the word "vendor" is obviously a misprint for "vendee."

This brings me to the consideration of the contention of the trustee that an order should be granted in favor of the claimant until final judgment is rendered in the action pending in the Chancery Court of the State of Tennessee, brought by that State against both Cissna and the Muncie Pulp Co., or at least without indemnity—to the trustee by Cissna against any liability by reason of the claim of the American Surety Co., before mentioned.

The suit was brought by the State of Tennessee to recover about 1,000 acres of land alleged to be in Tipton County, Tenn., then in the possession of Cissna, claiming to own the same in fee and against the Muncie Pulp Co., as his le*a*see, and an injunction was asked to stay waste in cutting and removing the timber. The defense pleaded was that the lands sued for were not in the State of Tennessee but in the State of Arkansas. The issue in that cause *g*inges on what

1382 constituted the "middle of the Mississippi River," which was and is the boundary line between Tennessee and Arkansas and as I understand it, Cissna's title to the land in great part stands or fails according as that issue may be determined. See the report of the case and maps in the 119 Tenn. Reports 47. The cause apearantly is at issue with an option to the State to amend bill in respect to the land in controversy (see pp. 133-134 of the reported case) but no hearing has been had.

The original bill was filed in the Chancery Court of Shelby County, Tenn., January 17, 1905. A copy of the pleadings in the cause is in evidence before me under the stipulation of facts made at the re*w*uest of the trustee(p. 9). These pleadings show that the bill was filed Jan. 17, 1905. The prayer of the bill is in the usual form of an application for a writ of injunction against the defendants, who are the Muncie Pulp Co., W. A. Cissna and Vince Beard, and for writs of attachment to impound the timber and lumber cut on

hand, as well as for the appointment of a Receiver to sell and dispose of such timber so attached and impounded, as well as for a recovery of the value of the timber already cut and removed. The joint answer of the Muncie Pulp Co., and Leo Oppenheimer, the Trustee in Bankruptcy, was filed March 30, 1905. The answer of W. A. Cissna was filed March 30, 1905. These three answers are those referred to by the Supreme Court of the State at p. 56 of 119 Tenn. as pleading, in the abatement to the jurisdiction of the Court, that the land sued for were not situated in the State of Tennessee but in the State of Arkansas. The Chancellor had sustained the pleas.

1383 The Supreme Court of Tennessee in the reported case reverses this decision and remanded the cause as stated supra and explained at p. 134 of the reported case.

The two bonds upon which the American Surety Co., had filed its claim, were given by the Muncie Pulp Co., with the American Surety Co., as the latter's surety and apparently without any indemnity from any source and without Cissna joining in the bonds or being a party to the bonds or indeed requesting the bonds. Apparently the bonds were given by the Muncie Pulp Co., in its own interest. The theory of the Surety Company's claim is that by reason of the execution of the bonds, the amount necessary to indemnify the Surety Co., against loss constitutes a charge upon the property of the Muncie Pulp Co., prior in dignity to any other liens thereon. As stated, this claim of the Surety Company was filed with the former referee March 14, 1905. Moreover it is obvious that to date the American Surety Co., has suffered no loss by reason of the execution of the two bonds.

It seems to be needless that I should examine the merits of the controversy between the State of Tennessee and the defendants Cissna and the Muncie Pulp Co. The State of Tennessee is not before me as a party, neither would a finding by this Court that the State of Tennessee had or has not a good cause of action, be binding on the Chancery Court of Tipton County, Tenn., which might decide precisely the contrary.

For present purposes, however, I will assume the ultimate recovery of the State of Tennessee against Cissna and the Muncie Pulp Co., resulting in a call upon the surety company to fulfill its obligations under its bonds to its law.

Even so, I do not see that such a situation is ground for the denial of the application of the claimant Cissna or a stay of 1384 any order to which he otherwise would be entitled. Cissna is claiming that his money from his vendee or its represen-ative, due under a contract between the two. His right to make that contract of sale is challenged by the State of Tennessee as well as the right of the Muncie Pulp Co., to make the purchase. The Muncie Pulp Co., to enable it to lift the injunction obtained by the State of Tennessee procures the Surety Company to execute a bond of suretyship. Cissna is a stranger to this bond, except so far as he profits by the lifting of the injunction. The Surety Co. made the bond knowing all these conditions.

Even were the surety company able to prove as against the Muncie Pulp Co., loss or damage by reason of its execution of the bond, its claim would be primarily against the assets of the Muncie Pulp Co., and not against the fund in controversy, the proceeds of property the title to which as between Cissna and the Muncie Pulp Co., belongs to Cissna even if the title of the State of Tennessee is paramount to the latter's title.

My conclusion is that the claimant is entitled to an order against the fund in the hands of the Trustee so far as those funds represent the proceeds of timber either removed by the receiver or trustee from the land or cut and removed from the land by the receiver or trustee.

Unless the parties can agree upon the amount of that fund the order should provide for a reference to ascertain its amount.

The order should also provide that when the fund is thus ascertained the trustee to the extent of the fund inclusive of any interest he may have received thereon less any expenses proper*able*
chargeable against it, should pay the face of the claimant's
1385 note with interest thereon at 5% from June 31st, 1901. The order should also provide that when the fund is thus ascertained and as a first charge thereon, the expense of the application, to-wit: the Referee's indemnity and the bill of the stenographer should be paid out of the fund. I deem this equitable.

Any party desiring a review of the order granted by me, may take this Memorandum, together with the papers referred to in it, as my certificate under General Order XXVII of the questions presented and my cummary of the evidence relations thereo*t*.

New York, May 24, 1909.

J. J. TOWNSEND,
Referee in Bankruptcy.

EXHIBIT "E" TO ANSWER OF W. A. CISSNA'S PETITION.

United States District Court, Southern District of New York.

In the Matter of the MUNCIE PULP COMPANY, Bankrupt; W. A. CISSNA, Claimant.

SIRS: Please take notice that upon the certificate of the Referee herein, filed in the office of the Clerk of this Court, on May 26th,
1909, and upon an order and the memorandum of the said
1386 Referee, dated and filed herein in the Referee's office, on May 24, 1909, and upon all other papers and proceedings recited and referred to, in the certificate of the said Referee, and upon all other papers and proceedings herein, I will move this court at a stated term thereof, to be held at the United States Court House in the Post Office Building, in the Borough of Manhattan, City and County of New York, on the — day of June, 1909, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order confirming in all respects the order and

memorandum of the Referee herein and for such other and further relief as to the Court may seem just and proper.

Dated New York, May 26th, 1909.

CARUTHERS EWING,
Attorney for W. A. Cissna.

Office & Post Office address No. 5 Be-ckman Street, New York City.

EDWIN T. TALIAFERRO,
Of Counsel.

To James, Schell & Elkins, Attorneys for Trustee, Office & P. O. Address 170 Broadway, New York City.

EXHIBIT "F" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court, Southern District of New York.

1387 In the Matter of MUNCIE PULP COMPANY, Bankrupt; ex Parte W. A. CISSNA.

I am satisfied that under the contract considered independently and under the opinion of the Circuit Court of Appeals, title passed at once to the bankrupt. I am equally satisfied that Cissna remained in possession of it while it was on the butt. The question is more difficult as to its possession after it was cut and before it was removed from Deans Island. No doubt the bankrupt's servants had full power to cut and draw it to the shore but they had nothing to move it until it was paid for, and even though they had such possession as would have justified their recovery of it it was at least a possession shared by Cissna since his consent was necessary for its removal from land which concededly always remained in his own possession. Therefore, the cut timber was also in Cissna's possession.

If this is so, it disposes of such cases as Re Garcewich 8 A. B. R., 149, where a chattel mortgage was upset*m* because the bankrupt was given the right to consume the goods. All such cases which follow the rule, the last authority of expression of which is Skilton vs. Codington, 185 N. Y. 80, presuppose that the bankrupt is not only in unlimited possession but is authorize*c* to sell or *s*onsume the goods. Here he was neither. Cissna had all the right of a pledge- or at least of a lienor and he had not given the bankrupt means of obtaining a fictitious credit. Even though his possessions were not adequate to support an unrecorded chattel mortgage which I do not concede, it was certainly enough to prevent the application of the rule in Re Garcewich, supra.

1388 The trustee objects however that in the Arkansas suit Cissna's assignors elected to regard the property as belonging to the Pulp Co., by asserting a vendor's lien upon it and that now Cissna cannot consistently claim that property. He need not claim

title in the timber and indeed he had no title at any time after the contract. Neither the Arkansas suit nor this suit contradict the trustee's title. Attachment under the Arkansas Statute covers a proceeding by which they might enforce their vendor's lien for the purchase price. Then they relied and now rely upon the lien reserved under the contract which necessarily presupposes that the contract remains unre-cinded and the title is still in the bankrupt.

This disposes of the trustee's claim to the property itself as against Cissna, but a question arises as to the extent of Cissna's claim. Upon that score I agree with the learned Referee that the full sum of $23,000.00 is a security for the note, with interest, since the timber would have secured the note likewise with full interest. It is not a question of reclaiming a fund with the profits which the trustee had received upon it, but it is a question of paying the debt out of the security. I should concede that the total amount of the security was only the sum of $23,000 with such interest as that sum had actually earned in the hands of the trustee, but the full amount must be subject to the debt with interest for precisely the same reason that a bankrupt's real estate is subject to the interest on all debts which are secured by mortgage upon it. Nor do I think that the stipulation by which the Arkansas attachment was raised limited the claim of Cissna in any sense to $16,000.00. Brown's affidavit is explicit to that effect, and it only bears out the meaning of the stipulation particularly the second paragraph of the subdivision marked "7."

1389 While I agree with the learned Referee that the whole fund of $23,000.00 is charged with Cissna's debt, nevertheless, insofar as he directs an immediate payment to Cissna, I must modify his report unless Cissna is willing to give a bond in the amount of the sum paid him, conditioned to respond to any claim which may subsequently be made by the State of Tennessee or the American Surety Co., against the trustee herein. My reasons for imposing this condition on him are as follows: If the State of Tennessee recovers in her suit she will have three possible remedies, either an accounting against the trustee or Cissna for the profit which the trustee has made from cutting and selling the lumber, or a scire facias against the Surety Co. Is she takes the latter course, as is likely, the Surety Company will pay the claim rightfully due from the Bankrupt and under the common rule it will be entitled by way of abrogation to whatever rights against the principal, i. e., both Cissna and the Bankrupt, the State would have had but for the payment by the Surety Co. It is therefore not at all adequate to the rights of the surety to say that it is a simple creditor or would be after paying the State's claim. As the State would not be a simple creditor if it succeeded in the claim, so also would not be the Surety Co. Therefore, if that Company pay the State's decree then it could sue either the Trustee or Cissna. If it sued the Trustee he would in turn have a right-over against Cissna, upon his implied warranty of title, the damages for which would be precisely the value of the property which the Trustee had lost by the recovery of the Surety Company. This would result in a complete circuit of action

in which Cissna would be compelled to repay to the Surety Company the sum which he now seeks to recover. Equity will of course prevent any such result, and if Cissna wishes a present payment he must suitably guarantee the Trustee and the Surety Company against the Tennessee suit.

1390 The Surety Company has already made claim to a preference and it must be cited into this proceeding. The State of Tennessee may likewise intervene if it shall be so advised, though I have no power to cite the State to this proceeding. If the Surety Company makes no claim upon the proceeds when it has been made a party and if the State chooses to waive any rights in the fund, then Cissna may have an order for the fund. If both these events do not occur, Cissna must either give the usual bond, or the fund must await the final determination of the Tennessee suit. In any event, however, the interest on Cissna's notes must stop as of the date of the entry of the order herein. My reason for this is that the uncertainty of Cissna's title arises not from any fault of the trustee, but because of the State's claim. The Court stands ready now to pay Cissna out of the fund derived from his timber, but it cannot do so, because of the claims made by the State. Those claims may not be eventually substantiated, but it is quite clear that they do not arise from any act of the bankrupt, but from the condition of Cissna's title. The fund could be at once tendered and the estate profit by the balance, and the prevention of this result I must attribute to Cissna.

The expenses of this proceeding must be borne by the fund, not by Cissna.

1391 EXHIBIT "G" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court for the Southern District of New York.

In the Matter of THE MUNCIE PULP COMPANY, Bankrupt. WILLIAM A. CISSNA, Claimant.

This cause this day came on for hearing at a Regular Term of this Court, before Hon. Learned Hand, presiding, upon the motion of William A. Cissna, claimant, to confirm the order of Hon. John J. Townsend, Referee, dated May 24th, 1909, and filed in the office of the Clerk of this Court, on the — day of May, 1909, and upon the motion of Leo Oppenheimer, Trustee, to overrule and disaffirm said order, and the Trustee's petition for Review, and the Court having fully considered said two motions, the order of said Referee and the evidence upon which the same was based, namely the petition of William A. Cissna, filed March 27th, 1907, the answer of Leo Oppenheimer, as trustee in bankruptcy, and the Muncie Pulp Co., filed June 8th, 1908, the stipulation made herein, dated April 8th, 1909, and the three exhibits thereto attached, the affidavit of R. G. Brown verified January 7th, 1909, and filed with the Referee January 20, 1909, and the stipulation relating thereto, similarly

filed, dated January 16th, 1909, and the certified copies of the complaint in equity of the State of Tennessee against Wm. A. Cissna and the Muncie Pulp Co., and certified copies of the answers thereto
the opinion of the Supreme Court of the State of Tennessee
1392 in the case of the State of Tennessee against Wm. A. Cissna and the Muncie Pulp Co., reported in 119 Volume of the Report of the State of Tennessee at page 47, and the map which appears in the cause of Stockley against Cissna, reported in same volume, and after hearing Edwin T. Talliaferro of counsel for the said Wm. A. Cissna, and R. P. Levis of counsel for the said Leo Oppenheimer, Trustee, it is

Ordered, adjudged and decreed, That the said order of the said John J. Townsend, Referee, is hereby approved, ratified and confirmed in accordance with the terms and provisions of this order as hereinafter set out. It is further ordered, adjudged and decreed, that the prayer of the petition of the said Wm. A. Cissna be granted, and that the Trustee in Bankruptcy, the said Leo Oppenheimer, is hereby directed to pay to the said Wm. A. Cissna, or his attorney or counsel of record herein, the amount of the two notes mentioned in the petition was $7,000.00 each, with interest thereon at 5% from June 21, 1901, to the date of this decree, and no further, to the extent that he may have funds in his hands realized from the sale by him or the receiver herein of timber removed by either or cut or removed by either from the land embraced in contract, dated June 21st, 1901, made and entered into between Wm. A. Cissna and the Muncie Pulp Co., it is further,

Ordered, adjudged and decreed That the expenses of this hearing, to-wit: the Referee's indemnity, the bill for stenographer and the cost and disbursement incurred in this Court, be first paid out of said fund when the same shall have been finally determined. It is further

Ordered, adjudged and decreed, That this order shall take effect and become operative, subject to the following conditions:
1393 First. Before said fund or any part thereof shall be paid to said Wm. A. Cissna, he shall make an executive bond to be approved by this Court, payable to the American Surety Co., of the City of New York, and Leo Oppenheimer, Trustee, in Bankruptcy, of the Muncie Pulp Co., to indemnify and hold harmless the said American Surety Co., and Leo Oppenheimer, Trustee in bankruptcy of the Muncie Pulp Co., and to indemnify and hold harmless the said American Surety Co., and said Leo Oppenheimer, Trustee in Bankruptcy of the Muncie Pulp Co., on two certain bonds, namely, one bond for the sum of $10,000.00 executed by the Muncie Pulp Co., as principal, and the American Surety Co., as surety, dated Jan. 6th, 1904, given on the dissolution of the injunction by the State of Tennessee Dec. 15th, 1903, as complainant in the action just mentiones, and conditioned that the Company would pay and discharge any final judgment rendered against it for the value of any timber cut from any land adjudged to belong to the said State of Tennessee which were upon the said land on Dec. 15th, 1903, also a bond in the penal sum of $15,000.00 dated March 9th, 1904, made by the Muncie

Pulp Co., as principal and the American Surety Co., of New York, as surety, given on the dis-olution of the same injunction in the same action and conditioned that the company would pay and discharge any judgment in said cause for the value of any timber cut and removed from the lands described in the bill, since Dec. 15th, 1903. The said bond so to be executed by the said William A. Cissna, to be made payable for only such sum as may be received by said Cissna and which sum the said American Surety Company may hereafter be compelled to pay out by reason of the said two bonds above mentiones. It is further,

1394 Provided That the said Wm. A. Cissna shall have the privilege of substituting a bond or bonds to the State of Tennessee in the Chancery Court of Shelby County, Tennessee, covering the amount to be paid, and actually received by the said Cissna under this order in lieu and place of that amount of the said two bonds of the said American Surety Co., and thereby releasing and discharging same to the extent of the said bond of Wm. A. Cissna and in the event of such substitution satisfactory to the State of Tennessee in said Chancery suit, as evidenced by a certified copy of an order of that Court, then and in that event the said Trustees shall pay to the said Wm. A. Cissna the said two notes of $7,000.00 each with interest thereon at the rate of 5% per annum as hereinbefore provided.

Dated New York, July 26, 1909.

LEARNED HAND, *D. J.*

EXHIBIT "H" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court, Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt; W. A. CISSNA, Claimant.

1395 An application having been made by the Trustee in Bankruptcy for leave to deposit in the Chancery Court of Shelby County, Tennesseee, the sum of $19,668.10 said deposit to stand to the credit of the action now pending in said Court, entitled "The State of Tennessee vs. W. A. Cissna and the Muncie Pulp Co.," and said application coming in for hearing before this Court and Edwin T. Taliaferro of counsel for W. A. Cissna, having asserted a lien against the said fund for services, rendered by him and by Caruthers Ewing, as attorney of record in the proceedings in the Southern District of New York.

Now, upon reading and filing the notice of motion dated the 12th day of May, 1910, and the annexed petition of Leo Oppenheimer, duly verified, the 12th day of May 1910, and on reading and filing the Appeal Bond of Edwin T. Taliaferro, verified May 15th, 1910, and after hearing Robert *P.* Levis of counsel for the Trustee in support of the motion, and Henry C. Wilcox, attorney for the American Surety Co., in support of the said motion, and Edwin T. Taliaferro, of counsel for W. A. Cissna claiming a lien upon the said fund both for serv-

ices rendered as counsel and attorney of record, and upon motion of James, Schull & Elkus, Attorneys for Trustee, it is

Ordered, That Leo Oppenheimer as Trustee in Bankruptcy be and he hereby is authorized and directed to deposit in the Chancery Court of Shelby County, Tennessee, the sum of $19,668.10 said deposit to be made to the credit of the action now pending in the said Court entitled "The State of Tennessee vs. W. A. Cissna and the Muncie Pulp Co.," to be held by the said Court pending the determination of the said cause and to be paid over to W. A. Cissna or the State of Tennessee, as the said Chancery Court may direct, said fund to be subject, however, in case a judgment is rendered in favor of W. A. Cissna, to a lien for services rendered to the said W. A. Cissna by his attorney of record, Caruthers Ewing, in the Southern District of New York, and it is further,

1396 Ordered, that upon the payment of said sum to the Clerk of the Chancery Court of Shelby County, Tennessee, The State of Tennessee as plaintiff in said action, shall consent to the original and amended bill filed against the Muncie Pulp Co., and Leo Oppenheimer as trustee and receiver, be dismissed at the cost of the complainant as to the Muncie Pulp Co., and Leo Oppenheimer Trustee and Receiver and the American Surety Co., of New York. It is further

Ordered, That such payment shall be made upon condition that the bond executed by the Muncie Pulp Co., as principal and American Surety Co., of New York, as Surety, on or about the 6th day of Jan., 1904, in the sum of $10,000.00 and the further bond executed by the said Pulp Company as surety in the sum of $15,000.00 on or about the 9th day of March, 1904, be cancelled and that all liability upon said bond be released, both as to the Muncie Pulp Co., and as to the American Surety Co., and upon the further condition that the said sum of $19,668.10 be received in full of all claims which either W. A. Cissna or the State of Tennessee may have as against the Muncie Pulp Co., Leo Oppenheimer as receiver, and trustee in bankruptcy, of the Muncie Pulp Co., and the American Surety Company, either or both, and upon further condition that in the event said Chancery Court of Shelby County, Tennessee, shall find upon the trial of said cause that said W. A. Cissna is entitled to said fund of $19,668.10, or any part thereof, then and in that event said sum shall be paid to said W. A. Cissna subject to the lien of his attorney as hereinbefore provided.

Dated New York, May 17th, 1910.

1397 EXHIBIT "I" TO ANSWER OF W. A. CISSNA TO PETITION.

United States District Court, Southern District of New York.

Re THE MUNCIE PULP COMPANY Ex Parte W. A. CISSNA.

HAND, *District Judge:*

Cissna's petition is that the suit in the Chancery Court of Tennessee is in effect in rem, and that the res is within the territory of the State of Arkansas. He says that no adjudication of a Court of Tennessee, even though avowedly determining the very issue as to whether the res is within the territory of the State of Tennessee,—an issue upon which the jurisdiction over the subject matter depends, can be binding upon another tribunal which mau be changed with the duty of determining the same question incidental to a determination of the jurisdictional validity of the decree of that Court, Thompson v. Whitman, 18 Wall, 457. On the other hand he urges that to remit the funds to the Court of Tennessee is to give unquestioned jurisdiction to that court and would be to decide here and now the very question upon which his contention depends and which he had a right to argue in this Court in spite of the fact that it has already been decided against him upon his plea of abatement in the Tennessee Court.

1398 If the suit in Chancery in Tennessee is in essence in rem the question so raised by Cissna is too serious to justify the determination at this time and in this way of the question so raised. I do not mean to express any opinion at this time which shall control the disposition of those questions when they shall appear in due course, but I do mean to decide now that the questions so raised are not frivilous and that Cissna may well succeed in establishing his contention as to the jurisdictional invalidity of any decision of the courts of Tennessee.

However, the suit in the Chancery — of Tennessee is not at lea-t formally in rem as indeed no suit in Chancery can be until the Court is in possession of the res which is the very question at issue. Assuming that Cissna is before that Court a valid decree in person may go against him compelling him to assign his interest in the subject matter. However, that decree would not effect the disposition of a res now in the possession of this Court unless in fact followed by a conveyance. Cissna would have to determine at his own peril whether he would make the conveyance or not, but if he did not, the effect of a decree as in the award of ownership would depend upon the jurisdiction over the res. I am well aware that there are cases where such an adjudication is regarded by other Courts, as for example where an executor is decrees to pay a legacy by a Federal Court, though the estate be in possession of a state Court of

1399 Probate, but that is because the legatee's rights are never in rem, except perhaps to a special legacy after assent and the question before the Federal Court in such cases, is not the adjudica-

tion of rights in a res, but the determination of a personal duty or obligation of the executor to pay legatees.

Therefore, giving this suit in Chancery of Tennessee the aspect either of a personal or of a real proceeding a serious question will remain for this court to decide when the State or the surety company in subrogation to the State's decree, comes to this Court seeking the fund. Therefore, as I cannot now say with certainty that such a decree will be jurisdictionally valid, it would be unjust to Cissna to remove the fund.

The order to remove is vacated and the motion denied.

L. H.
D. J.

EXHIBIT "CERTIFIED COPIES" TO ANSWER OF W. A. CISSNA TO THE PETITION.

Filed Feb. 27th, 1911.

UNITED STATES OF AMERICA,
Southern District of New York:

I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining on record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

1400 In testimony whereof, I have cause- the seal of the said Court *yo* be hereunto affixed, at the City of New York, in the Southern District of New York, this 21st day of February, in the year of our Lord, one thousand nine hundred and eleven, and of the independence of the United States the one hundred and thirty-fifth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

United States District Court, Southern District of New York.

In the Matter of THE MUNCIE PULP COMPANY, Bankrupt.

SIRS: Please take notice that upon the ann-xed affidavit of Leo Oppenheimer, duly verified the 11th day of May, 1910, a motion will be made before the Honorable Learned Hand in his chamber, in the Post Office Building, Borough of Manhattan, City of New York, on the 14th day of May, 1910, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, — *while* the order heretofore entered by this Court asking the trustee in bankruptcy to pay over *the* certain moneys to W. A. Cissna upon the giving by the said W. A. Cissna of a bond should not be amended so as to authorize the trustee in bankruptcy to deposit in the Chancery Court of Shelby County, Tennessee, the sum of $19,668.10, said deposit to

be made to the credit of the action now pending in the said Court entitled "The State of Tennessee vs. W. A. Cissna and the
1401 Muncie Pulp Co.," to be held by the said Court pending the termination of the said cause and subject to the order of the said Chancery Court.

Dated, New York, May 12, 1910.

Yours, etc.,

JAMES, SCHELL & ELKINS,
Attorneys for Trustee.

170 Broadway, Manhattan, New York City.

To Edwin T. Taliaferro, Esq., Attorney for W. A. Cissna, No. 5 Beckman Street, New York City.

United States District Court, Southern District of New York.

In the Matter of THE MUNCIE PULP COMPANY, Bankrupt.

To the Honorable Learned Hand, District Judge:

The petition of Leo Oppenheimer, respectfully shows that he is a trustee in bankruptcy of the Muncie Pulp Company, and has duly qualified by the giving of the bond required of him.

Your petitioner shows that the Muncie Pulp Co., entered into contract with W. A. Cissna, under date of June 21, 1901, for the stumpage rights to certain timber on Dean's Island, Arkansas. At the time of the filing of the petition in bankruptcy, the
1402 Muncie Pulp Company had paid but three-fifths of the purchase price of the said timber and there remained owing to the vendor the sum of $14,000.00 with interest.

Prior to the filing of the petition in bankruptcy the State of Tennessee instituted an action in the Chancery Court of Shelby County, Tennessee, against the Muncie Pulp Company, and W. A. Cissna which said bill in equity alleged that the State of Tennessee was the owner and entitled to the possession of both the land and timber purchased from W. A. Cissna by the Muncie Pulp Co., and prayed for an injunction restraining further cutting of the timber from the said land by the said Muncie Pulp Co. The American Surety Company of New York gave bond in the sum of $25,000.00 to release the said injunction. The injunction was vacated and the Muncie Pulp Company and your petitioner, while acting as Receiver in Bankruptcy, continued to cut timber.

Subsequent to the filing of the petition in bankruptcy your petitioner, as receiver, cut certain timber from the land which was the subject of the litigation in excess of the sum of $19,688.10 and the said sum is in the possession of your petitioner as trustee in bankruptcy of the Muncie Pulp Company held as a special fund.

Your petitioner shows that an order was made by this Court on July 26, 1909, after proceedings were instituted by W. A. Cissna and in accordance with the petition which W. A. Cissna filed in this Court, directing the petitioner as trustee to pay over to W. A. Cissna

the sum of $19,668.10 upon the giving by W. A. Cissna of a bond conditioned to reimburse the trustee for any damaged which he might suffer in the action in the State of Tennessee.

1403 Your petitioner states that he is informed by counsel that the action in the State of Tennessee between Cissna and the State of Tennessee will determine the title as to the land from which, in the main, your petition cut the timber, the proceeds of which are now in his possession.

Should W. A. Cissna be successful in this action, he will be entitled to the sum of $19,000.00 now in your petitioner's possession. Should the State of Tennessee be successful, in your petitioner's opinion, the said State will be entitled to claim from your petitioner as trustee any sum which may be in your petitioner's hand representing the proceeds of timber cut within the territory found to belong to the State of Tennessee. Should the State of Tennessee establish that it was entitled to the entire fund of $19,000.00 which portion as a trustee in bankruptcy should not pay to the State of Tennessee would have to pay to W. A. Cissna.

Your petitioner therefore has no interest in the said fund. The litigation has been lasting for almost 6 years and the entire defense of the said action has fallen upon your petitioner as trustee, but very little effort has been made by W. A. Cissna to establish his title to the premises on Dean's Island and the expenses of your petitioner in defending this suit up to the present time are in excess of $5,000.00.

No offer has ever been made by W. A. Cissna to reimburse your petitioner for these disbursement- and all the disbursements and expenses which have been concerned in connection with the said suit are due solely to the fact that the title which W. A. Cissna pretended to your petitioner was not a good title.

Your petitioner further shows that no bond has been given out by W. A. Cissna to secure the payment of money as provided by order of this Court, and the sum of $19,000.00 is still in your petitioner's hands.

1404 Your petitioner states that the plaintiff in the action pending in the State of Tennessee is willing to dismiss the action as to the Muncie Pulp Co., and the American Surety Co., provided the trustee in bamkruptcy will pay into the Chancery Court of Tipton County, Tennessee, the amount which a decree of this Court has found should be paid to W. A. Cissna and said deposit to await the termination of the action between the State of Tennessee and W. A. Cissna. Your petitioner shows that no harm can come to W. A. Cissna from such action. That the fund will be in the Chancery Court in the action now pending where it could be paid over to whichever of the two litigants are successful in said suit.

Your petitioner as trustee will be relieved of the burden of further litigation, and be released from any claim on the part of the American Surety Co., on account of the bond for $25,000.00 which was given by the said Surety Company to vacate the injunction.

Wherefore, your petitioner prays that he be authorized to deposit in the Chancery Court of Tipton County, Tenn., the sum of $19,-

668.10 to be paid by the Clerk of the said Chancery Court pending the outcome of the suit now pending entitled "The State of Tennessee vs. Muncie Pulp Co., and W. A. Cissna," said deposit to be made up on the entry of order dismissing the said case as to the American Surety Co., and the Muncie Pulp Co.

LEO OPPENHEIMER,
Petitioner.

1405 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York:

Leo Oppenheimer, being duly sworn, says that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

LEO OPPENHEIMER.

Sworn to before me this 12th day of May, 1910.

R. J. HANFORD,
Notary Public.

United States District Court, Southern District of New York.

In the Matter of THE MUNCIE PULP COMPANY, Bankrupt.

Notice on Presentation for Resettlement of Order Granted May 18, 1910.

GENTLEMEN: Please take notice That the order granted May 18, 1910, by Honorable Learned Hand, District Judge, in above entitled matter, will be presented to said judge at his chamber in the Post Office Building in the Borough of Manhattan, in the City of New York, on the 23rd day of May, 1910 at 4:00 o'clock in the forenoon for resettlement by the striking therefrom the provision at folio 5 to the effect that the fund therein *d*pecified shall, in case a
1406 judgment be rendered in favor of W. A. Cissna, be subject to a lien for the services rendered by his attorney of record, Caruthers Ewing; and also by striking from said order the words: at folio 8 of the closing paragraph thereof: "Either W. A. Cissna or," and also by striking from such paragraph the provision to the effect that in the event that the Chancery Court of Shelby County, Tennessee shall find upon the trial of said cause that the said Cissna is entitled to such fund of $19,668.10 or any part thereof, such sum shall be paid over to him subject to the lien of the attorney as in such order previous- specified; and also by proving that the order entered July 26, 1909 be vacated or modified so as to accord wit*j* such order of May 18th, 1910, as *this* amended and that on such

presentation for resettlement the annexed proposed order will be presented for settlement and signature.

Dated, New York, May 23, 1910.

Yours, etc.,

HENRY C. WILCOX,

Attorney for American Surety Company of New York.

To Messrs. James, Schell & Elkins, Attorneys for Trustee, No. 170 Broadway, Manhattan, New York City, N. Y.

To Edwin Taliaferro, Esq., Attorney for W. A. Cissna, No. 5 Beckman Street, Manhattan, New York City, N. Y.

1407 United States District Court for the Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt. WILLIAM A. CISSNA, Claimant.

An order, judgment or decree having been made herein July 25, 1909, confirming as therein set forth the order theretofore made by John J. Townsend, Referee, in granting a petition of Wm. A. Cissna, to be paid certain sums of money upon the terms and conditions therein set forth, and said Cissna not having complied with such terms or conditions, and a further order having been entered May 18, 1910, granting a petition of the trustee and directing him to deposit the sum of $19,668.10 with the Chancery Court of Shelby County, Tennessee for the purposes and under the conditions in said latter order specified, and applications having been made to resettle such order of May 18, 1910.

Now therefore after hearing Henry C. Wilcox, Attorney for the American Surety Company of New York, and Tobert P. Lewis, Esq., for the Trustee in Bankruptcy, in support of such application for resettlement, such order so entered May 18, 1910, is hereby resettled and amended so as to read as follows:

United States District Court for the Southern District of New York.

In the Matter of THE MUNICE PULP COMPANY, Bankrupt; WILLIAM A. CISSNA, Claimant.

1408 An order, judgment or decree having been granted in above entitled matter of July 26th, 1909, confirming to the extent therein set forth, an order theretofore made by Honorable John J. Townsend, Referee, and granting the prayer of the petition theretofore filed by William A. Cissna and directing the payment to him by the Trustee in Bankruptcy of the moneys, amounting to $19,668.10, therein specified, upon the terms and conditions therein set forth; and said Cissna having failed to comply with such terms and conditions, and an application having thereafter been by the

Trustee in Bankruptcy made to amend such order of July 26th, 1909, so as to allow him such *such* trustee to deposit in the Chancery Court of Shelby County Tennessee, such sum of $19,668.10, to the credit of the action pending in said Court by the State of Tennessee complainant against Wm. A. Cissna and Muncie Pulp Co., and such application coming on to be heard.

Now, upon reading and finding the petition of the trustee in bankruptcy verified May 12, 1910, the order or decree granted July 26th, 1909, and the papers and documents therein referred to, the opinion by this Court rendered June 23, 1909, and the affidavit of Edwin T. Taliaferro verified May 18, 1910, and after hearing Robert P. Levis, of counsel for the Trustee, and Henry C. Wilcox, attorney for the American Surety Co., of New York, in support of the motion, and *the* Edwin T. Taliaferro, of counsel, for Wm. A. Cissna, claiming a lien upon such $19,668.10 for Caruthers Ewing, Esq., for services rendered said Cissna as his attorney of record in the proceedings in the Southern District for New York; it is, on motion of James, Schell & Elkus, attorneys for the Trustee,

1409 Ordered, First, that the Trustee in Bankruptcy be relieved of the direction contained in the order or decree so entered July 25, 1909, to pay said Wm. A. Cissna or his attorney of counsel the sums therein specified amounting with interest to the date of such decree to $19,668.10, and that such order or decree be amended by striking therefrom the provision that said Cissna shall or may receive such sum upon giving the bonds therein specified; and that this order supercese such order of July 26th, 1909.

Second. That the trustee be and he hereby is authorized and directed to deposit in the Chancery Court of Shelby County, Tennessee, the sum of $19,668.10, to the credit of the action now pending in said court wherein the State of Tennessee is complainant and said W. A. Cissna and the Muncie Pulp Co., are defendants, to be held by that Court pending the determination of such cause.

Provided, However, that on such payment into such Court the original and amended bill filed therein against the Muncie Pulp Co., and Leo Oppenheimer as receiver or trustee, and against the American Surety Company of New York be dismissed at the cost of the complainant as to the Muncie Pulp Co., and Leo Oppenheimer, receiver and trustee, and the American Surety Co., of New York, and that the bond executed by the Muncie Pulp Co., as principal and the American Surety Co., as surety, in the sum of $10,000.00, on or about the 6th day of January 1904, and the further bond executed by the said Muncie Pulp Co., as principal and the said American Surety Co., of New York, as surety, in the sum of $15,000.00 on or about the 9th day of March, 1904, in such cause be and each of them is cancelled and discharged, and that all liability upon or by reason of said bond or either of them, be released and

1410 discharged and that said sum of $19,668.10 be thus paid into Court and received in discharge of all claims which the State of Tennessee may have against the Muncie Pulp Co., Leo Oppenheimer as receiver and trustee in Bankruptcy of the Muncie

Pulp Co., and the American Surety Co., of New York, or either of them.

Dated New York, N. Y., May 23, 1910.

United States District Court, Souther- District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt; W. A. CISSNA, Claimant.

An application having been made by the Trustee in Bankruptcy for leave to deposit in the Chancery Court of Shelby County, Tennessee, the sum of $19,668.10, said deposit to stand to the credit of the action now pending in said Court, entitled "The State of Tennessee vs. W. A. Cissna and the Muncie Pulp Co.," and said application coming on for hearing before this Court and Edwin T. Taliaferro, of counsel for W. A. Cissna, having asserted a lien against the said fund for services rendered by him and by Caruthers Ewing, as attorney of record, in the proceedings in the Southern District of New York;

Now, upon reading and filing the notice of motion dated the 12th day of May, 1910, and the annexed petition of Leo
1411 Oppenheimer, dult verified the 12th day of May, 1910, and upon reading and filing the affidavit of Edwin T. Taliaferro, verified May 13th, 1910, and after hearing Robert P. Levis, of counsel for the Trustee in support of the motion and Henry C. Wilcox, attorney for the American Surety Company in support of the said motion, and Edwin T. Taliaferro, of counsel for W. A. Cissna, claiming a lien upon the said funds both for services rendered as counsel and as attorney of record, and upon motion of James, Schell & Elkus, attorneys for trustee, it is

Ordered that Leo Oppenheimer, as Trustee in Bankruptcy, be and he hereby is authorized and directed to deposit in the Chancery Court of Shelby County, Tennessee, the sum of $19,668.10, said deposit to be made to the credit of the action now pending in the said Court entitled "The State of Tennessee vs. W. A. Cissna, and the Muncie Pulp Company," to be held by the said Court pending the determination of the said cause and to be paid over to W. A. Cissna or the State of Tennessee, as the said Chancery Court may direct, said fund to be subject, however, in case a judgment is rendered in favor of W. A. Cissna, to a lien for services rendered to the said W. A. Cissna, by his authority of re-ord, Caruthers Ewing, in the Seouthern District of New York, and it is further

Ordered, that upon the payment of said sum to the Clerk of the Chancery Court of Shelby County, Tennessee, the State of Tennessee, as plaintiff in said action, shall consent that the original bills filed against the Muncie Pulp Company and Leo Oppenheimer as Trustee and Receiver, and American Surety Co., of New York, be dismissed at the cost of the complainant as to the Muncie Pulp

Company and Leo Oppenheimer, Trustee and Receiver, and the American Surety Company of New York, and it is further
1412 Ordered, that such payment still be made upon condition that the bond executed by the Muncie Pulp Co., as principal and the American Surety Company of New York, as surety, on or about the 6th day of January, 1904, in the sum of Ten Thousand ($10,000) Dollars, and the further bond executed by the said Pulp Company as principal, and said Surety Co., as surety, in the sum of $15,000.00, on or about the 9th day of March, 1904, be cancelled and that all liabilities be released both as to the Muncie Pulp Company and as to the American Surety Company, be received in full of all claim which (either W. A. Cissna or) the State of Tennessee may have as against the Muncie Pulp Company, Leo Oppenheimer as Receiver and Trustee, in Bankruptcy, of the Muncie Pulp Co., and the American Surety Co., either or both. And upon further consideration that in the event said Chancery Court of Shelby County, Tennessee, shall find upon the trial of said cause that the said W. A. Cissna is entitled to said fund of $19,668.10, or any part thereof, then and in that event said sum shall be paid to said W. A. Cissna, subject to the lien of his attorney, as hereinbefore provided.

Dated, New York, May 18th 1910.

LEARNED HAND, *D. J.*

United States District Court for the Southern District of New York.

In the Matter of MUNCIE PULP COMPANY, Bankrupt; WILLIAM A. CISSNA, Claimant.

1413 An order or judgment or decree having been made herein July 26th, 1909, confirming as therein set forth the order heretofore made by Honorable John T. Townsend, Referee and granting the petition of W. A. Cissna to be paid certain sums of money upon the terms and conditions therein set forth, and a petition having been filed herein by Leo Oppenheimer, Trustee of the said Muncie Pulp Co., verified the 12th day of May 1910, and filed in this Court on the 17th day of May 1910, asking for permission to deposit the sum of $19,668.10 in the Chancery Court of the County of Shelby and State of Tennessee to the credit of the action now pending in said Court, entitled "The State of Tennessee vs. William A. Cissna and the Muncie Pulp Co., and

An order having been entered herein May 18, 1910, gra-ting the petition of the said trustee and directing him to deposit the sum of $19,668.10 with the said Chancery Court of Shelby County, Tennessee, for the purposes and under the conditions in said latter order specified, and, an application having been made to resettle said order on May 18, 1910,

Now therefore after hearing Henry C. Wilcox, attorney for the American Surety Company, of New York, and Robert P. Levis, Esq., for the Trustee in Bankruptcy in support of said application

for resettlement, and Caruthers Ewing, attorney and Edwin T. Taliaferro of counsel for the said Wm. A. Cissna, in opposition to said resettlement, and in favor of the reconsideration and revocation of said order of sate May 18, 1910, and

1414 Upon all of the proceedings herein, it is

Ordered, that the said order of date May 18, 1910, hereinbefore mentioned be and the same is hereby revoked, rescinded and annulled; it is further

Ordered that the petition of the said Leo Oppenheimer Trustee in Bankruptcy, of the Muncie Pulp Co., verified May 12, 1910, be and the same is hereby denied and refused. It is further

Ordered, that the said motion to resett-e the said order of May 18, 1910, is hereby denied, except as hereinbefore set out.

Dated New York, June 21st, 1910.

LEARNED HAND,
Judge United States District Court,
Southern District of New York.

Answer of W. A. Cissna.

Filed February 27th, 1911.

In the Chancery Court of Shelby County, Tennessee.

No. 13271, R. D.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

Answer of W. A. Cissna to Petition of Leo Oppenheimer, Trustee.

Filed Herein Feb. 17th, 1911.

For answer to said petition W. A. Cissna says:

1415 (1) He admits that Leo Oppenheimer, Trustee, has in his hands a fund of $19,668.10, in which neither the Muncie Pulp Co., nor said Oppenheimer has any interest. How the said trustee holds said money will be hereafter stated.

(2) It is denied that said Oppenheimer only has $19,500 in his hands. He *was* $19,668.10, together with certain interest earned by saod fund since May 17th, 1910, as will be hereafter shown.

(3) As to the decision of the Supreme Court of Tennessee herein this respondent refers to the decree and opinion of said Court. The respondent refers to the records of this Court, for its holding. Said records show what questions were involved and what were determined.

(4) If the Trustee in Bankruptcy of the Muncie Pulp Co., desired "to settle his accounts and to obtain a final complete discharge from further liability" as such Trustee, he should apply to the

Court appointing him. This Court has no jurisdiction of such accounts, settlements, etc.

(5) It is denied that this Court has jurisdiction over this respondent with reference to the matters in issue and certainly this Court has no jurisdiction over money belonging to this respondent until after a final decree against him. This Court cannot without respondent's consent now make any order or enter any decree which controls this respondent's desire as to where his money shall be kept. It is not within the lawful power of the Court to require or permit this respondent's money to be brought to Tennessee.

It is denied that this Court can or will decide any question between the Muncie Pulp Co., and this respondent and the effect of the said Trustee is to have the question that may arise between said company and this respondent settled in favor of said company as will hereafter be shown.

1416 (7) The petition alleges that—

"Upon order being entered by this Court directing that said fund be paid into this Court, said money may be ordered by the Bankruptcy Court having the control thereof, to be so paid into this Court."

Respondent says that it is equally true that said money may *not* be ordered by the Bankrupt Court to be paid into this Court.

It may be true that the Bankruptcy Court having the control" of the fund is the only Court which can make any order as to said fund.

It is submitted that as the petition shows that a Court has control of said fund, this Court should not make any orders with respect thereto.

(8) The petition alleges:—

"The whole of said fund is claimed by the plaintiff, the State of Tennessee, in the above styled cause on the ground that it is the proceeds of timber cut from its land, and on the further ground that the defendant, W. A. Cissna, is indebted to it for timber which he authorized to be cut from the State's land in a sum largely exceeding the sum above."

If this be true the Court having the control of said fund is the only Court which can entertain said claim. The State of Tennessee has filed no paper in this Court or cause asserting any claim to said fund.

(9) It is averred:—

"Petitioners desire to pay said sum into Court in order to be relieved of further liability of holding the same and in order to wind up the estate of the Muncie Pulp Company and the State of

1417 Tennessee by its Attorney-General and its counsel, desire the said sum of money to be paid into Court that the rights thereto may be adjudicated in this case between the State of Tennessee and W. A. Cissna."

There is no liability attached to the holding of said fund except not to misappropriate it. Respondent assumes that the said Trustee is under proper bond to account for said fund.

It may be true that the Attorney General and the Counsel for

Tennessee desire this fund paid into this Court. Such desire has not been expressed in any pleading. However that may be, this respondent has no such desire and as he has some rights thereto it is submitted that in dealing with a fund in which he is interested his wishes will be consulted if the wishes of any other party are to have weight with the Court. It is not a question of "desire," however, but a legal right.

(10) It is denied that the State of Tennessee has any interest whatever in said sum, though it may be true that the State of Tennessee is willing to surrender a liability against the Muncie Pulp Co., and the American Surety Company on two bonds aggregating $25,000.00, in order to get within the State of Tennessee $19,668.10 belonging to this respondent. It is not material why this is true, but that it is true is strange.

Respondent states that the said trustee realized from the timber the sum of $23,000.00 and yet for some inexplicable reason the State of Tennessee is willing to waive $35,000.00 in cash to get respondent's money in this State. This is a high price to pay for the placing of respondent's money in this Court and cause and respondent does not understand the reason of this proceedure.

1418 2.

Respondent will now show the Court that the only Court, the Court of Bankruptcy in New York, having jurisdiction of this fund, has on this very question of the right of the said trustee to pay said money into this Court finally adjudicated that no such right exists. Neither this Court nor said Court of Bankruptcy in New York could make such an order as will be made to appear from the following:

(1) On Oct. 1, 1907, this respondent filed in the United States District Court, Southern District of New York, wherein the affairs of the Muncie Pulp Co., were being administered as a bankrupt, a Court having jurisdiction of the parties and the subject matter, his petition seeking to establish a preferential right to payment of an amount due him as the unpaid balance on the purchase price of certain timber sold by respondent to said Muncie Pulp Co., on 21st day of June 1901.

A copy of said petition with the said contract exhibited herewith as well as an agreement dated Sept. 23, 1904, and notice to the trustee is herewith filed as a part of this answer as exhibit A hereto.

(2) On June 5th 1908, the said Leo Oppenheimer answered said petition in said Court a copy of which answer is herewith filed as exhibit B to this answer.

(3) On the issues made by said pleadings the parties agreed upon certain facts, copy of which said agreement is herewith filed as exhibit C to this answer.

(4) The cause was thereupon submitted for hearing and determination to Hon. John J. Townsend, Referee in Bankruptcy, in said Court, and on May 24th, 1909, the said Referee sustained the petition and claim of this respondent.

1419 A copy of this opinion and findings and the order passed by him is herewith filed as Exhibit D.

(5) On May 26th 1909, respondent's counsel by proper notice proceeded to have the Referee's holding brought before the United States District Court, Southern District of New York for confirmation.

A copy of said notice is filed herewith as exhibit "E".

(6) The said cause was heard before the Honorable Learned Hand, Judge of said Court, and on July 26th, 1909, he rendered an opinion, copy of which is filed herewith as Exhibit "F".

(7) On said holding judgment was duly rendered by said Court having jurisdiction of the parties and the subject matter, and copy of said judgment and decree of the Court is herewith filed as Exhibit "G".

(8) Said judgment and decree was no- appealed from and is in full force and effect and is binding upon the said Trustee and thereby as against said Trustee and in favor of this respondent it has been by a Court of competent jurisdiction adjudged and decreed that said $19,668.10, belongs to this respondent, except same was not to be paid to him unless he executed a bond to indemnify the American Surety Co., as therein stated, or executed bond to the State of Tennessee in this cause as therein provided.

This respondent has executed neither of said bonds. He was not required to execute either. He had a right to withdraw said fund on the execution of either of said bonds and he had a right to leave the fund in the hands of the trustee on the terms and conditions adjudged and decreed by the Court. No other Court has a right to alter, or modify or affect the terms of said decree. A disposi-
1420 tion of said fund held by said trustee other than in accordance with the terms and conditions of said trustee is a failure to give effect to a valid decree of a Court of competent jurisdiction rendered in a proceeding between the parties to the petition to which this answer is made and your respondent.

(9) Respondent further shows that on May 12, 1910, Leo Oppenheimer, Trustee, who filed the petition in this Court, filed in the United States District Court Southern District of New York, in the cause wherein this respondent had litigated with him, and established his rights, to-wit:

"In the matter of the Muncie Pulp Co., Bankrupt"—a petition similar to and substantially the same as that filed herein on Feb. 17th, 1911, and asked of that Court the only Court having jurisdiction to make an order as to said fund—authority to do that which he is now seeking to have this court do, and to have the decree of that court entered July 25th, 1909, so modified as to accomplish his purposes. An order was granted in accordance with said petition on May 17th, 1910, copy of which order is herewith filed as exhibit "H" hereto.

On May 23rd, 1910 respondent was notified that the American Surety Company would apply for an order altering said order, dated May 17th, 1910, and entered May 18th, 1910, (Exhibit "H") and on said date (May 23rd 1910) there was served on respondent copy of order to be asked for reforming the order or decree of May 18th,

1910, and granting said Trustee the authority to pay said fund into this Court.

Thereupon respondent on proper notice applied to said Court for a rescission of said order of May 18th, 1910, granting authority to the said Trustee to pay said fund into this Court and the said Trustee simultaneously sought the modification of the terms of said order as above shown.

1421 On June 21st 1910 the said Court denied the petition of said Trustee to pay said money into this Court and granted respondent's motion to have annulled and set aside the order of May 18th, 1910.

A certified copy of the petition filed by said trustee in said Court being substantially the same petition to which this is a reply, the notice accompanying same, the order of said Court dated May 18th 1910 the notice of application to reform same, and order accompanying said notice dated May 23rd 1910, and the action and order of the Court on June 21st 1910, rescinding said order of May 18th and denying the trustee authority to pay said money into this Court—all attached together are filed herewith as "Exhibit Certified Copy".

A copy of the opinion of the Court on said petition is filed herewith as Exhibit 1.

(Petitioner has not had time nor opportunity in view of the time allowed him to answer the petition to get properly certified copies of Exhibits A to 1 inclusive, but same are correct copies of each paper named.)

(10) Respondent pleads said judgment and decree s-ated June 21st, 1910 as res adjudicata of the questions presented by the petition to which this is a respon*de*; said decree is conclusive of the right of the said trustee to pay said money into this Court.

Respondent admits that the Court which has control and custody of said fund, having on proper application heard the petition of said Trustee, to pay said money into his Court, and having heard Respondent's objection thereto, and denied said trustee's appli-

1422 cation, and sustained respondent's objection, to that proceeding, this Court has no legal authority to retry the said matter; this Court should not even if such authority existed make an order about a fund in another court which the court controlling said fund has refused to make.

Respondent submits that when a matter is determined by a Court having jurisdiction of every phase of a question and by the Court to which the said trustee applied for the very order he here seeks that respondent is entitled to treat said matter as settled and to be from *from* the continued harrassment and annoyance of patent efforts to improperly prejudice his rights.

3.

Respondent says that while the order and decree of the New York Court of Bankruptcy, of July 26th, 1909, which adjudged his rights to the $19,668.10, out of the fund in the hands of the said trustee provided that said fund should not, after said date, be chargeable

with interest on said amount, still, respondent is informed and believes and charges that since said time the said Leo Oppenheimer has continuously or for the greater part of said time had said fund out at interest and that said -19,668.10 has earned interest in excess of $700.00. To the interest which said $19,668.10 has earned, this respondent is clearly entitled. Respondent expects at the proper time and in the proper way to ask and obtain an accounting in this behalf, in the said New York Court which alone has jurisdiction over said fund and said Trustee. The granting of the petition of said Trustee would prejudice and embarrass this respondent's rights in this behalf.

1423 4.

Respondent respectfully shows to the Court that even if the State of Tennessee should recover of the Muncie Pulp Co., and its surety on the injunction bonds herein, The American Surety Co., for timber cut by said Muncie Pulp Co., from lands belonging to the State of Tennessee, neither the Muncie Pulp Co., nor the Surety Co., could recover one cent from this respondent and said fund now in the custody of the New York Court could not be touched by either. To have said fund removed to this Court would be for this Court to adjudge this proposition against respondent and to exercise dominion and control over his money without his ever having been heard and without either the Muncie Pulp Co., or the American Surety Co., having been adjudged entitled to any rights against him.

Respondent calls to the Court's attention that the only thinkable right of the Muncie Pulp Co., as against this respondent must arise from a failure of respondent's title to timbe- sold by him to the Muncie Pulp Co.

The American Surety Co., has no rights whatever against this respondent except such rights as the Muncie Pulp Co. may have. If the Muncie Pulp Co.. has no rights against respondent, then the American Surety Co., has none.

While it has been loosely assumed and asserted by interested counsel who were not cognizant of the legal and equitable rights of the parties that the Muncie Pulp Co., is entitled to deduct from the amount due respondent whatever it may have to pay to the State of Tennessee or that the American Surety Co., will have this right, it will now be shown to the Court that no such right exists and that neither the Muncie Pulp Company, nor the American Surety Co., can maintain an action against respondent.

1424 By referring to the contract between respondent and the Muncie Pulp Co., dated June 21st, 1901, (attached to Exhibit A hereto) it will be seen that respondent sold said company the timber on certain sections of land in Arkansas.

"Together with all accretions to all of said above described property already made or hereafter to be made by the Mississippi River, or otherwise, the conveyance being limited to such land as is now in said described sections and all accretions thereto, and not to land that may have originally been in said sections."

In no place and at no time has respondent's title to Dean's Island and the accretions thereto been challenged or called in question.

Respondent never undertook to define or declare the existence or extent of said accretions. Respondent explained to the Muncie Pulp Co., at the time his title and in conveying to it simply followed the language of the conveyance to respondent. What accretions, if any, there were to Dean's Island was a matter to be determined by the Muncie Pulp Co. Respondent gave no express warranty of title and conveyed nothing except timber on Dean's Island and accretions thereto. Respondent never conveyed to the Muncie Pulp Co., any timber that could be any possibility belong to the State of Tennessee, and the State of Tennessee has never claimed that it owned Dean's Island or any accretions thereto. The sole claim of the State of Tennessee is that it owns land which is not an accretion to Dean's Island in the State of Arkansas. If the State of Tennessee succeeds in its claim it will not get one foot of land on Dean's Island nor any accretions thereto. The State of Tennessee can only succeed by showing that the land which it claims is not an accretion to Dean's Island, that is by showing that it claims no land which falls within the description of that land, the timber on which was sold by respondent to the Muncie Pulp Co.

1425 The Muncie Pulp Co., took its own chance and determined for itself what land constituted accretions to Deans Island. Respondent never undertook to determine this question, but refused to do so. Not only did respondent in fact refuse to do so, but in conveying to the Muncie Pulp Co., this respondent described by sections the main land and left the matter determining the extent of the accretions thereto to his vendees.

If respondent impliedly warranted title -uch warranty only attached to what respondent sold. He only sold the timber on Deans Island and accretions thereto. His title to the land described in the said contract has never been questioned.

Respondent submits that never until the Muncie Pulp Co., (or the American Surety Co. for it) pays the State of Tennessee for timber cut from the lande of the State of Tennessee, could the issue arise as to the rights of the Muncie Pulp Co., to recover of respondent on a breach of his implied warranty title. When and only when that payment shall have been made, if ever, could this question arise and then and only then could it be settled.

As no such payment has ever been made, no such question has ever arisen. Having never arisen, it has never been adjudicated. If an effort has been made to so adjudge prior to the time such question has arisen and without proper pleadings asserting a tangible and existing right of subrogation, such effort is futile and a judgment so undertaken to declare a subrogation right would be coram non judice and void.

1426 This respondent deferred to the judgment of the New York Court because he believed that judgment as rendered protected the rights of all parties.

Respondent was not willing to execute either of the bonds required by the learned court as a condition precedent to his reception of the

money which as against the Muncie Pulp Co., was adjudged to belong to him because he was advised that the terms of the required bonds would waive the very right he now asserts. He has, however, on several occasions concluded to execute the required bond in that Court because he has never believed that the State of Tennessee could there succeed in establishing its title to any timber cut by the Muncie Pulp Co. Respondent was not legally obliged to take this risk, however, and was entitled to look to that decree as protecting his rights. The Court therein adjudged that should this respondent execute neither of the bonds required than Leo Oppenheimer as Trustee was to hold said money and respondent has always believed that his rights were by that decree protected.

Respondent is advised that said decree is only operative just so far as it determines rights properly asserted and pleaded and that no right of subrogation was then before the Court but the court simply safeguarded the rights of all parties that might have an interest in the fund by preventing respondent from withdrawing the money without a forthcoming bond. In construing a decree the opinion of the Court may be examined and by reference to that opinion it will be seen that the learned Judge said:

1427 "As the State would not be a simple creditor if it succeeded in the claim, so also would not be the surety Company. Therefore, *is* that Company pay the State's decree *than* it could sue either the trustee or Cissna."

The above is a correct *statenebt* of the legal rights of the parties, and when the Muncie Pulp Co., or the American Surety Co., properly propound its action, if ever, against this respondent, then and only then could a right of recovery against the respondent be determined. Respondent has believed and yet believes that when such proceeding is instituted he can successfully defend it. In said opinion the learned Judge declared:

"Cissna must either give the usual bond or the fund must await the final determination of the Tennessee suit."

Respondent has treated and yet treats this as a judgment of the Court—the opinion which interprets the decree, If the present petition is granted, then this decree is annulled for it cannot be believed that the Court meant that the fund should be held to await the final determination of the Tennessee suit other than where it was being held at the time of that decree.

4.

Respondent further submits that it may be that against said fund adjudged, as above shown to him, the Muncie Pulp Co., (Or the American Surety Co., through it) might be entitled to rights measured by the timber which actually came from land belonging to the State of Tennessee for which judgment was herein recovered. In which event, however, as said Muncie Pulp Co., or American Suret-Co., would have to go into the Court holding the fund to assert such right, this respondent is entitled to the judgment of the Court as to what timber came from the lands of the State of Tennessee and

which that fund or any part represents. It was as to this feature of this case that Mr. Justice Hand in declining to permit the fund to be removed from that Court said, as shown in the opinion Ex-
1428 hibit 1 hereto.

"Therefore, giving the suit in Chancery in Tennessee the aspect either of a personal or a real proceeding a serious question would remain to this Court to define when the State or the Surety Company in subrogation to the State's decree comes to this Court seeking the fund. Therefore, as I cannot now say with certainty that such a decree will be jurisdictionally valid, it would be unjust to Cissna to remove the fund."

Not only does the said Learned Judge clearly state the injustice this attempted removal would be to respondent, but the plainly and properly recognized that the question of any one's rights to subrogation is yet undetermined.

5.

Respondent says that the claim by Leo Oppenheimer, Trustee, that he desires to have this fund removed to enable the affairs of the Muncie Pulp Co., to be wound up; is subject to suspicion because the administration of the Co.'s affairs is in the hands and under the control of the Court. However, respondent here and now agrees that the said Trustee may accomplish this avowed purpose through the following arrangement:

Respondent will enter into a stipulation that whatever fund is in the hands of said Trustee, i. e.,: the $19,668.10, and interest, if any, it has earned, may be deposited in any trust company in New York named by the Judge of the Court of Bankruptcy to the credit of the Clerk of the said Court, and held by said Trust Company under the terms and of the existing decree of that Court, and to be paid out and disbursed under the subsequent orders and decrees of that Court:
1429 This will remove the fund as an impediment to the winding up of affairs of said Muncie Pulp Co., and enable the Trustee to get his coveted discharge.

Respondent will also agree to any order to be entered in said Court which will enable the affairs of the Muncie Pulp Co., to be wound up without prejudice to any undetermined rights of parties interested therein. The failure of this respondent to execute such agreement as the said New York Court may believe proper to accomplish this result shall be treated as *as* waiver by respondent of his objection to placing that fund in this Court.

Respondent feels it proper to say that the objections herein made to the granting of the petition of the said Trustee are not intended as a reflection upon this Honorable Court, but respondent has a legal right to resist any order as to what shall be done with his money and he does so with the highest respect to this Court.

CARUTHERS EWING,
Solicitor for W. A. Cissna.

Final Decree and Reference and Appeal.

Entered March 2, 1911.

In the Chancery Court of Shelby County, Tennessee.

1430 No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY *et al.*

This day this cause came on to be heard and was heard before the Honorable F. H. Heiskell, Chancellor, on the pleadings, original and amended, the procedendo from the Supreme Court of Tennessee heretofore entered of record and made the decree of this court and the proof on file, together with exhibits thereto, and the exhibits to the deposition of G. W. Clothier, consisting of sections cut from trees on the territory in litigation, and was agreed by counsel for the respective parties, and the Court holding that the opinion and judgment of the Supreme Court evidenced by a procedendo and decree thereon adjudicated and fixed the boundary line between the State of Tennessee and the State of Arkansas and that said holding of the Supreme Court necessarily determined the extent of the rights of complainant to recover in this action and that this Court is concluded by said judgment of the Supreme Court, and is not at liberty by reason of any proof in the cause or by reason of a different view of the law applicable to the facts of the case, to disregard, change or modify such adjudication but that it is the duty of the Court to decree in accordance therewith.

It is ordered and adjudged and decreed by the Court that the boundary line between the State of Tennessee and the State of Arkansas is that line which is equidistant from the defined banks of the Mississippi River as it run in 1823 and the title of the complainant to the property mentioned and described in the bill to said boundary line is here and now decree- and declared, said property being more particularly described as follows:

1431 "Beginning at the northeast corner of Trigg 152 acre grant and extending thence north 72 degrees and 20 minutes east, 36 chains to an iron pipe along the middle thread of the river of 1823; thence south 17 degrees and 40 minutes east 77.86 chains to a point along the middle thread of the river of 1823; thence south 33 degrees and 20 minutes east along said middle thread of 1823, 6402 chains to an iron stake; thence south 49 degrees west 42.50 chains to an iron pulp at the northeast corner of the Huddleston 2,000 acre grant; thence northardly with the east bank of the old river of 1823, and along the east line of the Trigg 131 acre grant 35 chains; thence westwardly along the north line of said Trigg 131 acre grant to the point where said line intersects the east bank of old river across McKenzie Chute to the south line of the Chalmers

and other 135 acre grant; thence eastwardly along the south line of said grant to Chalmers and others to the southwes-y corner of the Trigg 37 acre grant; thence eastwardly to the south line of said Trigg 37 avre grant, 15 chains to the southeast corner of the Trigg 152 acre grant; thence northwardly with the east line of said Trigg 152 acre grant to the northeast corner of said tract and the point of beginning.

All of said property being adjudicated by the Supreme Court of Tennessee to be in the County of Tipton State of Tennessee and this Court doth so accordingly judge and decree but it appearing to the Court that a reference is necessary before the entry of final decrees, a writ of possession will issue only after the coming in of the report hereinafter ordered.

1432 And it appearing to the Court that at the date of the filing of the original bill, Dec., 15, 1903, it was alleged that there was certain timber and logs on the land claimed to be owned by the state of Tennessee, which had been cut by the Muncie Pulp Co., from the lands belonging to complainant, lying west of the middle line of the main channel of the Mississippi River, as it ran on the 7th day of March, 1876, which timber and logs the Muncie Pulp Co., was enjoined from removing from said land; and it further appearing that said injunction was modified by an order entered in this cause at a later date, whereby the Muncie Pulp Co., was permitted to remove said timber and logs upon giving bond in the sum of $10,000.00, conditioned to pay and discharge any final judgment for the value of any timber, lumber and logs that had been cut from the lands described in the original bill and which timber, lumber and logs were upon said land on the 15th day of Dec., 1903; and it further appearing that said bond was given on the 5th day of Jan. 1904, with the American Surety Co., of New York as surety thereon; it is ordered, adjudged and decreed that the State of Tennessee do have and recover of the Muncie Pulp Co., and of the American Surety Co., of New York, the value of the timber, lumber and logs which were severed from the soil on the lands described in the original bill on the 15th day of Dec., 1903, and which had been cut from the lands lying west of the middle thread of the Mississippi River as it ran on the 7th of March 1876 and east of the Tennessee bank of the Mississippi River as shown on the Humphrey map, said recovery so far as the American Surety Co., of New York is concerned, not to exceed $10,000.00.

And it further appearing to the Court that the injunction prohibiting the Muncie Pulp Co., from cutting timber from the lands described in the original bill, was modified by an order entered at a still later date, by which modifications the Muncie Pulp Co.,

1433 was permitted to cut and remove timber growing upon the lands alleged in said original bill to be the property of the State of Tennessee, upon giving bond in the sum of $15,000.00, conditioned to account for the value of the timber so cut and removed in the event that the lands described in the original bill should be finally determined to be the property of the complainant; and it appearing that said bond was given on the 9th day of March 1904,

with the American Surety Co., of New York as surety thereon, conditioned to pay any judgment recovered for timber cut and removed from said lands after Dec., 15, 1903; and it further appearing that an involuntary petition in bankruptcy was filed against the Muncie Pulp Co., on July 30, 1904, upon which said corporation was afterwards adjudicated to be a bankrupt, and that Leo Oppenheimer was appointed Receiver in Bankruptcy on August 3rd, 1904, and Trustee in Bankruptcy in March 1905, and that said Leo Oppenheimer as Receiver, removed from the lands all the timber that had been cut by the Muncie Pulp Co., prior to the filing of the petition in bankruptcy, and which was then on the land and it further appearing that said Leo Oppenheimer first as receiver and afterwards as trustee, in Bankruptcy, of the Muncie Pulp Co., continued to cut and remove timber from Deans Island and the accretions thereto, the amount and location of said cutting not being determinable from the proof now on file; it is order-, adjudged and decree- that the State of Tennessee do have and recover of the Muncie Pulp Company, and of the American Surety Co., of New York, the value of all timber cut by the Muncie Pulp Co., from the lands described in the original bill, lying between the middle thread of the Mississippi River as it ran on the 7th day of March 1876, and east of the Tennessee bank of the River, as shown on the Humphrey map, which timber was cut between Dec., 15th 1903, and August 1st, 1904.

1434 It is further ordered, adjudged and decreed that the State of Tennessee do have and receive of Leo Oppenheimer, Trustee in Bankruptcy of the Muncie Pulp Company, the value of all timber cut by him, both as receiver and as trustee for the Muncie Pulp Co., from the lands described in the original bill, lying between the middle thread of the Mississippi River as it ran on the 7th day of March, 1876, and east of the Tennessee bank of the river, as shown on the Humphrey map.

And it appearing that in addition to a joint liability with Leo Oppenheimer, Trustee and the Muncie Pulp Co., and the American Surety Co., as above, that W. A. Cissna is liable for any and all timber cut from land herein decreed to belong to the State of Tennessee, it is here and now adjudged and decreed.

And the Court being unable to determine from the proof now on file what timber, if any, has been cut by the defendants, or either or them, or has been removed by the defendants, or either or them, from lands which the Supreme Court of Tennessee adjudged to belong to the complainant, this cause is here and now referred to the Clerk & Master who will, from the proof on file and from such proof as may be offered before him, ascertain and report to this Court at its next term, what timber, if any, has been cut or removed from the lands adjudged to be the property of the State of Tennessee, the date when the party by whom said timber was cut or removed.

1435 The Master will show:

1st. What timber, lumber and logs were upon the land between the middle thread of the Mississippi River as it ran on the 7th day of March 1876, and east of the Tennessee bank of the river,

as shown on the Humphrey Map, on De'm 15th 1903, and which had been cut from said land.

2nd. What timber was cut from said territory by the Muncie Pulp Company and removed prior to August 1st, 1904.

3rd. What timber was cut from said territory by the Muncie Pulp Co., between Dec., 15th 1903, and August 1st, 1904, and which was removed by Leo Oppenheimer, Receiver in Bankruptcy after August 1st, 1904.

4th. What timber was cut and removed from said territory by Leo Oppenheimer, Receiver and Trustee in Bankruptcy, after August 1st, 1904, and prior to the filing of the amended bill herein.

5th. What timber if any, was cut or removed by Leo Oppenheimer, Trustee, after the filing of the amended bill here from any of the lands adjudged herein to belong to the complainant.

6th. In addition to reporting what timber, lumber or logs, if any, were removed from the land between the middle thread of the Mississippi River as it ran on the 7th day of March 1876, and east of the Tennessee bank of the river, as aforesaid, the Clerk & Master will report what timber lumber and logs, if any, were removed between the middle thread of the said river of 1876 and the middle thread of the river of 1823 and by whom, and when.

In other words, the Clerk & Master is directed in his report not only to show what timber was removed and when and by whom, same was removed from the lands herein decreed to belong to the State of Tennessee up to the middle thread of the river as it ran in 1876, but also what timber, lumber and logs, if any, were removed between the thread of the river of 1876 and the middle thread of the river of 1823.

1436 Said report will also show the market value of the trees cut, at the time same were cut and in the stump; also the market value of the timber and logs after the same were cut, both at the place of cutting and at the nearest market.

The Court reserved all other questions until the coming in of the report, and especially reserved the question of what rule of damages will be applied in determining the amount to which the complainant is entitled, if, on the coming in of said report, it be adjudged that the complainant is entitled to recover any sum whatever.

The costs herein are adjudged against W. A. Cissna but execution is to be withheld until the coming in of the report.

And to the above decree, W. A. Cissna, the Muncie Pulp Co., and Leo Oppenheimer, Trustee, except and ask that their exceptions be noted of record, which is done.

And the State of Tennessee requested the Court to rule specifically in respect to the following matters:

1. To fix a time limit on the reference ordered.

The Court declined to do this — announced that the reference would be ordered in the usual form with the right reserved to the State of Tennessee to apply, at any time, to the Court for the closing of proof on the reference and making of a report, and to the Court's

action in refusing to limit the time for reference to be executed, the State of Tennessee excepted.

2. To define *my* metes and bounds or in some definite manner the line of 1876, as used in this decree.

1437 The Court held that the Clerk & Master would necessarily find this from the proof in executing the reference and offered to direct a reference to the Clerk and Master to have said line ascertained and defined. The State of Tennessee did not ask for such reference and excepted to the Court's refusal to grant its said request or motion, as above.

3. To adjudge and decree a lien in favor of the State of Tennessee on the fund shown by the record to be in the hands of Leo Oppenheimer, Trustee.

The Court declined to so adjudge or to make any order in reference to said fund and the State of Tennessee duly excepted.

4. To adjudge and decree that the American Surety Co.'s obligations and bonds imposed on it liability for any timber *and* removed, after said bonds were executed, from land of the State of Tennessee.

The Court held that the liability of said Surety Co., was limited to the middle of the Mississippi River as it ran in 1876 and the State of Tennessee duly excepted to this holding.

5. To decree that W. A. Cissna, the Muncie Pulp Co., and Leo Oppenheimer, Trustee, were jointly liable to the State of Tennessee for all timber cut from the lands of the State of Tennessee.

The Court so held and each of said parties duly excepted.

6. To direct on the petition of Leo Oppenheimer, Trustee, filed herein Feb., 17th, 1911, and on the State's motion that the fund of $19,500.00 mentioned in said petition be paid into this Court.

The Court held that above the objection of W. A. Cissna this order would not be made and declined the prayers of said petition and the State of Tennessee duly excepted.

1438 On the consideration of this question the State of Tennessee objected to the Court's consideration of any of the papers or record of the Bankruptcy Court of New York excepted the decree which adjudged and settled the ownership of said money and the terms of its holding on the ground that said decree or judgment was plain and unambiguous and constituted the sole memorial of the rights of the parties. The Court overruled said objection and the State of Tennessee duly excepted.

From the above decree the State of Tennessee prayed an appeal to the next term of the Supreme Court of Tennessee but prior to the said prayer for an appeal there had been brought to the Court's attention the petition of W. A. Cissna filed herein Feb. 27th, 1911, to suspend further action herein, the Court withheld action on said prayer for appeal until said petition had been considered and action taken thereon.

Demurrer and Answer of State of Tennessee to Cissna's Motion to Suspend.

Filed March 13, 1911.

In the Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

The Demurrer and Answer of the State of Tennessee to the
1439 Petition Filed Herein by W. A. Cissna, on February 27th, 1911.

Now comes the complainant, State of Tennessee, by her solicitors and demurs to the petition of the defendant, W. A. Cissna, filed herein on Feb. 27th, 1911, upon the following grounds:

1st. The said petition was filed without the authority of leave of the Court.

2nd. The relief sought by the said petition, to-wit: that the hearing and determination of this cause should be stayed until the final determination of another cause and foreign jurisdiction is known to the rule of practice and procedure in Courts of equity.

3rd. The defendant Cissna has a full and complete remedy for the protection of his property by an appeal to the Supreme Court of this State, and thence if his contentions are sound and based on law by a writ of error to the Supreme Court of the United States.

4th. To grant the prayer of the said petition and stay the further hearing and determination of this cause for an indefinite period pending the determination of another cause in a different and foreign jurisdiction, would be a denial to the complainant of its remedy by due course of law and a refusal to administer right and justice without denial or delay as is ordained by Section 17, of Article 1 of the constitution of this State wherefore complainant prays judgment upon the petition.

And now waiving her demurrer complainant, State of Tennessee, now answers such parts of said petition as she is advised are necessary or material for her to answer.

1440 1. It may be true that a bill has been filed by the State of Arkansas against the State of Tennessee in the Supreme Court of the United States of the character referred to in the petition of the defendant Cissna, but reserving all rights therein *and* respect thereto, the State of Tennessee submits that the filing of such a bill or the institution of such a suit is immaterial to any question involved in this law suit, and the State of Tennessee has not been served with process nor notified that such suit has been instituted.

2. The defendant Cissna is not interested in the determination of the boundary between the State of Tennessee and the State of

Arkansas, because, as a matter of fact, as determined by the Supreme Court of Tennessee in this case, the limits of the territory claimed by the defendant Cissna do not reach the boundary line between the two States, but are confined to the extent of Deans Island as adjudged by the Supreme Court of Tennessee, in this cause, as shown by the opinion and decree of the Supreme Court of Tennessee filed in this cause.

Further, the defendant Cissna is not interested in the determination of the boundary line between the State of Tennessee and the State of Arkansas because as shown by the decision of the Supreme Court of Tennessee on appeal in this cause, and by *by* a decision of the Supreme Court of the State of Arkansas in Railroad vs. Ramsey, 53 Arkansas, 314, the rule of law and property in the State of Arkansas is that the title of riparian owner extends to the high water mark and all of the land lying between said high water mark and the middle thread of the stream on the Arkansas side of the Mississippi River belongs to and is the property of the people of the State of Arkansas, so that in no event can the title or rightful claim of the defendant Cissna extend to the boundary line between the two States.

1441 And further answering, the State of Tennessee shows unto your Honor that notwithstanding the claim and insistence of the Defendant Cissna to the contrary, it has been adjudged by the Supreme Court of Tennessee in this case that where there were no accretions to Dean's Island as contended by the defendant, and that the said defendant Cissna has no lawful and just claim either to any part of the land sued for by the complainant in this cause or the land lying between Deans Island and the middle thread of the Mississippi River, and the said judgment and decree of the Supreme Court of Tennessee standing unreserved and in full force and effect, is binding upon the defendant Cissna in this cause.

And further answering, the State of Tennessee respectfully submits to your Honor that this Court is without power to refuse to hear and determine this suit, until the alleged suit of the State of Arkansas against the State of Tennessee is determined by the Supreme Court of the United States, and that the State of Tennessee, Complainant herein, is entitled under the laws of this State to have this case proceeded with according to the usual practice of this Court to the end that justice may neither be denied nor delayed.

3. And further answering, the State of Tennessee refers to the entire record of this cause in order that your Honor may see and understand what has been done and adjudged herein up to this time.

4. And now denying that the defendant Cissna is entitled to any relief under his said petition, and any and all averments therein not before admitted, prays to be hence dismissed.

W. H. CARROLL,
JOHN R. BULLINGTON,
Solicitors for Complainants.

CHARLES T. CATES, JR.,
Attorney-General.

1442 STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, W. H. Carroll, who having been duly sworn, says that he is one of the solicitors for the State of Tennessee in this cause, and statements made in the foregoing answers are true to the best of his knowledge, and belief.

W. H. CARROLL.

Subscribed and sworn to before me, this March 13, 1911.

W. M. COX, *D. C. & M.*

Order on Complainant's Motion to Amend & Modify Decree.

Entered March 13, 1911.

In the Chancery Court of Shelby County, Tennessee, Division 1.

No. R. D. 10865.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

This cause came on to be further heard on this 13th day of March 1911, upon the entire record, particularly upon the motion filed herein by complainant to amend a decree entered on March 2nd, 1911, which said motion is as follows:

"Motion to Amend and Modify Decree.

Filed March 13, 1911.

1443 In the Chancery Court of Shelby County, Tennessee.

No. 13271.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

In this cause comes complainant, State of Tennessee, and moves the Court.

1st. To amend the decree entered herein on March 2nd, 1911, by striking out the second paragraph in said decree and inserting in lieu thereof the following:

"It is ordered, adjudged and decreed by the Court that the boundary line between the State of Tennessee and the State of Arkansas is that line which is equidistant from the defined bank of the Missis-

sippi River as it ran in 1823, and shown by Humphreys Map, which is made exhibit A to the original bill herein, and which is also exhibit A to the deposition of J. H. Humphreys herein, and the title of the complainant to the property known and described in the original bill herein by metes and bounds is here and now decrees and declared the said property being more particularly described as follows:

Beginning at the northeast corner of grant No. 212006 made by the State of Tennessee to Simon Huddleston for 2,000 acres. The east portion of which is owned now by H. W. Stockley and which grant or tract is situated in sections 5 & 6 in range 9 the 11th surveyor's district in said County and State and which said northeast corner is 78 chains north of the Northeast corner thence with said Huddleston's or Stockley's north lines north 41 degrees west 35 chains; thence with said Huddleston's or Stockley's said north line south 82 degrees west 34 chains; thence with said Hud-
1444 dleston's or Stockley's said north line 71 degrees, west 15.32 chains; thence north 8½ degrees, west 66 chains to the southwest corner of the (640) acre entry on Island 37 in the name of N. Potter now owned by H. W. Stockley; thence north 55 chains to the northeast corner of the 100 acre entry on Island 37 in the name of John Trigg; thence 61 chains to the middle or thread of the old main channel of the Mississippi River and which channel is now dry land, and which middle of said channel of the Mississippi River is a boundary line between the States of Arkansas and Tennessee; thence with said thread of said old river which is the boundary line between said States, south 18 degrees east 71 chains; thence with said middle thread of said old river with said boundary line south 31 degrees, east 62 chains; thence south 49 degrees west 42 chains, to the point of beginning, containing 1,050 acres, more or less.

"All of said property being adjudicated by the Supreme Court of Tennessee to be in the County of Tipton, State of Tennessee, and being the tract of land specifically described in the second paragraph of the original bill in this cause and Exhibit A thereto, which is the map herein made Exhibit A to the first deposition of J. H. Humphreys, and this Court does so accordingly adjudge and decree."

1445 2nd. To amend the said decree by striking out of the second paragraph that part thereof withholding a writ of possession for the said property in favor of complainant, State of Tennessee, and also that part of said decree withholding execution in favor of complainant, the State of Tennessee, against Cissna and for an order or decree of this Court in favor of complainant, the State of Tennessee, for a writ of possession of said property and for an execution against defendant Cissna for costs.

3rd. To strike out of said decree that part of the decree praying an appeal by complainant at this term and until further prayed.

4th. To amend the decree entered in this cause on March 2nd, 1911, and particularly that part thereof directing a reference to the Master so as to strike out of the said decree any reference to the middle thread of the Mississippi River "as it ran on the 7th day of

March, 1876," and all words equivalent thereto, so that the said references shall cover and apply to the land decreed to and belonging to the State of Tennessee in this cause as covered by the description of said land in said decree.

5th. For order limiting the time of taking the proof and executing the order of reference so that the cause may be prepared and passed thereon in time for any party ag-rieved to pray an appeal to the next term of the Supreme Court of the State.

6th. For a rehearing on that part of the decree refusing the prayer of the petition of the Muncie Pulp Company and Leo Oppenheimer, Trustee, to be permitted to pay funds into Court.

W. H. CARROLL,
JNO. P. BULLINGTON,
Solicitors for Compl't.

CHAS. T. CATES, JR.,
Attorney-General.

1446 And upon consideration of said motion and said record the Court is pleased to overrule the same, except the third paragraph thereof, and in respect to matters covered by the third paragraph of said motion, the Court permits the complainant to withdraw from said decree as entered the part thereof praying an appeal.

To the action of the Court in overruling and disallowing the remainder of said motion, the complainant, State of Tennessee, excepts.

The Court on a consideration of said motion announced that the Court would not in assessing the value of the timber apply what is known as the "Harsh Rule" and would decline to apply same but will and does hold that the rule to be applied in the ascertainment of the damages, if any, recoverable by the complainant, is the "Mild Rule," that is, the value of the timber cut in the stump and to this extent said decree of March 2, 1911, is amended and modified; to which action of the Court in holding that the State of Tennessee is not entitled to recover, if at all, more than the value of the timber cut by the defendant as it stood in the stump, the complainant, State of Tennessee, excepts.

In view of the proximity of the meeting of the Supreme Court, at its April Term, and the impossibility of executing the reference hereinbefore ordered, or the application of W. A. Cissna, said reference is withdrawn, and W. A. Cissna is granted an appeal to the next term of the Supreme Court which meets in April, 1911, upon the execution by Cissna of an appeal bond as required by law. And defendant Cissna is allowed ten days from this date to give such appeal bond and in default thereof said order of reference shall stand, and in making out the transcript of this cause it shall only be necessary for the Clerk & Master to make a transcript of that part of the record which has been made up since the filing of the
1447 procedendo in this cause and in the Supreme Court the case shall be heard upon the record on file here and the transcript so ordered to be made by the Clerk & Master, this being matter of agreement between the parties in open Court.

The Clerk & Master will file with transcript so ordered to be made all of the original maps in the cause and exhibits, including the printed record in Stockley vs. Cissna. This being done also by agreement and certain exhibits being sections of trees which may be utilized on appeal if desired by either party.

Order Overruling W. A. Cissna's Petition to Stay Cause.

Entered March 14th, 1911.

In the Chancery Court of Shelby County, Tennessee, Division 1.

R. D. 10865.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

This day this cause was heard upon the petition of W. A. Cissna, filed Feb. 27th, 1911, to stay the proceedings. The Court on hearing the said petition considered and heard the said petition on demurrer and answer of the complainant, and declined and disallowed said petition and declined to stay this petition, to which action of the Court the said Cissna duly excepted.

In lieu of a bill of exceptions, making said petition demurrer and answer — of the records, and instead of keeping same on the Minutes of the Court, it is agreed by the parties that said papers may be taken and treated as part of the record in this cause.

1448 *Memorandum of Chancellor on Merits.*

Filed March 17, 1911.

Suppose the river had eroded on the Tennessee side and filled out by accretions on the Arkansas side until the channel between banks occupied space formerly entirely caused by Tennessee grants can it be denied that Arkansas would own ½ and Tennessee the other ½ of the bed of this stream? So if the river merits by erosion and accretions through and this way until it covered Arkansas grants, still Tennessee would own ½ of the bed and Arkansas the other ½. In either case the grantors would have entirely lost their land to the State and in event of an avulsion and reliction in either case the land covered by the river at the time would be divided between the states. The State does not own an easement in the beds of the rivers it owns the fee. When a riparian owner's land by erosion goes into the river he has lost the fee to the state. The state has not merely acquired an easement of navigation over his land. By erosion the land is lost forever unless it is restored by accretion. Could an Arkansas grantor dispute the ownership to half the bed of the river because the river flowed within the boundaries of his grant and

claim that Tenn. had only an easement of Commerce over his land. Manifestly not. If the State loses to one riparian owner by accretion it loses absolutely, loses the fee. If it gains from another
1449 erosion it gains an absolute title. The — of Tennessee granters which by erosion went into the river between 1823 and 1876 was lost to them absolutely and was acquired by the State as absolute owners of the bed of the river. The bed of the river was owned jointly by the two States just before the avulsion in 1876 and just after the avulsion the line was the same. Can an avulsion change the line between states? Erosion and accretion may change the line but an avulsion cannot. If the land lost by Erosion from Tennessee had filled back by accretions before 1876 so that the river occupied the same limit as in 1823 then the center line of 1823 would have been restored and the reliction finding it thus would have fixed it. Can the same result follow from an avulsion and consequent reliction as from accretion? The principles laid down in the case says No, the conclusion says Yes. The testimony of the trees as brought out by Mr. Clothier shows that the bank of 1876 was far south and west of the bank of 1823, this shows that large accretions formed to the line of Deans Island from 1823 to 1876. The Supreme Court, however, has found that this is not so and has fixed a line of 1823 and adjudged this to be the line between the States. It seems that counsel for the state had faith to ask for a line midway between the banks of 1876.

Appeal Bond of W. A. Cissna.

Filed March 17th, 1911.

We, W. A. Cissna, appellant, and surety, Caruthers Ewing, acknowledge ourselves indebted to State of Tennessee, appellees, in the sum of Two Hundred and Fifty Dollars. To be void if the said W. A. Cissna, who has prayed for and obtained an appeal from the Decree of the Chancery Court of Shelby County, in a cause in which the State of Tennessee is complainant and Muncie Pulp Com-
1450 pany and W. A. Cissna are defendants, to the next term of the Supreme Court of Tennessee, for the District of West Tennessee, to be held at Jackson, Madison County, on the first Monday in April, next, shall pay all such costs as shall be awarded against W. A. Cissna by said Supreme Court.

This 17th day of March, 1911.

W. A. CISSNA,
By CARUTHERS EWING, *Att'y.*
CARUTHERS EWING.

1451 *Bill of Costs.*

$221.45

1452 STATE OF TENNESSEE,
Shelby County, ss:

I, Lamar Heiskell, Clerk & Master of the Chancery Court of Shelby County, do hereby certify that the foregoing 426 pages contain a full, true and perfect transcript of all the proceedings had since filing procedendo in a certain cause, lately pending herein, wherein State of Tennessee — Complainant, and Muncie Pulp Co. Defendant, as the same appears on record and file in my office.

In testimony whereof, I have hereunto set my hand, and affix- the seal of said Court, at office in Memphis, this 21 day of March, A. D. 1911.

[SEAL.] LAMAR HEISKELL,
Clerk & Master,
By W. M. COX, *D. C. & M.*

1453 In the Supreme Court of Tennessee, April Term, 1912.

STATE OF TENNESSEE
VS.
MUNCIE PULP CO. et als.

Memorandum.

This case was before this Court at its special April term, 1907, and was then determined as is shown by the report of the opinion of the Court found in 119 Tenn. 47. The issues determined were presented by the original bill of the Statee of Tennessee, and the plea in abatement of the defendants. These pleas presented the question of law and fact, whether the lands sued for were within the State of Tennessee at the date of the filing of the bill, and consequently, whether the jurisdiction to adjudge their title was in the Courts of this State, or the Courts of Arkansas. It was held that "the decision of this question necessarily involved the title of the complainant to the land sued for since she claims them as a sovereign State under the same grants, treaties and legislation by which its Western boundary is defined, declared and established. The location of the boundary line between Tennessee and Arkansas and the right of the former to recover the lands in question are practically the same question and will therefore be considered together."

Upon the former hearing, it was determined, (1) that the western boundary line of the State of Tennessee was the middle of the main channel of the Mississippi River. (2) That the middle of the main channel of the Mississippi River is a point equidistant from the well

defined and permanent banks on each shore. (3) That the
1454 true boundary line between the State of Tennessee and Arkansas is the middle thread of the Mississippi River as it flowed in 1823 and as shown by the map, Exhibit A to the deposition of Major J. H. Humphreys. This map was filed as an exhibit to the original bill and was referred to as showing the boundaries of the land sought to be recovered.

This much is practically conceded by appellant but it is insisted that the logic of the opinion should have lead to a different conclusion. We think this is a misapprehension of the opinion, but as the conclusion reached and the determination made constitute the binding force of the decree, it is hardly worth while to undertake to convince learned counsel, as well as the learned Chancellor below, that the opinion of the Court is consistent with its decree. The former opinion is the law of the case and determines the rights of the parties to the property in controversy. The evidence upon this appeal is not materially different from the evidence considered upon the former appeal from which the facts stated in the opinion of the Court were found. The testimony offered upon this appeal respecting the ages of certain trees may be entirely true and not militate in any degree against the conclusions stated in the former hearing. That is to say, these trees may have grown upon land slightly submerged which did not and could not form a well defined bank so as to mark the channel on the river. All of the assignments of error made by the appellant are overruled.

In January, 1904, after the filing of the original bill in December, 1903, counsel agreed that the injunction sued out by the complainant might be dissolved upon the defendant Muncie Pulp Company executing a bond in the penalty of $10,000.00, to account for the value of the timber, hardwood, logs and lumber on the lands of the complainant, and the Pulp Company was permitted under this bond to remove the same. In March, 1904, a further modification of the injunction was made by consent upon the execution by the
1455 Pulp Company of another bond in the penalty of $15,000.00.

After decreeing for the complainant in accordance with the opinion of this Court to the line established thereby as the Eastern boundary line of Tennessee, the Chancellor held that the Muncie Pulp Company and its surety on the bonds referred to were liable only for timber cut West of the middle thread of the Mississippi River as it ran on the 7th day of March, 1876, and East of the Tennessee bank of the Mississippi River as shown on the map of Major Humphrey, and also that the Pulp Company and its surety were liable only for timber cut from December 15th, 1903, to August 1st, 1904. This action of the Chancellor is here assigned as error, and it is insisted that the Pulp Company and the surety upon its bond are liable for all the timbers cut from the date of the filing of the bill up to the present time, and also for all timber cut upon any lands East of the middle of the River in 1823.

Upon the first point, it would seem that there could be no debate as the bond was executed in lieu of the injunction which was effective from December 15th, 1903, the date of the filing of the original bill,

and would have continued in effect throughout the litigation, but for the bond which was substituted for it. The holding of the Chancellor that defendants are not liable for timber cut beyond the alleged boundary line of 1876, is said to have been based upon the concluding paragraph of the opinion of this Court, which, as it appears in the published report, is as follows:

"It is said that the complainant sued for the land lying West of the center of the channel as it was in 1876, and therefore, cannot recover to the center of the channel of 1823. This is true, but this case must be remanded for a hearing upon the answer of the defendants, and if it is desired, the bill may then be amended so as to make the proper averments to entitle her to recover under the principles here settled."

Upon the remand, the amendments suggested were made, and as we have heretofore stated, the proof sustains the contention of the State. It is said that because the bonds were executed before the amendment was made under the original bill the defend-
1456 ants are not liable for timber cut upon lands included by the description of the amended bill which were not included in the original bill. This contention is correct in so far as the surety is concerned, but of course the principal is liable for all timber cut.

It is assigned as error that the Chancellor declined to permit Leo Oppenheimer, Trustee in Bankruptcy, of the Muncie Pulp Company to pay into Court funds in his hands derived from sales of timber cut upon the lands in question in discharge of the obligation of the Pulp Company for cutting and selling the same. It appears that Oppenheimer made application to the Court below to be permitted to do this, and the complainant, the owner of the land, consented thereto, but that upon objection of the defendant Cissna, the Court declined to permit it done. While matters of this kind are necessarily left to the discretion of the Trial Court in a large measure, we can see no objection to permitting this to be done.

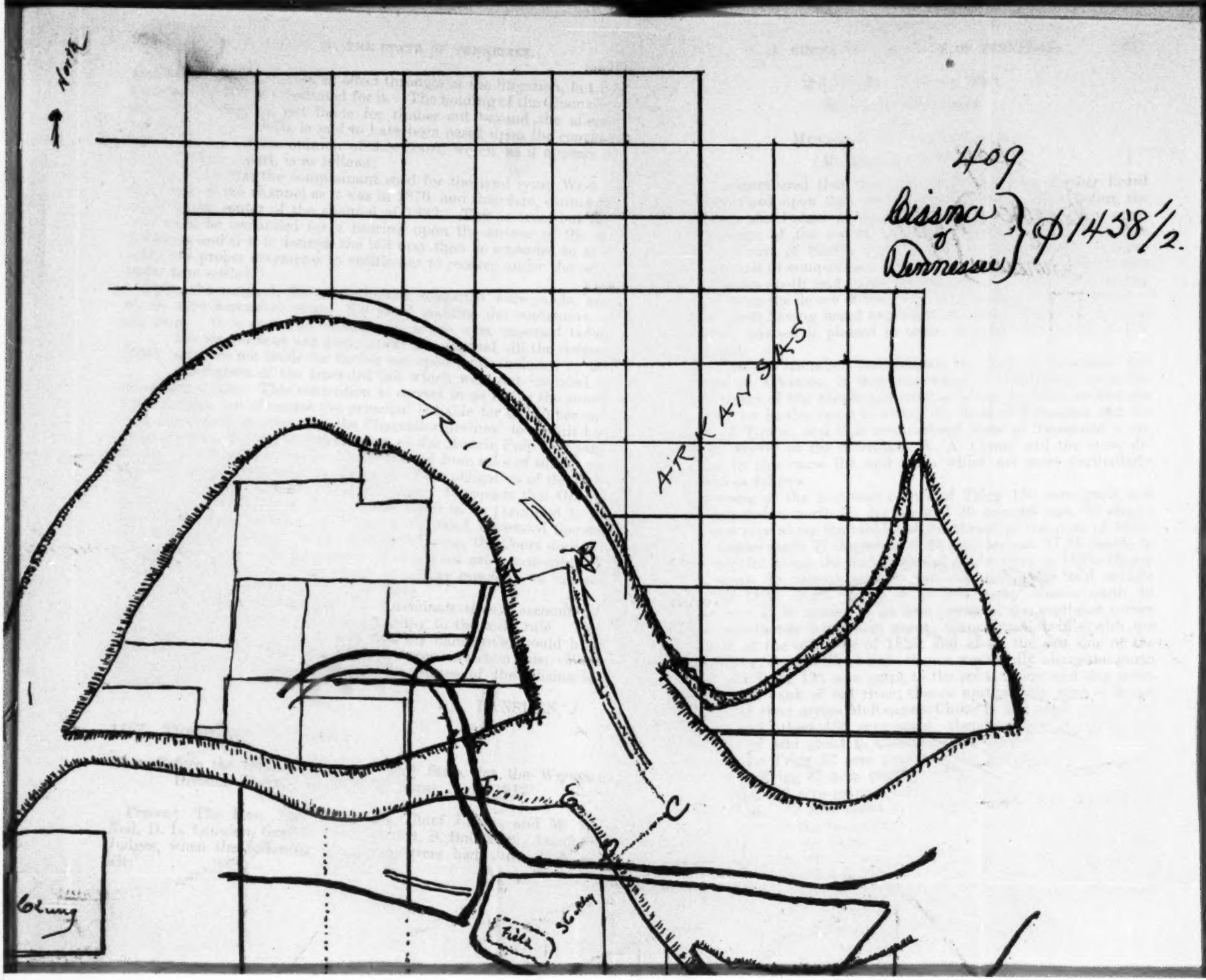
The Chancellor decreed that the defendants should account for the timber cut, removal and sold according to the mild rule. This is assigned as error, and it is said that the harsh rule should have been applied. We think the Chancellor was correct in this. With the modifications herein indicated, the decree of the Chancellor is affirmed.

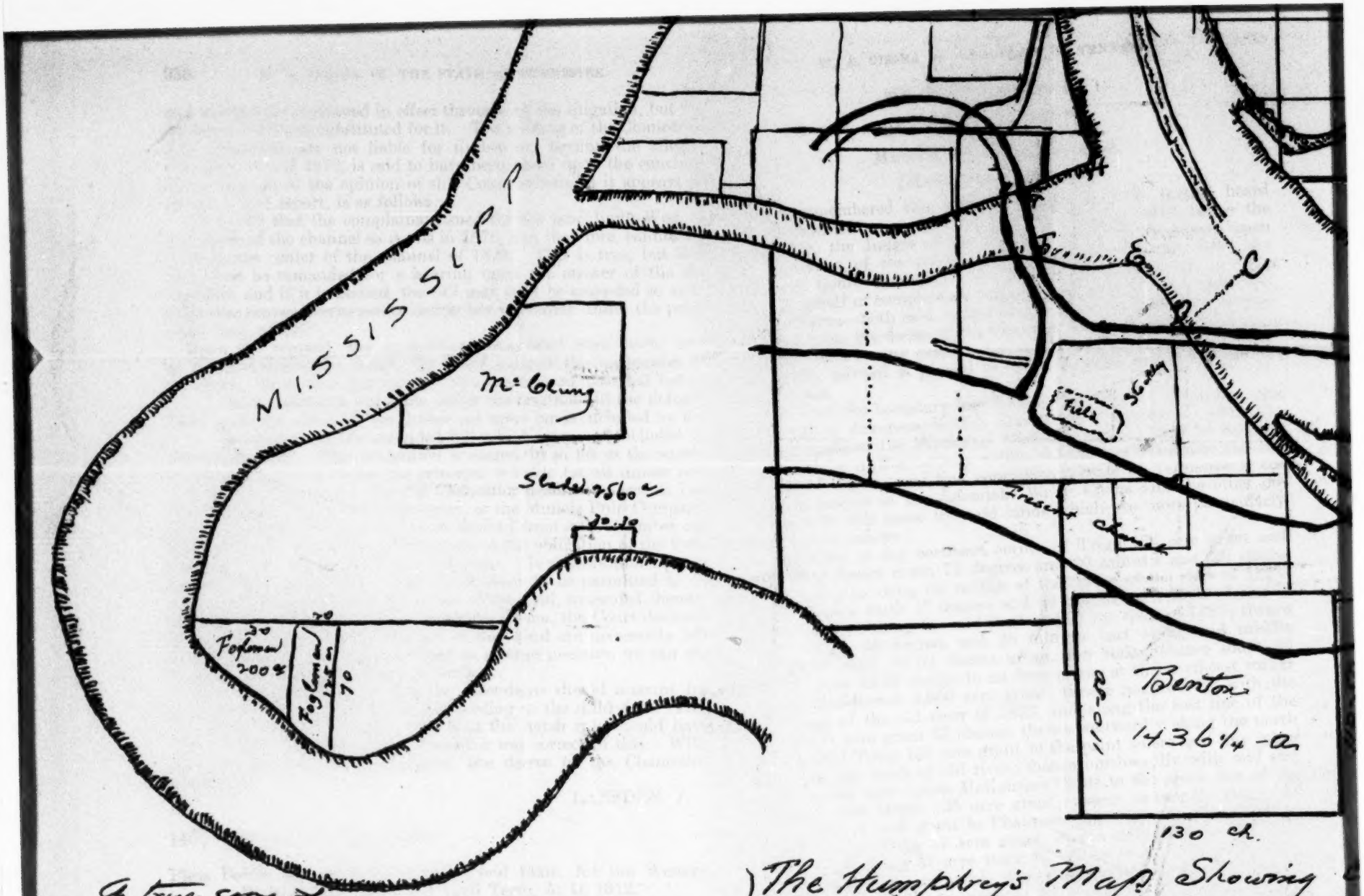
LANSDEN, *J.*

1457 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1912.

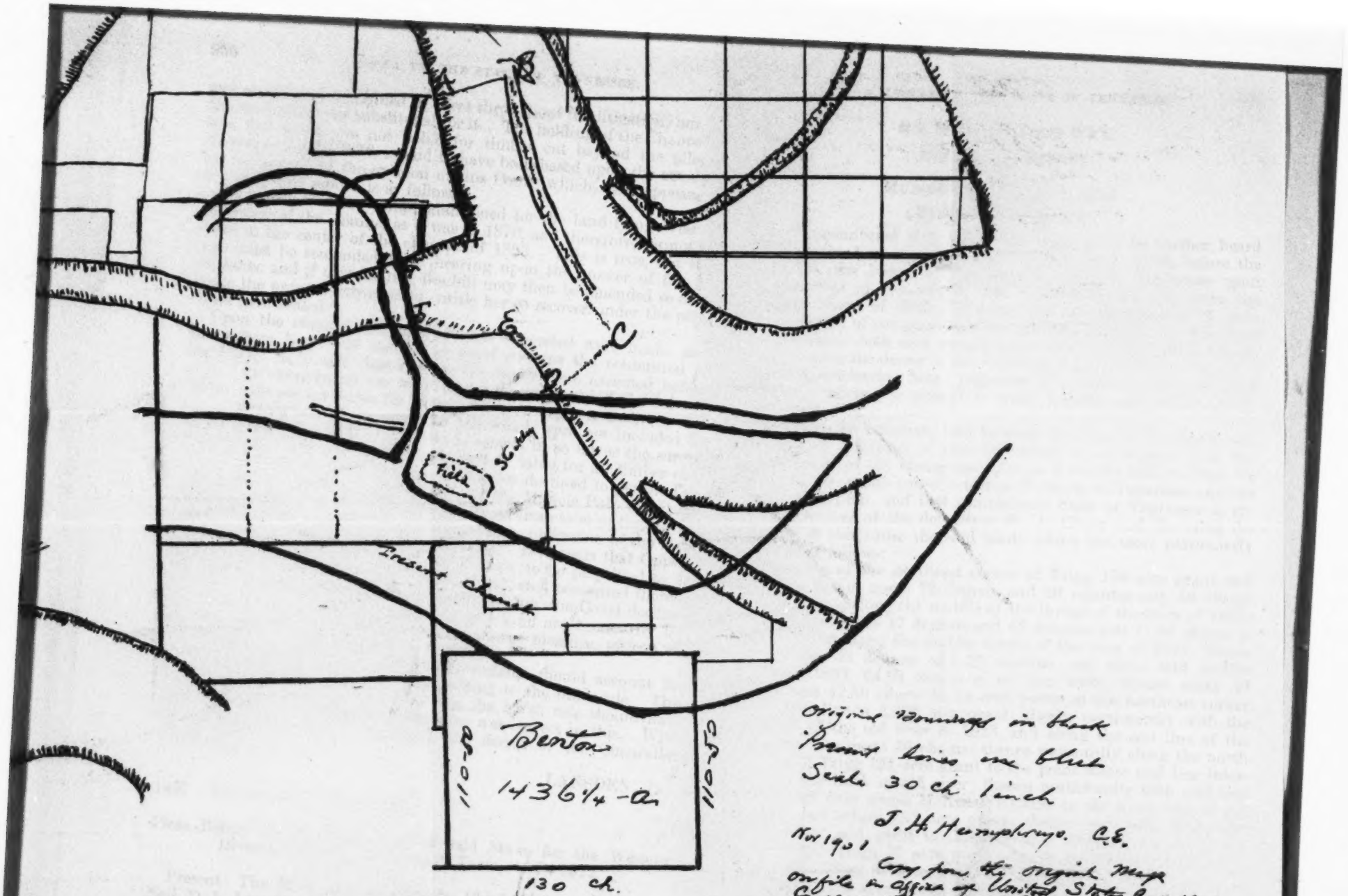
Present: The Hon. Jno. K. Shields, Chief Justice, and M. M. Neil, D. L. Lansden, Grafton Green, and A. S. Buchanan, Associate Judges, when the following proceedings were had, June 20th, to wit:


North
409
Basin of Tennessee
$1458 1/2.
ARKANSAS
RIVER
C
Levee
Fills
Scully



A true copy of
Exhibit "A" to Original bill.
State of Tennessee
vs
Muncie Pulp Co. Et al

The Humphreys Map Showing
in Brown Red and Conditions



Original soundings in black
Present lines on blue
Scale 30 ch 1 inch

J. H. Humphreys. C.E.
Nov 1901

Copy from the original map on file in office of United States Circuit Court in Memphis Tenn 1923

The Humphrey's Map Showing Conditions in 1823
in Brown Red and Conditions in 1901 on Blue

l bill.



#3, Shelby Chancery D'k't.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

(*Modified and Affirmed.*)

Be it remembered that this cause came on to be further heard and determined upon this, the 21st day of June, 1912, before the Honorable, the Judges of the Supreme Court of Tennessee, upon the transcript of the record, with all exhibits thereto, from the Chancery Court of Shelby County, and the assignments of error filed on behalf of complainant State of Tennessee and the defendant W. A. Cissna—both said compmainant and said defendant having appealed from the decree of the Chancery Court of Shelby County—and the Court having heard argument of counsel thereon and being sufficiently advised is pleased to order, adjudge and decree as follows, to-wit:

(1) That the boundary line between the State of Tennessee and the State of Arkansas, is that line which is equidistant from the defined banks of the Mississippi river as it *run* in 1823, so that the land sued for in this cause is within the State of Tennessee and the County of Tipton, and that complainant State of Tennessee is entitled to recover of the defendant W. A. Cissna and the other defendants in this cause the said lands which are more particularly described as follows:

Beginning at the northeast corner of Trigg 153 acre grant and extending thence north 72 degrees and 20 minutes east, 36 chains to an iron pipe along the middle of the thread of the river of 1823; thence south 17 degrees and 40 minutes east 77.86 chains to
1458 a point along the middle thread of the river of 1823; thence south 33 degrees and 20 minutes east along said middle thread of 1823, 64.02 chains to an iron stake; thence south 49 degrees west 42.50 chains to an iron pump at the northeast corner of the Huddleston 2,000 acre grant; thence northwardly with the east bank of the old river of 1823, and along the east line of the Trigg 131 acre grant 35 chains; thence westwardly along the north line of said Trigg 131 acre grant to the point where said line intersects the east bank of old river; thence northwardly with said east bank of old river across McKenzie's Chute to the south line of the Clamers' and others 135 acre grant; thence eastwardly along the south line of said grant to Chalmers and others to the southwest corner of the Trigg 37 acre grant; thence eastwardly to the south line of said Trigg 37 acre tract, 15 chains to the southeast corner of the Trigg 152 acre grant; thence northwardly with the east line of said Trigg 152 acre grant to the northeast corner of said tract and the point of the beginning; and being the same tract of land embraced within the letter- A, B, C, D, E, F, G, and H, and the Humphreys' map, which is part of the record in this cause, and a copy of which was filed as Exhibit A to the original bill herein, and is made a part of this decree, and *is* such ordered to be spread upon the minutes of this Court, which is done accordingly.

(Here follows map marked page 1458½.)

1459 (2) That a writ of possession be issued by the clerk of this Court to place the complainant State of Tennessee in possession of said tract of land hereinbefore described.

(3) And it appearing to the Court that the defendants, W. A. Cissna, and the Muncie Pulp Company are liable to the complainant State of Tennessee for the value of the timber cut, or removed by them, or by any one under their authority, from the tract of land hereinbefore adjudged and decreed to belong to complainant State of Tennessee, it is so ordered, adjudged and decreed.

(4) And it further appearing to the Court that on or about the 3rd day of August, 1904, Leo Oppenheimer, who by answer duly filed has become one of the defendants in this cause, was appointed Receiver, and in March, 1905, was appointed Trustee in Bankruptcy, of the defendant Muncie Pulp Company, a corporation which during the pendency of this cause has been adjudged a bankrupt, and that said defendant Oppenheimer as such Receiver or Trustee removed from said tract of land all the timber, cord wood and lumber which had heretofore been cut upon and not removed from said land, and also continued to cut and remove from said land, and to sell and dispose of the same, large amounts of timber, for the value of all of which he is liable to complainant State of Tennessee as the owner of said land, it is so adjudged and decreed.

(5) It is further adjudged and decreed that the liability of the American Surety Company as surety for the defendants Muncie Pulp Company, upon the bond for ten thousand dollars, executed on January 5th, 1904, and for fifteen thousand dollars executed on March 9th 1904, extends only to the value of timber which had been cut prior to December 5, 1903, but not removed, and also to the value of the timber cut or removed subsequent to Dec. 15, 1903, from the land lying between the middle thread of the Mississippi River as it ran on the 7th day of March, 1876, and east of
1460 the Tennessee bank of the river as shown by the Humphrey map.

(6) It is further ordered, adjudged and decreed that in ascertaining the value of the timber for which complainant State of Tennessee is entitled to recover against the defendants, the "mild rule" should be applied, that is, the value of the timber in the stump at the time and place it was cut, should be the measure of value to be applied in ascertaining the recovery of complainant on account of the timber cut from said lands.

(7) And it further appearing to the Court that this is a proper case for a reference to ascertain the amount and value of the timber, if any, cut and removed by the defendants, or either of them, from said lands hereinbefore adjudged to belong to the complainant State of Tennessee and for which said complainant is entitled to recover as hereinbefore adjudged, it is ordered and decreed that this cause be and now is referred to the Clerk of this Court, who will, after due notice to the parties, or solicitors of record, and from the proof now on file, or such other proof as may be taken before him by the parties, ascertain and report to this Court at its next term what timber and the value thereof, measuring accordingly to the rule

hereinbefore decreed, has been cut or removed by the defendant or any of them from the lands adjudged to be the property of the State of Tennessee, and, in so far as the same can be ascertained, the date when such timber was cut or removed.

The Clerk will show a report.

(1) The amount of the timber and the value thereof which has been cut or removed by the defendant W. A. Cissna, or any one for him, or any one acting under his authority, or by his direction from the lands herein adjudged and decreed to belong to the complainant State of Tennessee.

(2) What timber and the value thereof was cut or removed from said land by the defendant Muncie Pulp Company between December 15, 1903, and August 1, 1904.

(3) What timber and the value thereof was cut or re-
1461 moved from said lands adjudged to complainant by the defendant Oppenheimer, Receiver and Trustee in Bankruptcy, after August 1, 1904.

(4) What timber, lumber and logs, and the value thereof, were upon the land, or cut or removed therefrom, lying between the middle thread of the Mississippi River as it ran on the 7th day of March, 1876, and east of the Tennessee bank of the river as shown by the Humphrey map.

But nothing herein shall be construed as decreeing that the middle thread of the Mississippi River, as it ran on March 7th, 1876, was different from the middle thread of said river as it ran in 1823, but to the extent the same may be material under the fourth item of reference the Clerk will report the fact as it may be found.

(8) And it further appearing to the Court that on February 17, 1911, there was in the hands of defendant, Leo Oppenheimer, as Receiver and Trustee in Bankruptcy of the defendant Muncie Pulp Company, the sum of $19,500.00, arising from the sale of timber cut from the lands sold by defendant Cissna to said defendant Muncie Pulp Company, which was the subject of controversy between complainant State of Tennessee and said defendants, as shown by the petition filed by said Oppenheimer as Receiver and Trustee, as aforesaid, in this cause in the Chancery Court of Shelby County, Tennessee; and it further appearing that in and by said petition the said Oppenheimer as Receiver and Trustee as aforesaid, among other things, prayed to be allowed to pay, and have a decree directing him to pay, said funds in which he claimed no interest, into Court in this cause to the end that he as Receiver and Trustee in Bankruptcy of the Muncie Pulp Company and the American Surety Company, as surety for said Muncie Pulp Company upon the lands hereinbefore referred to, be relieved from further liability on account of said fund or for timber cut by him, the said Oppenheimer or the said Muncie Pulp Company upon or removed from the said lands claimed by the complainant State of Tennessee, now adjudged to belong to
1462 her; and it further appearing that the complainant State of Tennessee and said American Surety Company were willing to have said funds so paid into Court in this cause, and join in a motion to that effect in the Court below, but that the said motion and

the prayer of said petition being resisted by defendant Cissna was denied and disallowed by the Court below.

And this Court being of the Opinion that the Chancery Court of Shelby county erred in refusing to permit the defendant Leo Oppenheimer to pay said funds in his hands as aforesaid into Court in accordance with the prayer of his said petition, and that the complainant State of Tennessee's fourth assignment of error is well taken, doth therefore adjudge and decree that so much of the Chancellor's decree as denied the relief sought by the petition of said Oppenheimer and the motion of the State of Tennessee in conformity with the prayer of said petition, be and the same is hereby reversed, and it is further adjudged and decreed that the defendant Oppenheimer, as Receiver and Trustee in Bankruptcy of the defendant Muncie Pulp Company as aforesaid in this petition, be permitted and he is hereby directed to pay into the office of the Clerk of this Court, taking the receipt of the Clerk therefor, the funds in his possession arising from the sale of the timber cut from the lands sold by defendant Cissna to defendant Muncie Pulp Company, as hereinbefore shown, and upon the payment of said funds now in the possession of the said defendant Oppenheimer into the office of the Clerk of this Court the said Oppenheimer, Receiver and Trustee in Bankruptcy of the defendant Muncie Pulp Company, and the said American Surety Company, as surety of the said defendant Muncie Pulp Company upon the lands hereinbefore referred to, shall be relieved of any further liability on account of said funds, or on account of said lands, to-wit, said bond of ten thousand dollars, executed by the defendant Muncie Pulp Company with the American Surety Company as surety thereon, on January 5, 1904, and
1463 the bond for fifteen thousand dollars, executed by the Muncie Pulp Company on the 9th day of March, 1904, with the said American Surety Company as surety thereon; and said funds when so paid into the office of the Clerk of this Court shall be held to satisfy any recovery which may be rendered in favor of the complainant State of Tennessee against the defendant W. A. Cissna for and on account of timber cut or removed from the lands of the State of Tennessee by the said defendant Cissna, or the defendant Muncie Pulp Company claiming under and through the defendant Cissna, or by any one claiming to act for the defendant Cissna and Muncie Pulp Company, or by their authority.

In case said monies are paid into the office of the Clerk of this Court, the Clerk need not execute the foregoing fourth item of reference.

And it appearing to the Court from the statement of the Attorney-General made in open Court that Caruthers Ewing, Esq., E. B. Wilson, Esq., and Edwin T. Taliaferro, Esq., as attorneys and counsel for defendant Cissna, claim a lien upon said funds in the hands of the said defendant Oppenheimer, Receiver and Trustee in Bankruptcy, as aforesaid, and that recently he, said Attorney-General, at the instance and upon the request of said attorneys for Cissna agreed that, with the consent of the American Surety Company, five thousand dollars of said funds might be paid to said attorneys,

that is, the sum of $2,500.00 to said Caruthers Ewing, the sum of $1,500.00 to E. B. Wilson, and the sum of $1,000.00 to said Edwin T. Taliaferro, upon the condition, however, that in case the remainder should prove insufficient to pay and satisfy whatever judgment the State of Tennessee might recover against the defendant Cissna and others, parties defendant hereto, on account of timber cut or removed from said lands, each of said attorneys would refund and repay the amount so paid to him, or a proportionate part thereof, as might be necessary,—but that said American Surety Com-
1464 pany declined to join in said agreement and thereupon the Attorney-General moved the Court to make an order in this case to carry out said agreement when said funds are paid into the office of the Clerk of this Court, and upon consideration by the Court it is so ordered, and the Clerk of this Court is directed, when said funds are paid into his hands, to pay to each of said attorneys respectively the amount hereinbefore set out, upon each of them entering into an agreement to repay and refund the same, and to confess judgment herein therefore, in case the same will be needed to satisfy any recovery herein in favor of the complainant State of Tennessee against the defendant Cissna—each of said attorneys being responsible only for the amount, or a proportionate amount thereof as may be necessary, paid to him.

(9) All the costs of this cause will be paid by the defendant Cissna, for which execution may issue.

1465 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1912.

Present: The Hon. Jno. K. Shields, Chief Justice, and M. M. Neil, D. L. Lansden, Grafton Green and A. S. Buchanan, Associate Judges, when the following proceedings were had, June 20th, to-wit:

#2, Shelby Chancery Dk.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY.

(Petition to Rehear Dismissed.)

This cause came on further to be heard upon a petition to rehear on behalf of the State, which is after full consideration by the Court denied, this Court being of the opinion that said petition is not well taken and the same is dismissed at the cost of the petitioner.

1466 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1913.

Present: The Hon. M. M. Neil, Chief Justice, and D. L. Lansden, Grafton Green, A. S. Buchanan and Samuel C. Williams, Associate Judges, when the following proceedings were had, April 15th, to-wit:

STATE OF TENN.
vs.
MUNCIE PULP CO. et al.

Order Reviving Order of Reference.

In this cause, upon motion of the Complainant, State of Tennessee, the Court is pleased to order and decree that the order of Reference entered herein at the last term of this Court on the 20th day of June, 1912, be and the same is in all things revived, and the Clerk of this Court will proceed to execute the same as therein directed making report to this term of Court if practicable, if not, then to the next term thereof.

1467 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State, for the Western Division Thereof, at the April Term, A. D. 1914.

Present: The Hon. M. M. Neil, Chief Justice, and D. L. Lansden, Grafton Green, A. S. Buchanan and Samuel C. Williams, Associate Judges, when the following proceedings were had, May 19th, to-wit:

No. —. Ended Docket, 1912.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Comes the State of Tennessee by its Attorney-General, Frank M. Thompson, and moves the Court that the exceptions filed herein by W. A. Cissna to the report of the Clerk on the accounting ordered by this Court, to ascertain the amount and value of the timber removed from the State's land be overruled and for naught held, that such report be in all things confirmed, and for final judgment in said cause.

FRANK M. THOMPSON,
Att'y-Gen.
W. H. CARROLL,
JOHN P. BULLINGTON,
Ass. Attorneys.

1468 THE STATE OF TENNESSEE:

Pleas Before the Supreme Court of said State for the Western Division Thereof, at the April Term, A. D. 1914.

Present: The Hon. M. M. Neil, Chief Justice, and D. L. Lansden, Grafton Green, A. S. Buchanan, and Samuel C. Williams, Associate Judges, when the following proceedings were had, June 18th, to wit:

STATE OF TENNESSEE
vs.
MUNCIE PULP CO.

Final Decree.

This day this cause came on to be heard before the Court on the application of the State of Tennessee upon an order confirming the report of T. B. Carroll, Clerk, as follows:

The undersigned respectfully reports to your Honors that in accordance with the mandate of this Court, rendered on the 21st day of June, 1912, after due notice given to the parties, or their solicitors of record, from the proof now on file in said cause, and other proof taken by counsel for the State of Tennessee, he begs herewith to report to the Court his findings:

In making this report, I wish to state that the reference was not heretofore taken because I was directed by General Charles T. Cates, Jr., Attorney-General for the State of Tennessee to delay the reference for a time on account of an agreement entered into between him and Mr. Caruthers Ewing, counsel for W. A. Cissna.

I wish further to report to the Court that Leo Oppenheimer, Trustee in Bankruptcy for the Muncie Pulp Co., on the 23rd day of September, 1912, paid into the hands of the undersigned the sum of $20,000.75; that out of that amount in accordance with the orders of the Court I paid over to Mr. Caruthers Ewing, the sum of $2,500.00, to Mr. E. B. Wilson the sum of $1,000.00, and to Mr. Edwin Taliaferro the sum of $1,500.00, accepting therefrom their individual agreements to repay and refunds, and to confess
1469 judgment herein therefor in case the said sum should be needed to satisfy any recovery declared in favor of the complainant, The State of Tennessee, against the defendant W. A. Cissna, said agreements are attached hereto.

Order of Reference.

1. The amount of the timber and the value thereof which has been cut or removed by the defendant, W. A. Cissna, or anyone for him, or anyone acting under his authority or by his or by his direction, from the lands herein adjudged and decreed to belong to the complainant, The State of Tennessee.

2. What timber and the value thereof was cut or removed from

the sand lands by the defendant, The Muncie Pulp Co., between December 15th 1903, and August 1, 1904.

3. What timber and the value thereof was cut or removed from said lands adjudged to complainant by the defendant, Oppenheimer, Receiver and Trustee in Bankruptcy, after August 1, 1904.

4. What timber, lumber and logs and the value thereof, were upon the land or cut or removed therefrom lying between the middle thread of the Mississippi River as it ran on the 7th day of March, 1876, and east of the Tennessee Bank of the river as shown by the Humphrey map.

In making my report of the amount of timber cut and removed from the State's lands, I am numbering the items 1, 2, 3, and 4.

1. I find that all of the timber cut from the land adjudged to belong to the State of Tennessee cut and removed from the said land by the Muncie Pulp Co., or its Receiver or Trustee in Bankruptcy, or their agents, under contract of date of June 21, 1901, between W. A. Cissna and the Muncie Pulp Co., wherein the said W. A. Cissna conveyed or attempted to convey the timber on said lands and other lands to the said Muncie Pulp Co. See copy of contract, record page- 145-8. This timber was cut and re-
1470 moved by the Muncie Pulp Co., its Receiver and Trustee in Bankruptcy, and its attorneys or their agents. See deposition of R. G. Brown, record pp. 92-98-99. Also deposition of Vince Beard, Record, p. 1, question five and answer.

The saw log timber or a very considerable part thereof was sold to the Anderson-Tully Co., for $11 and $13 per thousand feet, depending on grades.

See deposition of R. G. Brown, record page- 91-92-115.

Also Exhibits thereto, Record, page- 107-8-9.

Also Exhibit to deposition of A. J. Harris, Jr., record page- 128, 127-129.

The net price received by the Muncie Pulp Co., for the saw log timber was $8 per (1,000) one thousand feet.

See deposition of R. G. Brown, record, page- 92 and 93.

See Exhibits to deposition of A. J. Harris, Jr., record, page- 127-8-9.

From the proof taken by counsel for the State of Tennessee, on behalf of the complainant, The State of Tennessee, it appears that in 1912, counsel for the State, sent H. M. Spain, a reputable and experienced timber estimator, C. H. Scherer, a consulting Engineer, J. A. Green, a surveyor, together with helpers upon the land and that an accurate and careful count of the stumps was made and an accurate and careful measurement was made of the size of said stumps, and, whenever possible, measurements were made of the length of the trees, and from the deposition- of these witnesses, together with the corroborative testimony of Vince Beard, I find that the said Cissna; or the Muncie Pulp Co., or their agents, or the Receiver and Trustee in Bankruptcy of the said Muncie Pulp Co., Leo Oppenheimer, or his agents and attorneys, cut and recovered from the lands adjudged to belong to the State of Tennessee, 5,654,824

feet of law log timber, receiving therefor, a uniform price of $8 per (1,000) one thousand feet, or a total of $45,138.59.

I find further that the Muncie Pulp Co., began cutting and removing this timber late in 1901, or early in 1902 and completed
1471 removing thereof early in 1906. It is impossible to ascertain from the proof how much was cut and removed each month, or each year, so I have averaged the cutting and find, in the event interest is to be charged from the date of the removal, that the average time of removal dates from January 1, 1904.

I find therefore, that in the event interest is to be charged, from the date of the removal, ten years and three months have elapsed since the average date of removal, making a total interest charge of 62 per cent. which should be computed against the totel value of the timber above fixed, that is, $45,138.59.

It is impossible for me to determine accurately, from the proof, either in the original record or from the proof produced at this reference, the amount of pulp wood timber cut and removed from the State lands. It is shown by the deposition of R. G. Brown (See Record p-. 112-3) that a considerable amount of pulp wood was removed and that various sums were received therefor.

It appears that the timber was sold by the cord for one dollar per cord net.

See deposition of R. G. Brown, record, page 92.

From the deposition of the said R. G. Brown, it appears that of the $23,000.00 received by him, seven thousand two hundred and nineteen and 26/100 ($7,219.26) Dollars, was received from the sale of pulp wood; while fifteen thousand, seven hundred and eighty ($15,780.00) Dollars was received from the sale of said log timber. Taking this as an average it would seem that the value of timber ran about two (2) to one (1); that is, there was two ($2.00) dollars' worth of saw log timber to each dollars' ($1.00) worth of pulp wood.

I therefore, find that the value of the pulp wood cut and removed from the land was one-half (½) that of the saw log timber, or $22,569.00.

See deposition of R. G. Brown, record, 112-113.

1472 Item 2.

In regard to the second clause wherein I am ordered to ascertain and report the amount and value of the timber cut and removed from the State's lands by W. A. Cissna, or by the Muncie Pulp Co., or its agents between December 15, 1903, and August 1, 1904. I wish to report that the record shows that no account was kept by any one showing the amount of timber cut from this land at any particular time. It seems that the timber cut from the State's land was intermingled with timber cut from other lands, and it is, therefore, impossible for me to ascertain or report the amount or the value of the timber cut between any particular dates. It seems that there was some agreement between the attorneys for the State and the attorneys for the said W. A. Cissna and the Muncie Pulp Co.,

wherein one Captain Joplin was to keep a tally and record of these matters, but a few months thereafter, the said Joplin died and no attempt was ever made to separate the items. The only evidence of any kind that might, by any chance, throw any light on this question, or the accounts between the Anderson-Tully Co., and the Muncie Pulp Co. and between the Anderson-Tully Co., and R. G. Brown and Caruthers Ewing, attorneys, and between the Anderson-Tully Co., and Vince Beard, wherein it appears, that there was sold and delivered to the Anderson-Tully Co., and they paid for $45,-262.90 worth of timber between October 15, 1903, and March 23, 1906; that these payments were made to different parties; and Mr. R. G. Brown, in his testimony states that these payments were made on account of timber cut from this and other lands owned by W. A. Cissna.

I therefore find that it is impossible from the evidence before me, to ascertain or report the amount or the value of the timber cut and removed from the State's lands by the Muncie Pulp Co., between December 15, 1903 and August 1, 1904.

Item 3.

For the same reason given in clause two of the reference, I
1473 find it is impossible for me to ascertain or report the amount or the value of the timber adjudged to the complainant, the State of Tennessee, by the defendants, Oppenheimer, Trustee in Bankruptcy for the Muncie Pulp Co., after August 1, 1904.

Item IV.

In as much as Leo Oppenheimer, Trustee in Bankrputcy, for the Muncie Pulp Co., paid into the undersigned's hands as Clerk of this Court the sum of $20,200.75, no proof was taken nor did I make any findings on the fourth clause of the referee.

Of the amount so paid into my hands by the said Oppenheimer, Trustee, after paying out $5,000.00 to the three attorneys, that is Caruthers Ewing, E. B. Wilson, and E. T. Taliaferro, as directed by the decree of this court, I still have on hand the sum of $15,200.75.

In finding the value of the timber cut and removed from the State's lands I have applied the "mild rule", that is, the value of the timber in the stump at the time and place it was cut.

All of which is respectfully submitted this, the sixth day of April, 1914.

T. B. CARROLL, *Clerk.*

And this cause is likewise heard on the exceptions of W. A. Cissna to said report, and on his application to state proceedings as follows:

Now comes W. A. Cissna and excepts to the report of T. B. Carroll, Clerk, on the reference ordered in this cause June 21, 1912, and for the cause of exceptions, says that the proof was taken on an

erroneous theory, to-wit: That the complainant had jurisdiction of — entitled to that territory which went to the middle of the Mississippi River as it ran in 1823, whereas complainant's right and title as aforesaid, if any, went only to the middle of the Mississippi River as it ran in 1876, being the year in which an avulsion took place, the legal result of which was to leave the boundary line be-
1474 tween Tennessee and Arkansas in the middle of the river as it ran just preceeding the avulsion.

And said defendants, further excepting, shows that it was agreed in the taking of proof on said reference that the complainant had treated the boundary line between Tennessee and Arkansas as the middle of the Mississippi River as it ran in 1823. And that the timber charged against this defendant in the report of the clerk was timber which was within said boundary, whereas, the true boundary was at another and a different place, towit: The middle of the river as it ran in 1823, and it is not claimed that the timber as it is valued by the clerk was within the State of Tennessee, assuming that Tennessee's Western boundary line is the middle of the Mississippi river as it ran in 1876.

And for further cause of exceptions. In the nature of an objection to the entry — a decree, said W. A. Cissna, brings to the attention of the Court, that, as adjudged by the Supreme Court in this cause, the question herein involved is the location of the boundary line between the States of Tennessee and Arkansas, the said W. A. Cissna objecting and protesting that the Supreme Court of Tennessee has no jurisdiction of that issue; that, aas shown by the record in this cause, the question of the fixing of the boundary line between the said states is now pending before the Supreme Court of the United States; that said cause was by counsel for the respective states argued before the Supreme Court of the United States on April 20, 1914, and was submitted to the Court on that date, that the decision of said court will be final and conclusive on all parties; that after the submission of said case to the only court having jurisdiction of the subject matter and while said Honorable Court is considering said case no steps or proceedings shall be had in the present case, that this case should be stayed until it is settled and determined by the Supreme Court of the United States where the line between Tennessee and Arkansas is to be located, because *in the* determination by this Court not in accord with the determination of the
1475 Supreme Court of the U. S., is void and would be in conflict with the decision of the Supreme Court of the U. S.

And said W. A. Cissna, excepting to any further proceeding or to the entry of any decree in the report of the Clerk, submits the proof taken, and proceedings had on the reference as part of the record for consideration of the Court on this exception and protest in the nature of an application to stay proceedings.

CARUTHERS EWING,
Sol. for W. A. Cissna.

And the Court being advised in the premises, upon consideration of said motion doth

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Order, adjudge and decree that the report of T. B. Carroll, Clerk be approved and confirmed and that the exception and application for stay of proceedings of W. A. Cissna be disallowed and to the said holding of the Court with respect to both matters the defendant W. A. Cissna excepted.

It is accordingly ordered, adjudged and decreed by the Court that the State of Tennessee have and recover of W. A. Cissna the sum of $45,138.59, with int. thereon from the 1st day of Jan. 1904, to this date, to-wit: $28,264.29, making a total recovery of $73,402.88, being the value of all the saw log timber cut and removed from the lands adjudged to belong to the State of Tenn., and being that particular land described by metes and *and* bounds in the decree of this Court and in the 2nd Section of the 1st paragraph thereof said decree having been handed down by this Court in the above styled cause upon the 21 day of June 1912, which said — is as follows:

Beginning at the northeast corner of Trigg 153 acre grant and extending thence north 72 degrees and 20 minutes east, 36 chains to an iron pipe along the middle thread of the river of 1823; thence south 17 degrees and 40 minutes east 77.86 chains to a point along the middle thread of the river of 1823; thence south 33 degrees and 20 minutes east along said middle thread of 1823, 64.02
1476 chains to an iron stake, thence south 49 west 42.50 chains to an iron pump in the northeast corner of the capitol Huddleston's 2000 acre grant; thence northwardly with the east bank of the old river of 1823, and along the east line of the Trigg 131 acre grant 35 chains, thence westwardly along the north line of said Trigg 131 acre grant to a point where said line intersects the east bank of old river; thence northwardly with said east bank of the old river across McKenzie's Chute to the south line of the Chalmers and other- 135 acre grant; thence eastwardly along the south line of said grant to Chalmers and others to the southwest corner of the Trigg 37 acre grant, thence eastwardly to the south line of said Trigg 37 acre grant, 75 chains to the southeast corner of he Trigg 152 acre grant; thence northwardly with the east line of the said Trigg 152 acre grant to the northeast corner of said tract, and the point of beginning; and being the same tract of land embraced within the letters A, B, C, D, E, F, G, and H, on the Humphrey's Map, which is a part of the record in this cause, and a copy of which was filed as exhibit A to the original bill herein and is made a part of this decree, and as such is ordered to be spread upon the minutes of this Court, which is done accordingly.

It is further ordered, adjudged and decreed that the State of Tennessee have and recover of W. A. Cissna the sum of $22,569.00, being the value of the pulp wood cut and removed from the lands herein adjudged to belong to the State of Tennessee as above defined, with interest thereon from the 1st day of January, 1904, towit: $14,-131.92, making a total of $36,700.92.

It is therefore accordingly ordered, adjudged and decreed by the Court of the items above mentioned that the State of Tennessee have and recover of W. A. Cissna the total amount of $110,103.80 and the costs hereof which execution may issue as at law.

It is further ordered, adjudged and decreed that Caruthers Ewing, E. F. Taliaferro and E. B. Wilson, be declared to have a lien for attorney's fees to the extent of the payments heretofore made
1477 them, based on services rendered in the recovery of the fund, which was paid into the Court—that is, the said Caruthers Ewing a lien to the extent of $2500.00, the said E. T. Taliaferro, the sum of $1500.00, the said E. B. Wilson the sum of $1000.00.

It is further ordered, adjudged and decreed that the funds in the hands of the Clerk of this court, to-wit, $15,200.75, be applied to the satisfaction of the judgment herein rendered, to all of which W. A. Cissna duly excepts.

It is further ordered, adjudged and decreed that all the costs of this cause be paid by W. A. Cissna and —— ——, surety on the appeal bond, for which execution may issue as at law.

W. A. Cissna, upon the hearing of the motion of the State to confirm the report of the Clerk, brought to the attention of the Court his exceptions and his application for a stay of the proceedings pending the settlement by the Supreme Court of the United States of the boundary line between the States of Tennessee and Arkansas, and objected to the further consideration of his case by the Court, and requested that the proceedings be stayed as above and said exceptions, and said requests were disallowed, and to this action said W. A. Cissna duly excepted.

And the said W. A. Cissna, in open Court, stating his intention to apply to the Supreme Court of the U. S. for the writ of certiorari or to take necessary steps to have the action of the Court herein reviewed by the Supreme Court of the U. S., it is hereby ordered that the Clerk of this Court furnish the said W. A. Cissna upon payment of proper charges therefor and all costs of this proceeding, a certified copy of the record herein, as the record to be presented to the Supreme Court of the United States for the purposes aforesaid.

1478 In the Supreme Court of the State of Tennessee.

THE STATE OF TENNESSEE
vs.
MUNICE PULP COMPANY et al.

To the Honorable M. M. Neil, Chief Justice of the State of Tennessee:

The petition of W. A. Cissna respectfully shows that heretofore there was tried in the Chancery Court of Shelby County, Tennessee, a case in which the petitioner was the main defendant and on appeal to this Court the judgment of the Chancery Court of Shelby County, Tennessee, rendered on the demurrer of the complainant, was overruled—the opinion of the Supreme Court in that behalf being reported in Vol. 119 at page 47 of the Reports of the State of Tennessee.

Petitioner states that this cause was then remanded under and by virtue of said opinion of the Supreme Court of this State to the

Chancery Court of Shelby County, Tennessee, where the complainant's bill was amended and on issues joined a judgment in accordance with the opinion of the Supreme Court was rendered against the petitioner and from that decree of the Chancery Court of Shelby County, Tennessee, the petitioner appealed to the Supreme Court, when, at the April Term, 1912 thereof and on the 21st day of June, 1912, the judgment and decree of the Chancery Court was
1479 affirmed and a reference ordered to the Clerk of the Supreme Court, which reference was executed and a report made and filed by said Clerk, which was, over the objection of the petitioner, on the 18th day of June, 1914, confirmed and on said date by the Supreme Court of Tennessee a final judgment or decree was rendered in this cause awarding to the State of Tennessee the possession of real estate mentioned and described in the bill, and likewise awarding the State of Tennessee as complainant, a judgment against this petitioner in various sums making a total of $73,402.88, principal and interest on one item, and the further sum of $36,700.92, principal and interest on another item, making a total recovery of $110,-103.80, with the cost of proceedings.

Petitioner avers and says that the complainant in this cause sought the recovery of land and a recovery for timber alleged to have been cut from said land by petitioner, the determination of which question required and resulted in the location of the boundary line between the States of Tennessee and Arkansas, and upon the trial of said cause in the Chancery Court of Shelby County, Tennessee and in the nature of an objection to the confirmation of the report of the Clerk of the Supreme Court of the State of Tennessee, the defendant insisted and relied upon the absence of jurisdiction in any court of the State of Tennessee to settle and determine the boundary line between the two sovereignties, to-wit, the State of Arkansas and the State of Tennessee; the said defendant insisted and relied upon the statutes of the United States, towit, 5 U. S. Statutes at Large
1480 5051, as defining the limits and boundary of the State of Arkansas, and insisted and relied upon the Constitution of the United States vesting in the Supreme Court of the United States exclusive jurisdiction to fix and determine the location of the boundary line between the two states, to-wit, Tennessee and Arkansas, and these insistences were by the Honorable Supreme Court of the State of Tennessee overruled and disallowed, resulting in a judgment as aforesaid, which judgment was, as petitioner respectfully submits, repugnant to and in violation of the law of the United States and of the Constitution of the United States.

And petitioner further shows that the said judgment of said Supreme Court was and is a final judgment in the highest court of the State of Tennessee in which a decision in said cause could or can be had.

Petitioner further shows that a federal question was raised in said cause, as hereinbefore set out, and that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States, with the Statutes of the United States, and the Constitution of the United States, and that said judgment of said Supreme

Court was contrary thereto and that a decision of said federal question, to-wit, the location of a boundary line between two sovereign states, was necessary to the judgment rendered and was expressly determined as the basis of the judgment of the Court.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Tennessee in said
1481 cause and prays that a writ of error to said Supreme Court be allowed; that citation be granted and filed; that the errors complained of may be reviewed in the Supreme Court of the United States and the Judgment of said Supreme Court of Tennessee be reversed.

This the 5th day of December, 1914.

W. A. CISSNA,
By CARUTHERS EWING,
His Attorney in Law and in Fact.

STATE OF TENNESSEE,
Shelby County:

Caruthers Ewing makes oath in due form of law and says the statements in the foregoing petition are true to the best of his knowledge, information and belief.

CARUTHERS EWING.

Sworn to and subscribed before me, this 5th day of December, 1914.

[Seal Earl King, Notary Public, Shelby Co., Tenn.]

EARL KING,
Notary Public.

1482 In the Supreme Court of Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP CO. et al.

Bond on Writ of Error.

Know all men by these presents, that, whereas W. A. Cissna, one of the defendants in this action, has applied for a writ of error that this cause may be removed from the Supreme Court of the State of Tennessee unto the Supreme Court of the United States, and

Whereas, said petition for writ of error with the record has been presented to the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee and said petition granted,

Wherefore, we, W. A. Cissna, as principal, and United States Fidelity & Guaranty Co., surety, do hereby acknowledge ourselves bound unto the State of Tennessee in the sum of One Thousand ($1,000.00) Dollars, good and lawful money, well and truly to be paid.

But the condition of this obligation is that said W. A. Cissna, as plaintiff in error, prosecute his writ of error aforesaid to effect, and if he fail to make his plea good shall pay all costs in this behalf accruing as may be adjudged by the Court.

Witness our hands, this 26th day of January, 1915.

W. A. CISSNA, *Principal.*
UNITED STATES FIDELITY & GUARANTY CO., OF BALTIMORE, MD.,
By S. M. WILLIAMSON,
Agt. & Att'y-in-Fact, Surety.

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

Approved this Jan. 29, 1915.
M. M. NEIL,
Chief Justice of Tennessee.

1483 Supreme Court of the State of Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

The above entitled matter coming on to be heard upon the petition of the appellant, W. A. Cissna, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee, upon examination of said petition and of the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, and bond having been executed in the penalty of one thousand dollars, a writ of error is hereby allowed, as prayed in the petition.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 29th day of January, in the year of our Lord, one thousand, nine hundred and fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

1484 To the State of Tennessee:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error granted by the undersigned, as Chief Justice of the Supreme Court of the State of Tennessee, in the case of the State of Tennessee vs. Muncie Pulp Company, et als., in which case W. A. Cissna is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in his petition is mentioned and complained of, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 29th day of January, in the year of our Lord, one thousand, nine hundred and fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

1485 Copy.

To the State of Tennessee:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error granted by the undersigned, as Chief Justice of the Supreme Court of the State of Tennessee, in the case of the State of Tennessee vs. Muncie Pulp Company, et als., in which case W. A. Cissna is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in his petition is mentioned and complained of, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 29th day of January, in the year of our Lord, one thousand, nine hundred and fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

[Endorsed:] 1485½. I hereby acknowledge service of within citation. This Feb'y 1st, 1915. Tom C. Rye, Governor, State of Tennessee.

1486 Copy.

To the State of Tennessee:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error granted by the undersigned, as Chief Justice of the Supreme Court of the State of Tennessee, in the case of the State of Tennessee vs. Muncie Pulp Company, et als., in which case W. A. Cissna is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in his petition is mentioned and complained of, and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, this the 29th day of January, in the year of our Lord, one thousand, nine hundred and fifteen.

M. M. NEIL,
Chief Justice of the Supreme Court of Tennessee.

I hereby acknowledge service of the foregoing writ this Feb'y 2d, 1915.

FRANK M. THOMPSON,
Att'y Gen. for Tenn.

1487 STATE OF TENNESSEE:

In the Supreme Court for the Western Division at Jackson.

United States Circuit Court of Appeals, Sixth Circuit, 1902.

Shelby Chancery Docket, #1, 1907.

Shelby Chancery Docket, #2, 1912.

STATE OF TENNESSEE
VS.
THE MUNCIE PULP CO.

I, T. B. Carroll, Clerk of the Supreme Court of Tennessee, for the Western Division, at Jackson, certify the above and foregoing 1486 pages to be a full, true and complete transcripts of the record in three volumes of proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered and all decrees and orders entered in the Supreme Court of Tennessee, for the Western Division at Jackson, in the above entitled cause.

STATE OF TENNESSEE
VS.
THE MUNCIE PULP COMPANY.

Also the original petition for the allowance of a Writ of Error, the original citation to the plaintiff in error acknowledgment of service thereof, a copy of the original bond and of its approval by the Chief Justice of said Supreme Court.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court at the City of Jackson, this 19th day of February, 1915.

[Seal Supreme Court of Tennessee, Western Division.]

T. B. CARROLL,
Clerk of the Supreme Court of Tennessee for the Western Division, at Jackson.

1488 STATE OF TENNESSEE:

In the Supreme Court for the Western Division at Jackson.

Shelby Chancery Docket.

THE STATE OF TENNESSEE
vs.
THE MUNCIE PULP CO.

Bill of Cost.

For making up transcript to the Supreme Court of the United States, paid by Mr. Caruthers Ewing, of Memphis $400.00

I, T. B. Carroll, Clerk of the Supreme Court, of Tennessee, for the Western Division, do hereby certify that the above is a correct copy of the bill of cost, in the above mentioned cause, and that I have received the above amount as above Stated, witness my hand and seal at office, in the City of Jackson, this 11th day of January, 1916.

[Seal Supreme Court of Tennessee, Western Division.]

T. B. CARROLL, *Clerk.*

[Endorsed:] 409/24,636.

1489 In the Supreme Court of Tennessee.

STATE OF TENNESSEE ex Rel.
vs.
MUNCIE PULP COMPANY et al. (W. A. CISSNA, Plaintiff in Error to Supreme Court of United States).

Stipulation of Counsel.

In this cause the parties agree that the attached papers being petition for writ of error, allowance thereof by Hon. M. M. Neil, Chief Justice of the Supreme Court of Tennessee, order thereon, writ of error and assignments of error, may be attached to and treated as a part of the record in this cause now on file with the Clerk of the Supreme Court of the United States.

This June 3rd 1915.

FRANK M. THOMPSON,
Attorney-General of State of Tennessee.
JNO. P. BULLINGTON,
Of Counsel for State of Tennessee.
CARUTHERS EWING,
Solicitor for Plaintiff in Error.

1490 Filed Jan. 29, 1915. T. B. Carroll, Clerk, by J. E. Youngbett, D. C.

In the Supreme Court of the State of Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

Assignments of Error on Writ of Error.

Now comes W. A. Cissna, plaintiff in error, and respectfully submits that in the record proceedings and final judgment of the Supreme Court of the State of Tennessee in the above entitled matter there is manifest error in this, towit:

1. The Court erred in holding that the boundary line between the State of Tennessee and the State of Arkansas was the middle of the Mississippi River as it existed in 1823 because the boundary line between the State of Tennessee and the State of Arkansas was the middle of the Mississippi River as it existed in 1876. From 1823 to 1876 there had been gradual and imperceptible changes in said river and the boundary line between the States followed said imperceptible and gradual changes and shiftings of the river and were unaffected by the fact of an avulsion that took place in 1876 whereby said river made for itself a new channel, at or about the property in controversy. Said avulsion worked no change in the boundary line between the States of Tennessee and Arkansas but said boundary line remained and continued as and where it was on the date of said avulsion.

1491 2. The Court erred in holding with respect to the avulsion of 1876:

"The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river back to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Tennessee what it held before the erosions upon its banks."

3. The Court erred in holding that the State of Tennessee had title to or jurisdiction over land to the middle of the Mississippi River as it existed in 1823 rather than as it existed in 1876. The Court held that there had been gradual and imperceptible changes in the middle of the river between those dates in that it was found as a fact that the width of the river at the point and place in controversy "had increased from perhaps a little less than one mile in 1823 to between one mile and a quarter and one mile and a half, and that the most if not all of this was the result of erosions from the Tennessee bank."

The Court further found as a fact that the change made in the

river by the abandonment of its old channel and the making of a new channel in 1876 was an avulsion.

On these facts as found by the Court and as they actually existed, the true boundary line between the States of Tennessee and Arkansas was the middle of the river as it existed at the time of the avulsion and said avulsion did not press back the line of the State of Tennessee so as to restore to the State land which had been lost to the State by erosions.

1492 4. The Court erred in not granting the petition of plaintiff in error for a stay of proceedings pending the settlement of the true boundary line between the States of Tennessee and Arkansas because said question was then pending in the Supreme Court of the United States and seasonable application was made to the Court for such stay of proceedings pending the settlement of the question by the Supreme Court of the United States.

The Court erred in proceeding with and determining the case because the Court was without jurisdiction on the statement of the Court that this proceeding affected "the States of Tennessee and Arkansas in their sovereign capacity and their jurisdiction along this entire joint boundary line." The Court was without jurisdiction to settle the boundary line between the States mentioned.

5. The Court erred in holding that there had been no accretions to Deans Island. The undisputed evidence was that there had been accretions to Deans Island in the State of Arkansas corresponding with the erosions upon or into the Tennessee shore.

6. The Court erred in holding that the Act of Congress admitting the State of Arkansas into the Union, approved June 5th, 1836 (5 Stat., 50 c. 100) did not have the effect of fixing the boundary line of the State of Arkansas as fixed by said Act of Congress.

7. The Court erred in holding that the boundary line between the States of Tennessee and Arkansas was not the middle of the main channel of the Mississippi River as related to the channel of navigation.

8. The Court erred in holding that the decision of the Supreme Court of the United States in Iowa v. Illinois, 147 U. S. 1,

1493 was not controlling and was in direct conflict with other decisions of the Supreme Court of the United States on this subject.

Of the case of Iowa v. Illinois, 147 U. S. 1, the Supreme Court erred in saying and holding:

"This case is in direct conflict with the previous cases of Missouri v. Kentucky, St. Louis v. Rutz, Jones v. Soulard, St. Louis Public School v. Risley, and Nebraska v. Iowa, above cited, which involved practically the same question, and the first four construed the same treaties and acts of congress. They are not differentiated, overruled, or even referred to in the case of Iowa v. Illinois. The decision in these cases is based upon the proper construction of the treaties and acts of congress admitting the States into the union, and not upon the laws of nations. We are better satisfied with the reasoning of these cases than we are with that of the last one, and prefer to follow them."

9. The Court erred in ordering a reference to the Clerk of the Court based upon the idea that the boundary line between the States of Tennessee and Arkansas was the middle of the Mississippi River as it existed in 1823; the Court erred in awarding a decree against the plaintiff in error based on the report of the Clerk, made in obedience to said order of reference.

10. The Court erred in taking jurisdiction of the said cause of action and in holding that the subject matter of controversy was within the State of Tennessee.

11. The Court erred in ordering judgment entered against the plaintiff in error and in failing to enter judgment for the plaintiff in error.

CARUTHERS EWING,
Solicitor for W. A. Cissna, Plaintiff in Error.

1494 Copy.

In the Supreme Court of the State of Tennessee.

THE STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

To the Honorable M. M. Neil, Chief Justice of the State of Tennessee:

The petition of W. A. Cissna respectfully shows that heretofore there was tried in the Chancery Court of Shelby County, Tennessee, a case in which the petitioner was the main defendant and on appeal to this Court the judgment of the Chancery Court of Shelby County, Tennessee, rendered on the demurrer of the complainant, was overruled—the opinion of the Supreme Court in that behalf being reported in Vol. 119 at page 47 of the Reports of the State of Tennessee.

Petitioner states that this cause was then remanded under and by virtue of said opinion of the Supreme Court of this State to the Chancery Court of Shelby County, Tennessee, where the complainant's bill was amended and on issues joined a judgment in accordance with the opinion of the Supreme Court was rendered against the petitioner and from that decree of the Chancery Court of Shelby County, Tennessee, the petitioner appealed to the Supreme Court, when, at the April Term, 1912, thereof and on the 21st day of June, 1912, the judgment and decree of the Chancery Court
1495 was affirmed and a reference ordered to the Clerk of the Supreme Court, which reference was executed and a report made and filed by said Clerk, which was, over the objection of the petitioner, on the 18th day of June, 1914, confirmed and on said date by the Supreme Court of Tennessee a final judgment or decree was rendered in this cause awarding to the State of Tennessee the possession of real estate mentioned and described in the bill, and likewise awarding the State of Tennessee as complainant, a judgment against this petitioner in various sums making a total of $73,402.88, prin-

cipal and interest on one item, and the further sum of $36,700.92, principal and interest on another item, making a total recovery of $110,103.80, with the cost of proceedings.

Petitioner avers and says that the complainant in this cause sought the recovery of land and a recovery for timber alleged to have been cut from said land by petitioner, the determination of which question required and resulted in the location of the boundary line between the States of Tennessee and Arkansas, and upon the trial of said cause in the Chancery Court of Shelby County, Tennessee and in the nature of an objection to the confirmation of the report of the Clerk of the Supreme Court of the State of Tennessee, the defendant insisted and relied upon the absence of jurisdiction in any court of the State of Tennessee to settle and determine the boundary line between the two sovereignties, to-wit, the State of Arkansas and the State of Tennessee; the said defendant insisted and relied upon the statutes of the United States, towit, 5 U. S. Statutes at Large
1496 5051, as defining the limits and boundary of the State of Arkansas, and insisted and relied upon the Constitution of the United States vesting in the Supreme Court of the United States exclusive jurisdiction to fix and determine the location of the boundary line between the two states, to-wit, Tennessee and Arkansas, and these insistences were by the Honorable Supreme Court of the State of Tennessee overruled and disallowed, resulting in a judgment as aforesaid, which judgment was, as petitioner respectfully submits, repugnant to and in violation of the law of the United States and of the Constitution of the United States.

And petitioner further shows that the said judgment of said Supreme Court was and is a final judgment in the highest court of the State of Tennessee in which a decision in said cause could or can be had.

Petitioner further shows that a federal question was raised in said cause, as hereinbefore set out, and that said judgment of said Supreme Court was repugnant to and in conflict with the laws of the United States, with the Statutes of the United States, and the Constitution of the United States, and that said judgment of said Supreme Court was contrary thereto and that a decision of said federal question, to-wit, the location of a boundary line between two sovereign states, was necessary to the judgment rendered and was expressly determined as the basis of the judgment of the Court.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Tennessee in
1497 said cause and prays that a writ of error to said Supreme Court be allowed; that citation be granted and filed; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment of said Supreme Court of Tennessee be reversed.

This the 5th day of December, 1914.

W. A. CISSNA,
By CARUTHERS EWING,
His Attorney in Law and in Fact.

STATE OF TENNESSEE,
Shelby County:

Caruthers Ewing makes oath in due form of law and says the statements in the foregoing petition are true to the best of his knowledge, information and belief.

CARUTHERS EWING.

Sworn to and subscribed before me, this 5th day of December, 1914.

EARL KING,
Notary Public.

The writ of error as prayed for in the foregoing petition is hereby allowed this — day of December, 1914, the writ of error to operate as a supercedeas on the execution of a bond in the sum of $1,000.00 to be approved by the Clerk of the Supreme Court at Jackson, but on the failure to execute such bond, the writ of error is allowed, which shall not, however, act as a supercedeas.

M. M. NEIL,
Chief Justice Supreme Court of Tennessee.

1498 Supreme Court of the State of Tennessee.

STATE OF TENNESSEE
vs.
MUNCIE PULP COMPANY et al.

The above entitled matter coming on to be heard upon the petition of the appellant, W. A. Cissna, for a writ of error from the Supreme Court of the State of Tennessee to the Supreme Court of the United States, and upon examination of said petition and the record in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be and is hereby allowed.

1499 UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court of the United States, Western Judicial District of Tennessee.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Tennessee, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Tennessee, as plaintiff, and

the Muncie Pulp Company and others, among them being Walter A. Cissna, as defendants, involving, according to the insistence of Walter A. Cissna, one of the defendants in said cause, and as appears from the record, the location of the boundary line between the States of Arkansas and Tennessee; the constitutionality of an Act of Congress admitting Arkansas into the Union; the jurisdiction of the State of Tennessee with respect to the subject matter of the controversy; the refusal of the Court to suspend the proceedings on and according to the petition of Walter A. Cissna; the claim of Walter A. Cissna to lands under a title deraigned from the State of Arkansas, and further in said proceeding wherein was drawn in question the validity of a treaty or satute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

or wherein any title, right, privilege, or immunity was
1500 claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Walter A. Cissna as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of January, in the year of our Lord one thousand nine hundred and fifteen.

A. G. MATHEWS,
Clerk of the District Court of the United States for the Western District of Tennessee.

Allowed by—

M. M. NEIL,
Chief Justice of the Supreme Court of the State of Tennessee.

Filed Jan. 29, 1915. T. B. Carroll, Clerk, by J. E. Youngbett, D. C.

1501 [Endorsed:] Supreme Court of the United States, October Term, 191–. ——— ———, vs. ——— ———. Writ of Error.

1502 [Endorsed:] File No. 24636. Supreme Court U. S., October Term, 1915. Term No. 409. W. A. Cisna, Pl'ff in Error, vs. The State of Tennessee. Stipulation of counsel and addition to record. Filed June 28, 1915.

Endorsed on cover: File No. 24,636. Tennessee Supreme Court. Term No. 89. W. A. Cisna, plaintiff in error, vs. The State of Tennessee. Filed March 29th, 1915. File No. 24,636.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1917

W. A. CIESNA,
Plaintiff in Error,

vs.

No. [redacted]

STATE OF TENNESSEE,
Defendant in Error.

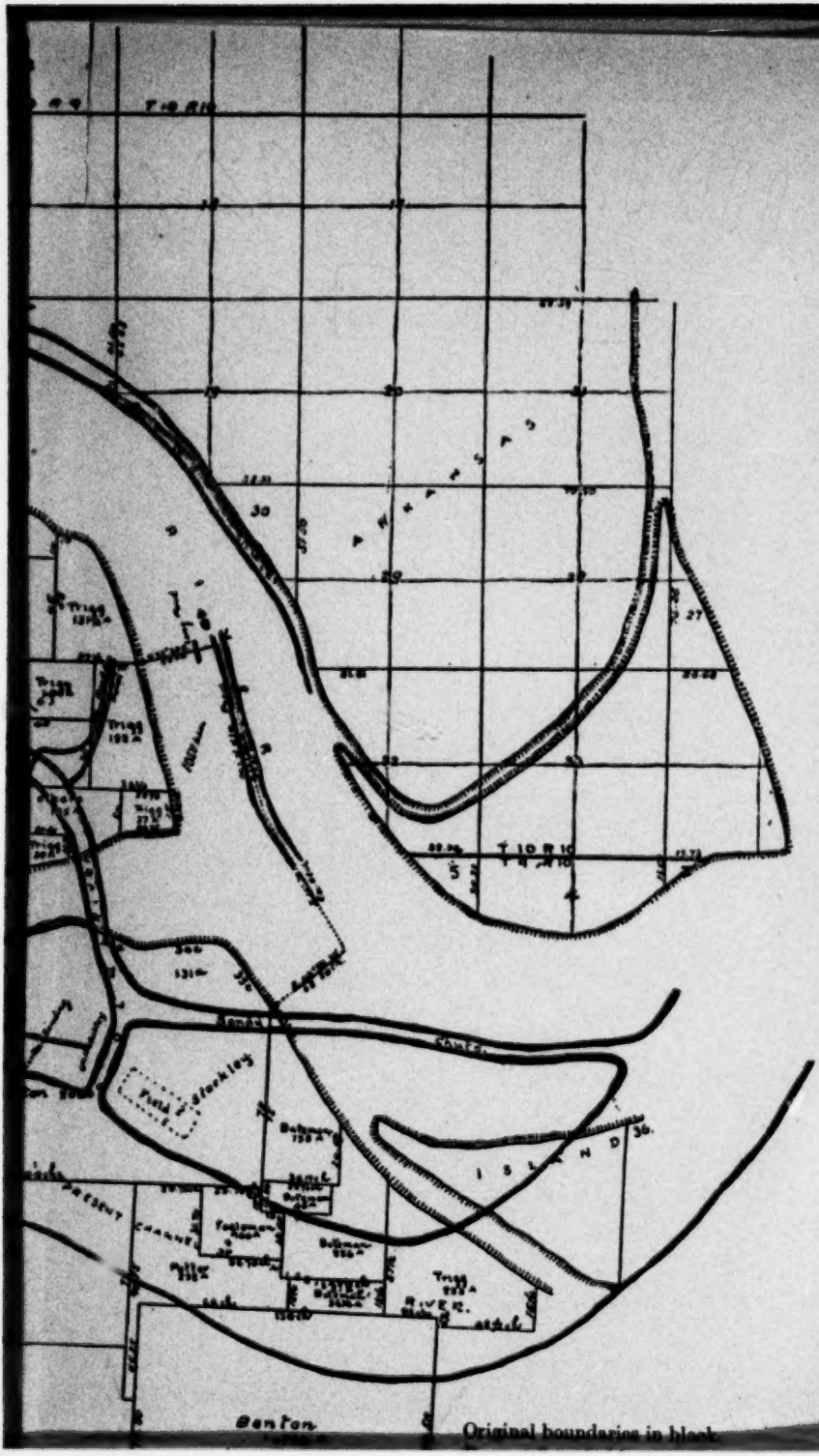
BRIEF AND ARGUMENT

On Behalf of the

STATE OF TENNESSEE.

FRANK M. THOMPSON,
Attorney General,

JOHN P. BULLINGTON,
Solicitors for State of Tennessee.


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29
27
Benton
I S L A N D
Original boundaries in black

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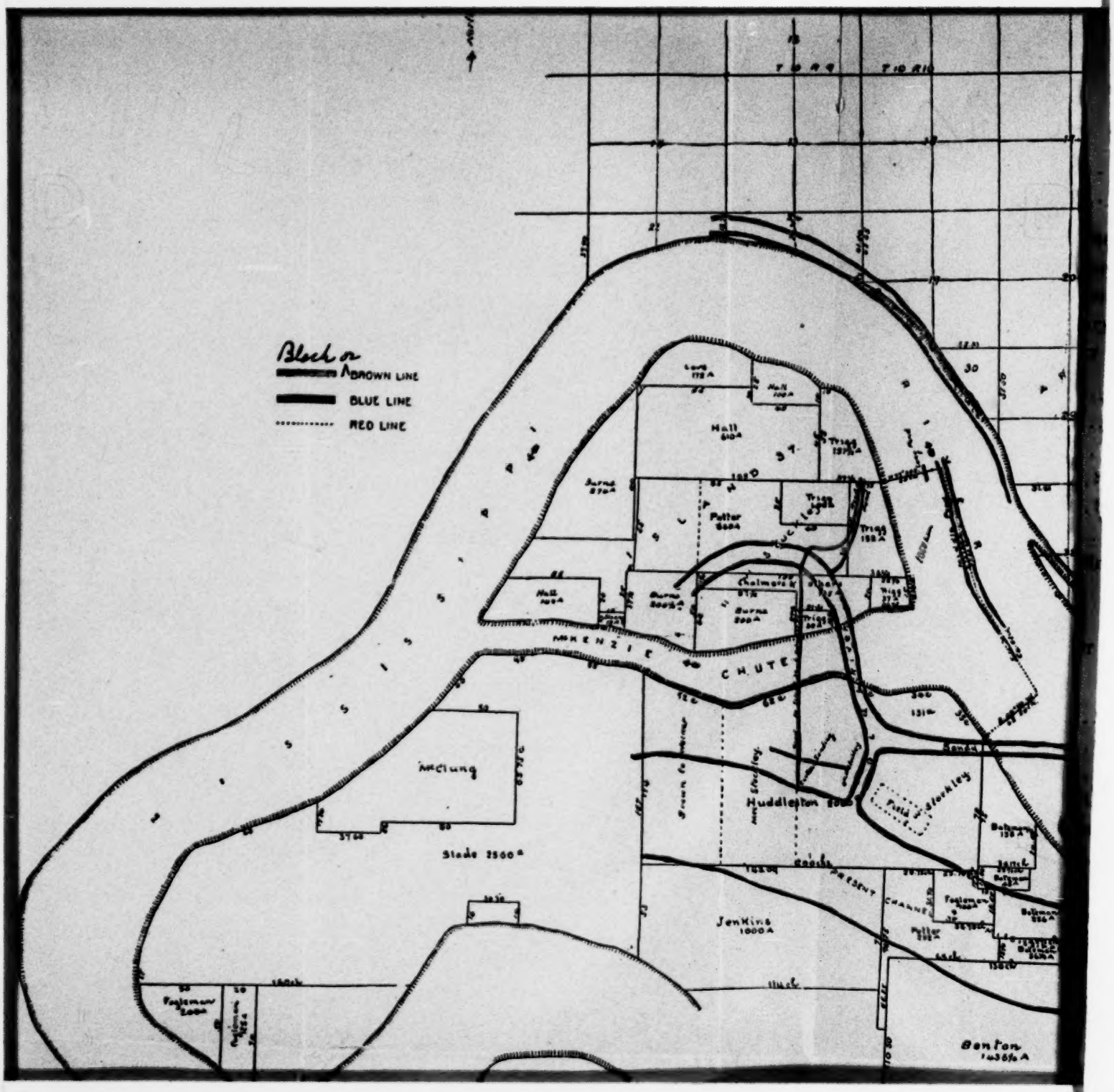
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Questions for Decision .....14 to 15

The Supreme Court of the United States has no jurisdiction to review a decision of a State Court in a controversy between the State and a citizen of another State arising out of the location of a boundary line between the property of the State and the property of the individual.

U. S. Revised Statutes, Sec. 687 17
U. S. Revised Statutes, Sec. 709 18
Brown v. Atwell, 92 U. S. 327 23
California v. So. Pac. R. R. Co., 157 U. S. 229..... 19
Cap. Nat. Bk. v. First Nat. Bk., 172 U. S. 503..... 19
Cohens v. Virginia, 6 Wheat. 393 .....20, 22
Commercial Bank v. Buckingham, 5 Howard, 342..... 22

The cases cited by plaintiff in error do not support his contention.

Brown v. Atwell, 92 U. S. 327 24
Felix v. Scharnweber, 125 U. S. 554 24
Florida v. Georgia, 17 How. 479 26
Gross v. U. S. Mortgage Co., 108 U. S. 477..... 24
McCarty v. Carolina Fur. Co., 134 Tenn. 35 26
Newport Light Co. v. Newport, 151 U. S. 527..... 25
Powell v. Brunswick, 150 U. S. 433 26


Block or
BROWN LINE
BLUE LINE
RED LINE
MACKENZIE CHUTE
McClung
Slade 2560A
Huddleston 800A
Jenkins 1000A
Benton 1436½A

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It must not only appear that a Federal question was presented, but it must also appear that its decision was necessary to the determination of the case, and where the judgment of the State Court rests upon independent grounds the writ of error will be dismissed.

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California Powder Works v. Davis, 151 U. S. 389-393.. 30
Cap. Nat. Bank v. First Nat. Bank, 171 U. S. 427..... 30
Eustis v. Bowles, 150 U. S. 361 30
Giles v. Little, 134 U. S. 645 30
Gillis v. Stenchfield, 159 U. S. 658 30
Murdock v. Memphis, 20 Wall. 105 30
Mo. Pac. R. R. Co. v. Fitzgerald, 160 U. S. 556..... 30
Stryker v. Goodnow, 123 U. S. 527 30
Winter v. Montgomery, 156 U. S. 527 30

The western boundary line of Tennessee is the "middle of the Mississippi River."

Treaty between Great Britain, France and Spain, Feb. 1763, 3 Jenkinson's Treaties, 177 37
Treaties and Conventions between the United States and other powers since July 4, 1775; Gov. Print. Office at Washington, 1889, p. 371 37
Vol. 1, Am. St. Papers Pub. Lands, p. 17 38
Mo. v. Ky., 11 Wall. 395 39
Cessill v. State, 40 Ark. 501 39
Wolf v. State, 104 Ark. 140 40
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Congress had no power to change the boundary of Tennessee.

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Washington v. Oregon, 211 U. S. 127 39
La. v. Miss., 202 U. S. 40 39
Mo. v. W. Va., 217 U. S. 41, 43 39
State v. Cissna, Rec. p. 354 39

The boundary between Tennessee and Arkansas has been fixed at the middle or the center of the bed of the main channel of the river by judicial interpretation, unchallenged jurisdiction, Legislative Acts and acquiescence.

Treaty between Great Britain, France and Spain, Feb. 1763, 3 Jenkinson's Treaties, 177 40
Cessell v. State, 40 Ark. 501 40
Wolf v. State, 104 Ark. 140 40
Foppiano v. Sneed, 113 Tenn. 173 40
Moss v. Gibbs, 10 Heisk, 283 40
Stockley v. Cissna, 119 Tenn. 189 41
Morgan v. Reading, 3rd Sm. & Mar. (Miss.) 366 41
Cissna v. State, Rec. p. 654 41

Long acquiescence in the assumption of a particular boundary and the exercise of dominion and sovereignty over the territory within it conclusive.

Rhode Island v. Mass., 4 Howard, 591, 639..... 49
Mo. v. Ky., 11 Wall. 395 49

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Va. v. Tenn., 148 U. S. 503 49
La. v. Miss., 202 U. S. 54 49
Maryland v. Va., 217 U. S. 1, 41, 43 49
Vattells on Law of Nations, 2nd Book, Ch. 11, Sec. 149. 50
Wheaton on Int. Law, Pt. 2, Ch. 4, Sec. 164..... 50
Twiss on International Law, 137 50
Halleck on International Law, 50 50

In the case of an avulsion the boundary is the center of the abandoned bed of the stream, and not the line of steamboat navigation.

Halleck on International Law, Sec. 24 51
Farnham on Water, Vol. 3, p. 2495 51
Woolsey Int. Law, Sec. 58 51
Wharton's Digest of Int. Law, Vol. 1, Sec. 30 51
Opinions of Attorneys General, Vol. 8, p. 177 51
Sandar's Justinian, pp. 168, 169 51
Missouri v. Kentucky, 11 Wall. 395 51
Nebraska v. Iowa, 143 U. S. 359 51
Buttenuth v. St. Louis Bridge Co., 123 Ill. 535 51
Indiana v. Kentucky, 136 U. S. 47 51
Louisiana v. Mississippi, 202 U. S. 1, 49, 51..... 51
Washington v. Oregon, 211 U. S. 134 51
Railroad Co. v. Clinton, 88 Iowa, 188 51
Belle Fontaine Imp. Co. v. Neidringhaus, 181 Ill. 426.. 51

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When, as the result of an avulsion, the water ceased to flow over land lost by erosion, the title returned to the original owner, where the property was capable of identification.

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St. Louis v. Rutz, 138 U. S. 226 53
Hardin v. Jordan, 140 U. S. 382 53
Stockley v. Cissna, 119 Fed. 831 53
Mulry v. Norton, 100 N. Y. 426 53
Packer v. Bird, 137 U. S. 666 53
Hughes v. Birney, 107 La. 664 53
Cohens v. Virginia, 6 Wheat. 293 57

The rule of reliction and the reappearance of submerged lands applies between States as between individuals.

Rhode Island v. Mass., 12 Pet. 654 53
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

W. A. CISSNA,
Plaintiff in Error,

vs. No. 89

STATE OF TENNESSEE,
Defendant in Error.

BRIEF AND ARGUMENT

On Behalf of the

STATE OF TENNESSEE.

May It Please the Court:

This is a suit between the State of Tennessee and a citizen of the State of Illinois owning land in the State of Arkansas, and claiming, by virtue of possession, a considerable tract of land which was in the old bed of the Mississippi River, and which was at the time of the insti-

tution of this suit dry land and very valuable on account of the timber growing upon it.

A full statement of the pleadings and of the facts established by the proof will not be made. Accepting the statement in the brief filed by counsel for the plaintiff in error as sufficient, we will only call attention to certain material matters that have been omitted or that appear to have particular bearing on the contentions of the defendant in error.

The property in controversy is a part of the old bed of the Mississippi River, which in one night in 1876 changed its course as set forth on page 2 and 3 of plaintiff's brief. After the "cut-off" the old bed of the river rapidly filled up and soon became, except in high water, dry land.

Cottonwood trees shortly began to grow upon the land, and when this suit was instituted, had grown to considerable size and the timber had become very valuable.

W. A. Cissna, a citizen of the State of Illinois, owning Dean's Island, which lay directly east of the property in controversy (Humphrey's Map, Rec. p. 930), took possession of all, or a considerable portion of this property, claiming the same as accretions to Dean's Island, and on August 7th, 1901, sold the timber on this and perhaps other land, to the Muncie Pulp Company for $35,000.00 (Rec. p. 747-8). The Pulp Company immediately began cutting and removing the timber. The immense volume

and value of this timber, and, therefore, the necessity of the State's protecting and conserving its property may be judged from the report of the Clerk of the Supreme Court of Tennessee on the reference ordered by that court and made and returned in 1914 (Rec. p. 937-40).

One H. W. Stockley, of Tipton County, Tennessee, owning lands bordering on the Mississippi River on the Tennessee side, and having secured a grant from the State of Tennessee to a portion of the old river bed (Rec. p. 263), and thereby conceiving himself to be the owner of the particular land now in controversy, filed an ejectment proceeding against the now plaintiff in error, W. A. Cissna, in the United States Circuit Court on May 13th, 1901 (Rec. p. 1 and 2).

The entire record of the ejectment proceeding between Stockley and Cissna is made a part of this record (Rec. pp. 1 to 292). The result of that proceeding is stated in the brief of plaintiff in error (pp. 4, 5, and 6), and in the opinion of Judge Lurton (Rec. p. 336, et seq.).

All of the land now in controversy between plaintiff in error and defendant in error was involved in the above proceeding; it was so shown on Humphrey's Map, which was a similar map to Exhibit "A" of the original bill in this cause.

In that case the defendant filed a plea in abatement to the jurisdiction of the Court on the ground that the land was in Arkansas and not in Tennessee, but later with-

drawing his plea admitted that a part of the land in controversy, but not describing what part, was in Tennessee, and that, therefore, the court had jurisdiction, filed his answer and proof was taken by the complainant (Brief of plaintiff in error, p. 5).

When the complainant had completed his proof, the defendant moved for peremptory instructions on account of the failure of the complainant to show a perfect title, and the Court instructed the jury to bring in a judgment in favor of the defendant Cissna.

The case was carried, on appeal, to the Circuit Court of Appeals, Sixth District, by Stockley, and on November 10th, 1902, the judgment of the lower court was affirmed, Judge (later Mr. Justice) Lurton handing down the opinion of the Court.

Judge Lurton, in a most able and learned opinion, among other things, said:

> "It is clear whatever the interpretation placed upon the ambiguous judgment relied upon to show that the defendant withdrew his plea to the jurisdiction, that the lands in dispute are on the east side of the middle of the channel of the Mississippi River, and, therefore, within the boundary of Tennessee, although now west of the present channel of the Mississippi River."
>
> (Rec. pp. 344-45.)

Also holding that the lands were not subject to grant within the meaning and purport of the law when the Tennessee Act of 1847 was passed (Rec. p. 360).

It is important that the Court, in considering this cause, keep in mind a sequence of events. This is important because of claim made by plaintiff in error that the "question involved is the boundary line between the State of Tennessee and the State of Arkansas," and the effort to import into this cause an injustice that may be done to the State of Arkansas, or to a citizen of that State.

The case of Stockley v. Cissna, above, was decided by Judge Lurton on November 10th, 1902 (Rec. p. 337). Petition to rehear was filed on January 8th, 1903 (Rec. p. 361), and was denied on February 3rd, 1903 (Rec. p. 388).

After the opinion of Judge Lurton was handed down and the petition to rehear was denied, the position of Tennessee was such that some action was necessary.

Under the ruling of Judge Lurton the property involved in the controversy between Stockley v. Cissna belonged to the State of Tennessee; it had been seized and was being held by a citizen of the State of Illinois, who had sold the timber to a New York corporation, which was rapidly cutting and removing the timber beyond the jurisdiction of the Courts of Tennessee.

Immediate action was necessary in order to stop this waste. It was the duty of the proper officials of the

State of Tennessee to act quickly in order to prevent the loss to the State of its property, for the land was then chiefly valuable on account of the timber growing upon it.

In order to avoid any possible question that might arise with Arkansas on account of a disagreement as to the proper location of the boundary line as related to the line of the property at issue, the Legislature of the State of Tennessee, on April 13th, 1903, some eight months prior to the filing of the bill in this cause, passed an Act entitled "An Act to authorize and empower the Governor to appoint a Commission to consist of three men to survey and locate the line between the States of Tennessee and Arkansas at a point where the channel of the Mississippi River has changed since the establishment of the lines between said States, etc." (Acts of Tennessee, 1903, Ch. 420, p. 1215), and further setting forth in the caption of said Act that the purpose thereof is to establish the true line, and thus avoid a possible "unfortunate controversy with our sister State of Arkansas."

Caption of Acts of 1903, Ch. 420, p. 1216.

This Act provided:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the Governor is hereby authorized and empowered to appoint a Commission to consist of three men, citizens of Tennessee, one of whom shall be a practical civil engineer, and shall do the actual surveying of the line, and who are hereby authorized and empowered to confer with a like Commission appointed by the governing au-

thorities of the State of Arkansas, relating to the boundary line between the States of Tennessee and Arkansas, and to survey and locate the line between said States, at all points where the channel of the Mississippi River has been changed since the line was originally established between said States, and the said Tennessee Commission is further authorized and required to survey and locate the line between low water mark of the said abandoned channel of the Mississippi River around 'Devil's Elbow' and any other points surveyed and located, and the adjoining land owners on the Tennessee side of said river; to estimate the number of acres of land lying between the State of Tennessee and Arkansas herein authorized to be surveyed and located, and to examine and consider the character and value of said lands, and when they will have finished the work herein required of them prepare a written report, showing the result of their work in all matters herein required of them, and transmit the same to the next General Assembly of the State of Tennessee for ratification or rejection."

Acts of 1903, Ch. 420, p. 1216.

A similar Act was passed by the Legislature of Arkansas, but was vetoed by the Governor, and thus the effort of the State of Tennessee to locate the boundary line by agreement was defeated. The bill was vetoed, learned counsel for plaintiff in error states, "evidently on the ground that Arkansas owned the land and a Commission was unnecessary."

Plaintiff's Brief, p. 12.

How counsel reached this conclusion is to us somewhat of a mystery; certainly the Legislature of Arkansas did not so believe when it passed an Act similar to that passed by the Legislature of Tennessee; nor was this belief generated by the very able, learned and elaborate opinion of Judge Lurton in the case of Stockley vs. Cissna, supra. It would rather seem to us that the Governor of the State of Arkansas vetoed the bill for the reason that having read the opinion of Judge Lurton he could see no possible benefit to be derived by the State of Arkansas from a joint Commission, and did not, therefore, wish to put the State to the expense necessary in order to locate the line to a tract of land that had already been adjudged to belong to the State of Tennessee; or it might even be possible that the Governor of Arkansas could find no reasonable excuse to intervene between the State of Tennessee and a non-resident of the State of Arkansas in a controversy in which, after reading Judge Lurton's opinion he did not believe the State of Arkansas was interested.

The State of Tennessee was then left in this position: Arkansas had declined to join with it in locating the boundary line; a citizen of the State of Illinois was in possession of its property; a New York corporation was cutting and removing the timber from its land; it was the duty of the proper officials of the State of Tennessee to conserve the land and timber for the use of all the citizens of the State.

In December, 1903, the original bill was filed in this cause against the necessary parties and upon the bill, pleas in abatement of the defendants, replications of the State, answers of the defendants, and proof taken by all parties, proceeded to trial through the courts of Tennessee, with the result as set forth in the brief of plaintiff in error and in the opinion of Judge (now Senator) Shields (Rec. p. 646, et seq.), and further in the memorandum opinion of Judge Lansden (Rec. p. 928), and the final decree of the Supreme Court of Tennessee (Rec. p. 928).

It will be seen from the original bill (Rec. pp. 394-5) and Exhibit "A" thereto (Rec. p. 930) that the particular land described by metes and bounds and set forth as the land embraced within the letters A, B, C, D, E, F, G, and H on Humphrey's Map was exactly the same land that was finally adjudged to belong the State of Tennessee (Rec. p. 931).

In the general description of the property in the first paragraph of the original bill, it was set forth "the State of Tennessee is now, as it was then, the owner of that part of the bed of the river lying between the low water mark on the Tennessee side and the center of said river as it flowed prior to the 'cut-off' in 1876." (Rec. p. 394.)

Notwithstanding the litigation between Stockley and Cissna, the judgment of Judge Lurton, the Act of the Legislature of Tennessee in 1903 and a similar Act in

1907, and the proceedings in this cause, no claim was made by the State of Arkansas that any part of the land in controversy was within the boundary lines of that State until the winter of 1911 after this case had been tried in the Chancery Court of Shelby County, appealed to the Supreme Court of the State of Tennessee, argued and reargued, and more than four years after the opinion of Judge Shields in 1907 had been published in 119 Tennessee Report, and after additional proof had been taken in the Chancery Court of Shelby County, and the case had been argued and submitted for final hearing to the Chancellor.

The position now assumed by plaintiff in error that the boundary line between Tennessee and Arkansas is the center of the channel of navigation is a new theory and was not relied on by him in his answer to the original bill. In his answer he said "Defendant says that no part of the property described in the bill was in 1876 between the then Tennessee bank and the middle of the river. The same was wholly on the Arkansas side." (Rec. p. 644.)

His reliance was placed upon the erosion that had been made from the Tennessee bank and the accretion that had formed to Dean's Island prior to the cut-off; to accretion that had formed to the Island after the cut-off; and upon the fact that the State of Tennessee had granted all of the land described in her bill to other parties (Rec. pp. 643-644).

Again the plaintiff in error in his answer to the amended bill filed by Tennessee stated "defendant is advised that the line between the States of Arkansas and Tennessee changed and shifted with the gradual changes of the river and that the middle of the Mississippi River as it existed in 1876, when by an avulsion the channel of the river was altered, became and was and is the boundary line between the States of Tennessee and Arkansas." (Rec. p. 840.)

So also the question of an injustice that may be done to a citizen of the State of Arkansas is a novel in view of plaintiff's statement:

> "Q. State your name, age, residence?
> A. W. A. Cissna, Chicago, Illinois, 57 years old."
> (Rec. p. 595.)

THE ASSIGNMENTS OF ERROR CONSTITUTE A GENERAL ATTACK UPON THE JURISDICTION OF THE COURTS OF TENNESSEE AND UPON THE RULINGS OF THE SUPREME COURT OF THE STATE OF TENNESSEE AND WILL BE CONSIDERED ACCORDINGLY.

I.

(a) The Court held that the land in dispute was west of the middle of the main channel or bed of the Mississippi River as it ran in 1823 and that it had jurisdiction over the same.

(b) Plaintiff in error claims that the lands are all, or nearly all, in Arkansas and that, therefore, beyond the jurisdiction of the Courts of Tennessee.

II.

(c) The Court found: "We think unquestionably that the bed of the abandoned river should be equally divided between them (referring to Tennessee and Arkansas), for we apprehend that the Arkansas side belongs to that State, since the title of riparian owners under its laws is limited to high water mark. - - - the line separating their respective jurisdictions to be run along the channel midway between the banks as they existed and were surveyed in 1823, as shown in the map made by Maj. J. H. Humphrey and exhibited with the bill of complaint." (Rec. p. 682.)

(d) Plaintiff claims that the middle of the channel of navigation is and always has been the boundary line between said States.

III.

(e) The Court found that the effect of the avulsion was "to press back the line of the State as it ran at low water mark to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the lines between the two States, so as to restore to Tennessee what it held before the erosions upon its banks. The right of restoration to their lands was one of the vested rights of those grantees, and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted." (Rec. p. 683.)

(f) Plaintiff contends that the line became fixed at the middle of the channel of navigation at the time of the avulsion, or at least in the middle of the stream of the river at the immediate moment of the avulsion; that there is no right of restoration by reliction where property lost by erosion is restored by avulsion either to the riparian owner or to the State.

QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

(1) The jurisdiction of the Supreme Court of the United States to review a decision of the Supreme Court of Tennessee in a controversy between the State of Tennessee and a citizen of the State of Illinois arising over the title to a tract of land which has been decided by the Circuit Court of Appeals of the United States (Rec. p. 336) an dby the Supreme Court of the State of Tennessee (Rec. p. 47) to be wholly within the boundary lines of the State of Tennessee.

(2) Has the Supreme Court of the United States jurisdiction to review every decision of a State Court where the question of the location of a boundary line as related to private property is raised by a citizen of a foreign State, claiming to own property in an adjoining State, when the adjoining State itself does not intervene or raise any question?

(3) Has the Supreme Court of the United States exclusive jurisdiction over every question of the location of a boundary line of a State when the question is raised by a non-resident of the States affected and the States themselves are not both parties to the controversy?

Should this Court decide that it has jurisdiction to review the decision of the Supreme Court of Tennessee in this cause, then the same questions arise here that were

presented to this Court in the case of Arkansas v. Tennessee.

(4) Is the boundary between the States of Tennessee and Arkansas, (a) the middle of the main channel or bed of the river? or (b) the center or middle of the deepest water? or (c) the center of the track of steamboat navigation?

If it is the first, it is subject to change as the result of accretions and erosions, while if it is the second, it is subject to change by reason of the shifting sands which constitute the bed or bottom of the river; while if it is the third, it not only changes by reason of the shifting of the sands in the bed of the river, but from time to time with different stages, being at one place at low water, at another place at high water, and still at another place at the flood stage. *This line is known only to the experienced river pilots and is constantly changing.*

(5) When the avulsion occurred and the boundary line between the states became fixed in the abandoned bed of the river, is that line now to be ascertained,

(a) By the only feasible and practicable plan, which at the same time gives effect to the well established rule of reliction, by taking the center of the river as it flowed in 1823 and 1836, or

(b) Taking the center of the river bed (if it can be determined and ascertained) as it flowed in 1876, just prior to the cut-off, or,

(c) Attempting to locate where the steamboat channel was prior to the avulsion in 1876.

If the latter, then, is the steamboat track at the flood state preceding the avulsion to be taken, or the track of navigation at the extreme low water of 1874, and if neither, then at what stage, and, if either, how is it to be ascertained?

(6) And was it the duty of the Supreme Court of the State of Tennessee to suspend proceedings in this cause upon the motion of W. A. Cissna, notifying said Court that Arkansas had filed a bill against Tennessee in the Supreme Court of the United States to locate and fix the boundary line between the States?

JURISDICTION.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW A DECISION OF THE HIGHEST COURT OF A STATE IN A CONTROVERSY BETWEEN THE STATE AND A CITIZEN OF ANOTHER STATE OVER A LINE BETWEEN THE STATE'S PROPERTY AND THE PROPERTY OF THE CITIZEN.

In a case between a State and a citizen of another State, the Supreme Court of the United States has original, but not exclusive jurisdiction, Section 687 of the Revised Statutes of the United States providing:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction."
>
> U. S. Rev. Stats., Sec. 687, Fed. Stats. Ann., 436.

The Supreme Court of the United States has appellate jurisdiction to review the judgments and decrees of State Courts on Writ of Error, where there is drawn into question a title, right, privilege or immunity claimed under the constitution, a treaty or statute of or authority exercised under the United States. Section 709 of the Revised Statutes of the United States; Federal Statutes Annotated, p. 467:

"(Judgments and decrees of state courts on writ of error.) A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Rev. Stats. of the U. S., Sec. 709.

Fed. Stats. Ann., p. 467-8.

In Murdock v. Memphis, Mr. Justice Miller, discussing the general question of the right of the Supreme Court of the United States to review final decisions of the highest court of a State, laid down the following rules:

"Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it

shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court.

2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court."

Murdock v. Memphis, 86 U. S. p. 444, 20 Wall. (U. S.) 635.

In the case of the Capital National Bank v. First National Bank, 172 U. S. 503, Mr. Chief Justice Fuller said:

> "The writ of error from this Court to revise the judgment of a state court can only be maintained when within the purview of Section 709 of the Revised Statutes."

In the case of California v. Southern Pacific R. R. Co., 157 U. S. 229, Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

> "The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising un-

der the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing. . . .

By the Constitution, and according to the statute, this Court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a state and its own citizens, and original, but not exclusive, jurisdiction of controversies between a state and citizens of another state or aliens."

In the above case the bill was dismissed, because the suit was between a State and citizen of another State and its own citizens.

The only exception to the above rule is that the Supreme Court has been held to have jurisdiction to review a decision of the Supreme Court of a State in controversy between a State and citizens of another State where a question involving some title, right, privilege or immunity claimed under the Constitution or a treaty or statute of or authority exercised under the United States, or the validity of a statute or authority exercised was drawn into question, or specially set up and claimed, and the opinion of the State Court was adverse to such title, right, privilege or immunity.

Cohens v. Virginia, 6 Wheat. 393.

In this case, discussing the question of the jurisdiction of the Supreme Court in a case where the State was a party, Mr. Chief Justice Marshall said:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything, the char-

> acter of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law."
>
> Cohens v. Virginia, 6 Wheat. 393.

The reason given by Mr. Chief Justice Marshall for this construction was that to construe it otherwise "would be to construe a clause dividing the power of the Supreme Court in such a manner as to in a considerable degree defeat the power itself."

To bring this case within the rule laid down by Mr. Chief Justice Marshall, it must appear (1) that some question stated in Section 709 of the Revised Statutes of the United States did arise, and (2) that the question was decided by the Supreme Court of the State of Tennessee, as required in that section; and it must also appear that this cause was decided on the federal question raised and not upon the construction by the Supreme Court of Tennessee of general laws or local statutes.

The case of the Commercial Bank v. Buckingham, 5 How. 342, was dismissed by this Court, because of want of jurisdiction, and Mr. Justice Greer, in discussing the question said:

"To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1, That some of the questions stated in that section did arise in the State Court; and, 2, That the question was decided in the State Court, as required in the section.

It is not enough that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the Court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and 'that this claim was overruled by the Court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

In Brown v. Atwell, 92 U. S. 327, the Court said:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts, for the record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it."

Brown v. Atwell, 92 U. S. 327.

THE CASES CITED BY PLAINTIFF IN ERROR DO NOT SUPPORT HIS CONTENTION. IN NEARLY EVERY CASE CITED THE COURT DECLINED TO ENTERTAIN JURISDICTION AND NONE OF THE CASES CITED PRESENT A QUESTION SIMILAR TO THAT NOW AT ISSUE.

In the case of Brown v. Atwell, supra, the question at issue was an accounting claimed by one individual against another on account of the joint ownership of a patent. The Court decided it had no jurisdiction, and the petition was dismissed.

Brown v. Atwell, 92 U. S. 327.

The case of Felix v. Scharnweber was a controversy between two individuals and arose through the joint ownership of a patent. The writ of error was dismissed for want of jurisdiction, Mr. Justice Gray saying:

> "This record does not present any federal question. No such question is stated in the pleadings, involved in the rulings at the trial or in the final judgment, or mentioned in the opinion of the Supreme Court of Illinois."

Felix v. Scharnweber, 125 U. S. 554.

The case of Gross v. United States Mortgage Co., 108 U. S. 477, was a suit between an individual and a foreign corporation, and the Court decided it had jurisdiction, and that a federal question was involved in that an Act of the Legislature of Illinois was claimed to be in con-

flict with a provision of the Constitution of the United States.

In the case of Newport Light Co. v. Newport, the Court dismissed the writ of error for want of jurisdiction. In this case, the Court of Appeals of Kentucky, at the request of the plaintff in error, certified that the validity of an Act of the General Assembly and the authority exercised under the same was drawn in question on the ground that the same impaired the obligation of a contract between the appellant and the appellee, and was repugnant to the Constitution of the United States, and that a decision of the highest court of the State was in favor of the validity of said Act. In regard to the certificate, this Court said:

> "The above certificate of the chief justice of the Court of Appeals of Kentucky, while entitled to respectful consideration, does not in itself establish the existence of a Federal question in this case, and confer jurisdiction upon this court to re-examine the judgment complained of. This Court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under Section 709 of the Revised Statutes.
>
> Looking, therefore, as we must, to the record in the cause to ascertain whether any Federal question is really involved, we are clearly of opinion that no such question is presented, and that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment complained of."
>
> Newport Light Co. v. Newport, 151 U. S. 527.

The case of Powell v. Brunswick, 150 U. S. 433, was a bill filed by fifteen citizens and taxpayers of Brunswick to enjoin the disposition of certain bonds of the county. The writ of error was dismissed. In discussing the certificate of the presiding judge of the court, Mr. Chief Justice Fuller laid down the same rule announced in the case of Newport Light Co. v. Newport, supra.

In every case but one cited by plaintiff in error in his exhaustive and able brief, the Court dismissed the petition for want of jurisdiction. No case is cited in which a State was one party and a citizen or citizens of another State the other party, nor does the plaintiff anywhere in his brief cite any case where this Court reviewed the dedecision of any State Court in any case of like nature.

But, says plaintiff, "settling the boundary line between States is solely a matter for this Court, and a federal question arises when that is the determinative issue," and he quotes:

Florida v. Georgia, 17 Howard 479.
McCarty v. Carolina Lbr. Co., 134 Tenn. 35.

In the case of Florida v. Georgia, the bill was filed by the State of Florida against the State of Georgia to establish a boundary line between the two States, and was clearly within the first paragraph of Section 678 of the Revised Statutes of the United States. No question ever was, or ever could have been raised as to the jurisdiction of this Court in that case. The question which was raised was

the right of the United States to intervene on the motion of its attorney-general.

The case of McCarty against the Carolina Lumber Co., supra, was a suit between an individual on the one side and a private corporation on the other. The land in controversy was claimed by one to be in Tennessee; by the other to be in North Carolina. At the time this suit was brought a case was pending in the Supreme Court of the United States between the State of Tennessee and the State of North Carolina to fix a long disputed boundary line. The property involved lay within the disputed territory. The Supreme Court of Tennessee held that it had no jurisdiction or power to establish a line between the States, neither State being a party to the suit, and further held that the line must be established either by compact of the sovereign States themselves, or, if by judiciary proceedings, then by decree of the United States Supreme Court. But, it further held "but this Court in the suit of private parties may fix and adjudge the actual location of a line as affecting the boundary of their lands" (McCarty v. Carolina Lbr. Co., 134 Tenn. 55), and the Court then proceeded to fix said lines.

In the case at bar, no treaty or statute of or authority exercised under the Constitution of the United States is, or has been, at issue, nor has there been drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States;

nor has any title, right, privilege or immunity been claimed under the Constitution of or any treaty or statute of or commission held or authority exercised under the United States.

The boundary line between the States of Tennessee and Arkansas is not involved, nor could it be involved, unless both of the States were parties to this suit. The location of the boundary line was an incident. It was necessary to locate it in relation to the lines of property claimed by the State of Tennessee and held by the plaintiff in error. The questions involved are questions of general law and not federal questions.

The question upon which the plaintiff in error relies in this Court is purely a question dependent upon the general laws of the land. It was upon the construction by the Supreme Court of the State of Tennessee of the effect of the avulsion of 1876 that the Court decided that the lands here involved belonged to the State of Tennessee.

> "The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Tennessee what it held before the erosions upon its banks. The rights of restoration to their lands was one of the vested rights of those grantees, and the

right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted."

(Rec. p. 683.)

It is upon the same questions that plaintiff in error depends when in his brief he sets forth what he terms his "whole contention."

> "His whole claim is that while state and property lines or boundaries may be altered by accretion or erosion, (being gradual and imperceptible processes or operations), said lines are unaffected by an avulsion."
>
> Plaintiff's Brief, p. 36, Par. 2.

And when he says:

> "In almost every conceivable way the plaintiff in error has, from the inception of the controversy, repudiated any claim to any land not on the Arkansas side of the Mississippi River of 1876, just as it was one minute before the 'cut-off.' "
>
> Plaintiff's Brief, p. 40, Par. 3.

It has uniformly been held that in order to give this Court jurisdiction on a writ of error to the highest court of a State, it must appear not only that a federal question was presented, but that its decision was necessary to the determination of the case, or that the judgment of the State Court as rendered, could not have been given with-

out deciding it, and where the decision complained of rests upon independent grounds not involving a federal question, and broad enough to maintain the judgment the writ of error will be dismissed without considering any federal question that may also have been presented.

California Powder Works v. Davis, 151 U. S. 389-393.
Eustis v. Bowles, 150 U. S. 361.
Mo. Pac. R. R. Co. v. Fitzgerald, 160 U. S. 556.
Capital Nat. Bank v. First Nat. Bank, 172 U. S. 427.
Murdock v. Memphis, 20 Wall. 105.
Winter v. Montgomery, 156 U. S. 385.
Gillis v. Stenchfield, 159 U. S. 658.
Giles v. Little, 134 U. S. 645.
Stryker v. Goodnow, 123 U. S. 527.

In Capital National Bank v. First National Bank, supra, Mr. Justice Fuller, delivering the opinion of the Court, said:

> "Moreover, even though a federal question may have been raised and decided, yet, if a question not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this Court will not review the judgment."

This enunciation of the rule of this Court is plain, and is in line with decisions too numerous to quote.

In his plea to the jurisdiction of the Court, and in his answer to the original bill filed by the State of Tennessee in this cause, plaintiff in error avers:

"Defendant says that in the said year 1823 all of the property described and mentioned in the bill was on the Tennessee side of the middle of the Mississippi River as it then ran; that from the year 1823 to 1874, continuously, there were erosions into the Tennessee shore and accretions to the Arkansas shore, or to Dean's Island, so that by the year 1874 Dean's Island had by gradual and imperceptible accretions become much enlarged, and by the gradual and imperceptible encroachments of the river the land on the Tennessee side had been washed away."

Plaintiff's Brief, p. 8.

The question here presented for the decision of the Supreme Court of Tennessee is the question of the effect of an avulsion, and its relation to lands which had previously been lost by erosion. It is a question dependent on general laws. The same question is relied on by plaintiff in his first, second, third, fifth and sixth assignment of error, and a close examination of his brief and of the pleadings will disclose that there is no other issue between plaintiff in error and defendant. This being so, even if the Supreme Court of Tennessee has reached a wrong conclusion, or if its rulings are contrary to previous rulings of this court in other cases where the same question was raised, such error, or such difference of opinion and construction would not confer jurisdiction upon this Court.

THIS COURT HAS NO JURISDICTION TO REVIEW THE FINDINGS OF THE SUPREME COURT OF TENNESSEE IN THIS CAUSE, AND THE WRIT OF ERROR SHOULD BE DISMISSED; THERE IS NO FEDERAL QUESTION INVOLVED, BUT PURELY A QUESTION DEPENDENT ON THE CONSTRUCTION OF GENERAL LAWS.

If the plaintiff in error has the right to have the ruling of the Supreme Court of Tennessee on this case reviewed by the Supreme Court of the United States, then every squatter along the old and abandoned bed of the river, when the State undertakes to put him off its land, has the same right by claiming that the land lies within the State of Arkansas, and not within the State of Tennessee. Going even further, every claimant of land near the boundary line between two States would have the right to carry a sovereign State into the Federal Court in any contest between the State and the claimant over the lines of any of the State's property.

At the time this suit originated there was no contest between the State of Tennessee and the State of Arkansas over the boundary line. Both States had agreed upon the construction of the treaty of 1763, that the middle of the bed of the Mississippi River constituted the boundary line, and both States for many years had acted upon that assumption. Both States had asserted their jurisdiction to that line, and each State had acquiesced in the claim of the other. In the assertion of this claim

the learned Attorney-General of the State of Arkansas, Hon. Hal L. Norwood (who as Attorney-General filed the bill in the case of Arkansas v. Tennessee) in the case of Wolf v. the State, in his brief filed on behalf of the State, taking the same position as announced in the case of Cessell v. State, 40 Ark. 501, which is the same position taken by the Supreme Court of the State of Tennessee in this case, filed a brief to sustain the contention of Arkansas, from which we here quote:

> "The boundary line is a point equidistant from the principal or well-defined banks of the river, 10 Heis. (Tenn.) 283; 119 Tenn., 47; 79 N. W., 449; 138 U. S., 226; 143 Id., 359; 196 Id., 230; 5 Wheat., 375; 133 Ill., 535; 40 Ark., 501; 53 Id., 314; 24 Howard 41; 1 La. Ann., 372; 3 Sm. & M. (Miss.), 366; 55 Ia., 558; 119 Fed., 812."

There being perfect accord between the States themselves, has a citizen of a foreign State (the State of Illinois) the right to raise the question of the boundary line between the States?

The opinion of the Supreme Court of Tennessee affords sufficient evidence of the time and attention devoted by the Court to the consideration of this cause. The case was argued in the spring of 1905. It was held by the Court under advisement, and a reargument was ordered in the April Term in 1907, and the case was decided at an extra term in September, 1907. The opinion of Judge Shields, covering some eighty pages of printed matter in 119 Tennessee Reports, reviews the history of the treaties and

conventions under which the boundary line of Tennessee was fixed, and the laws and decisions of text writers and courts on questions of avulsion, reliction, erosion and accretion. The opinion also reviews the contentions of the parties; the proof introduced by each; applies the law to the conditions existing, and announces the finding of the Court on the construction of general laws, and not upon any question arising under the constitution or a law of the United States.

(a) The contention of the parties:

"The defendant has undertaken to prove that a change took place in this case by accretion to Dean's Island, and erosion upon the opposite Tennessee bank. *Their exact contentions* are that by erosion upon the banks of what are now Centennial Island and Island 37, and accretions to the banks of Dean's Island, since 1823, both before and after the cut-off in 1876, the middle of the river and the line separating the two states had advanced gradually westward towards the Tennessee bank, and that at the time of the cut-off the middle of the river was where the eastern boundary line of the Huddleston and Trigg lands had been before they were washed away and became a part of the bed of the river, and, that being the boundary between the two states, complainant can recover nothing east of it, and having previously granted that portion of the channel covering the Huddleston and Trigg lands, it can not recover that, because those who hold under the original grants are entitled to such lands since restoration or reappearance, caused by the abandonment of the

channel by the waters, and therefore the bill of complainant must be dismissed."

(Rec. p. 674.)

(b) The proof:

"The great volume of the testimony introduced in this case by both parties was for the purpose of proving that the channel of the river at that place where the lands sued for now lie, increased in width since 1823 and prior to 1876, and the extent of such increase; and by the complainant to prove that no accretions had formed upon Dean's Island after 1823, and by the defendants that the area of the island had in this way, since that date, been greatly increased and extended westward."

(Rec. p. 674.)

(c) Findings of the Court:

"When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, *much more immediately south of that island than west of it where the premises sued for are situated.* While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

(Rec. p. 675.)

"We do not think that there were any accretions to Dean's Island previous to 1876."

(Rec. p. 675.)

"It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than, the erosions upon the Tennessee bank, and therefore there was no room for any accretions to the Arkansas bank. These are facts clearly established in this record, and to our minds they demonstrate that in 1876 there had been no appreciable change in the banks of Dean's Island since 1823."
(Rec. p. 675.)

The contentions of the parties were over questions of the general law applicable to the conditions that existed. The proof was of those conditions. The findings of the Court were based on the Court's construction of the law as pertaining to those conditions. The findings of the Court on the location of the boundary line between Tennessee and Arkansas were an incident to the findings of the Court in this case, and were rendered necessary only because of the plea in abatement of the plaintiff in error, and because one of the lines of the property owned by the State happened to be the boundary line between the State of Tennessee and Arkansas, and one of the lines of the property claimed by plaintiff in error happened to be the same line.

We submit that this Court has no jurisdiction in this or in any similar case; that the question of the location of the boundary line between the two States is a question to be raised by the States themselves, and can not be raised by a citizen of another State—certainly not unless both States are parties to the litigation; that the loca-

tion of the lines of property belonging to a State in a litigation with an individual, because as an incident to the location of said lines it becomes necessary to locate the line of the State, does not confer jurisdiction upon the Supreme Court of the United States to review the decision of the highest Court of the State on the ground that the location of the boundary lines between the States is solely within the jurisdiction of this Court.

THE WESTERN BOUNDARY LINE OF THE STATE OF TENNESSEE IS A POINT EQUIDISTANT FROM THE PRINCIPAL, WELL DEFINED AND VISIBLE BANKS OF THE MISSISSIPPI RIVER WITHIN WHICH THE WATERS ARE CONFINED AND FLOW AT THEIR ORDINARY AND NATURAL STAGES.

I.

The western boundary of the Colony of North Carolina as defined in the Treaties between Great Britain, France and Spain, made in February, 1763, was a line "drawn along the middle of the Mississippi River."

3rd Jenkinson, Treaties 177.

Also as set forth in Treaty made with Great Britain November 30th, 1782, "thence by a line to be drawn along the middle of said River Mississippi until it shall intersect the northernmost part of thirty-one degrees of the Northern Latitude."

Treaties and Conventions between the United States and other Powers since July 4th, 1775,

Government Printing Office at Washington, 1889, p. 371.

On February 25th, 1790, North Carolina ceded to the United States that territory which subsequently became the State of Tennessee, describing the western boundary line of said territory as "the middle of the Mississippi River."

Vol. 1, Am. St. Papers, Pub. Lands, p. 17.

The Code of Tennessee, in describing the western boundary of the State, designated "the middle of the stream of the Mississippi River, including within the State of Tennessee all such islands as are held under grants from the States of Tennessee and North Carolina."

Shannon's Code of Tenn., Sec. 80.

The Treaty of 1763 defining the western boundary line of that territory which later became the State of Tennessee, was construed by this Court as early as 1871. In Missouri v. Kentucky, Mr. Justice Davis said:

> "It is unnecessary for the purposes of this suit, to consider whether on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of an express agreement to the contrary, because the Treaty between France, Spain and England in February, 1763, stipulated that the middle of the river Mississippi should be the boundary between British and French territories on the Continent of North America, and this line established by the only sovereign powers at the time interested in

the subject, has remained ever since as they settled it."

Mo. v. Ky., 11 Wall., 395.

It was so construed by the Supreme Court of Arkansas more than thirty years ago in the case of Cessill v. the State, 40 Ark. 501.

II.

Arkansas was admitted into the Union on June 23rd, 1836, and its boundary was fixed as "the middle of the main channel of the Mississippi River."

5 U. S. Stats. L. 50, 51.

III.

The State of Tennessee having been first admitted to the Union and its boundary line fixed and determined, Congress had neither the intention nor the power to change its boundary line.

Wash. v. Oreg., 211 U. S. 127;
La. v. Miss., 202 U. S. 40;
Mo. v. W. Va., 217 U. S. 41, 43;
State v. Cissna, Rec. p. 354.

Mr. Justice Brewer in the case of Washington v. Oregon above, said:

"The northern boundary of the State of Oregon was established prior to that of the State of Washington, and it is not within the power of the national government to change that boundary without the consent of Oregon."

Wash. v. Oreg., 211 U. S. 127.

In the case of Louisiana v. Mississippi, Mr. Justice Fuller said:

> "It is enough to say that Congress after the admission of Louisiana could not take away any portion of that State and give it to the State of Mississippi."
>
> La. v. Miss., 202 U. S. 40.

IV.

The boundary line between Tennessee and Arkansas has always been construed to be the middle of the bed of the Mississippi River equidistant from the visible, well defined and substantially subsisting banks within which the waters are confined and flow at their ordinary and natural stages, and not the middle of the channel of steamboat navigation. It has always been construed and uniformly adjudicated by the highest courts of the State that the boundary line between said States is the middle of the Mississippi River, and not the middle of the channel of commerce or navigation. Every court and every authority of both States which has had occasion to consider the subject has so considered and has acted upon that assumption.

Treaty between Great Britain, France and Spain, Feb. 1763, 3rd Jenkinson's Treaties, 177;

Cessell v. The State, 40 Ark. 501;

Wolf v. The State, 104 Ark. 140;

Foppiano v. Snead, 113 Tenn. 173;

Moss v. Gibbs, 10 Heisk. 283;

Stockley v. Cissna, 119 Tenn., p. 139;
Cissna v. The State, Rec. p. 654;
Morgan v. Reading, 3rd Sm. & Mar. (Miss.) 366.

As early as 1869 Justice Nicholson, in delivering the opinion of the Court in the case of Moss v. Gibbs, above, said:

> "By the Treaty of 1763 between France, Spain and England, the middle of the Mississippi river was made the dividing line between the British and French territories on this continent."

And through his entire opinion it is evident that the phrases "middle of the river" and "middle of the main channel of the river" are used as synonymous terms to designate the center of the bed of the main stream of the river, measuring from one well defined bank to the other, and not "the channel of navigation."

Moss v. Gibb, 10 Heisk. 263.

In Foppiano v. Snead, Mr. Justice Neal said:

> "The center of the Mississippi River is the line between Tennessee and Arkansas."
>
> Foppiano v. Snead, 113 Tenn., p. 173

The ruling of Chief Justice Shields in this cause is in strict accordance with the ruling of the highest courts of Arkansas. In the case of Cessell v. The State, Judge Eakin, speaking for the Court, said:

> "It will be observed that the principle upon which the court proceeded is, that the line of deepest water in the river bed is the boundary of the State, and

continues such as it fluctuates. No question arises in this case upon either of the two qualifications, and the sole matter left for us to decide is this: What is meant by the "Main channel" and what is the middle of it? The channel of a river, bay or sound is, in boatmen's parlance, the course over its bed over which the water is deepest, and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow, and which may be at sometimes full and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch, as it presents something of a permanent nature, or at least at all times visible; and when changed leaving traces of the old landmarks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas channels in the sense of the river pilot are ever shifting, invisble—discoverable only by patient soundings and then imperfectly. We can not suppose that such channels would be adopted as state boundaries, or as references to determine them.

The Mississippi river is full of islands, having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within the state by taking the largest of those water conduits as the true river. The middle of the main channel,

then, must mean the point or line along the river-bed equidistant from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but in a far less so and to no very inconvenient degree. Gradual attrition on one side, with accretion on the other, making a change in the permanent banks, might perhaps change the boundary with regard to absolute space. But it is not necessary, for practical purposes, that a boundary should be a fixed mathematical line, and this could only apply to changes in the banks of a channel which remain substantially the same. *For if the main body of the water were to find a new channel, and abandon the old one, leaving intervening lands in a natural state, the old boundary would still be ascertainable, and would govern.* This has been decided in the case between Kentucky and Missouri (infra) and results, with regard to surveyed lands, from the additional clause above noted, in the constitution of 1874. It seems that the largest channel determines which is the river and the central line of that makes the state boundary.

The boundary line in question is a very old one, and does not concern this state alone. It originated with the treaty between England, France and Spain in February, 1763, which made the middle of the Mississippi river the boundary between British and French territories. This line has been ever since observed in subsequent treaties, in Federal legislation, in state Constitutions and judicial decisions, and there are not lacking unmistakable indications of the meaning of the middle of the river. For instance, in the treaty between the United States and Spain,

in October, 1795, before our purchase of Louisiana, the fourth article provides 'that the western boundary of the United States, which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said states to the completion of the 31st degree of latitude north of the equator.'

In the case of Myers v. Perry et al., 1 La. Ann., which resulted from a steamboat collision on the Mississippi, it became necessary to ascertain the locus in quo as affecting jurisdiction between the states of Louisiana and Mississippi. The middle of the river was taken as the boundary line, without any reference to depth of the water. See also, on the same subject, a case very replete with historical learning, that of Morgan & Harris v. Reading, reported in 3 Sm. & Mar. 366, in which this great empire boundary is described, with reference to the treaty of 1763, as a "line drawn along the middle of the Mississippi." This would not be a good description of a steamboat track, zigzagging from bank to bank amongst sand bars in low water.

In the case of Missouri v. Kentucky, 11 Wall. 395, which was a contest between states for jurisdiction over Wold Island, in the Mississippi, Mr. Justice Davis said that by virtue of the treaties above named, together with the treaty of peace with England in 1783, the ancient right of Virginia, to which Kentucky has succeeded, extended to the middle of the bed of the Mississippi River.

It seems that where there are several channels, the principal one is considered the river, and in this the medium filum makes the boundary.

There was only one channel in this case, which was the river bed between the Arkansas and Tennessee shores at Osceola. The court and attorneys treated the case throughout as if the channel meant the line of the deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1784, no question could arise as to change of channel. The instructions asked by defense were erroneous, but those given for the state were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendants guilty or innocent accordingly."

Cassill v. State, 40 Ark. 501.

In the case at bar Judge Shields said:

"We concur fully with the Supreme Court of Arkansas in the construction given the treaties of 1763 and 1783 in that opinion and hold, as held by that Court, that the boundary line between the British possessions in America, which then included all the territory now composing the states bordering upon and having for their western boundary the Mississippi river, and the territory of Louisiana, then belonging to Spain, was fixed and defined as a line along the middle of the main channel of the river, equidistant from the visible and permanent

banks confining its waters, and that the several acts of Congress admitting into the Union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties and must be construed to mean the same thing. This question has not before been before this court, but in a case involving property rights upon an unnavigable stream called for as a boundary line of private estates it was held that 'the thread of the stream is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary state of the water, at medium height, neither swollen by freshets nor shrunk by drouths.' Barnham v. Turnpike Co., 1 Lea 706.

The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating this state from Arkansas is as defined in the case of Cessill v. State, supra. This appears from an act of the General Assembly of the state approved April 15, 1903, Chapter 420, Acts of 1903, in which the lands in controversy and all others lying upon the Tennessee side of the old bed of the river are declared to be the property of the state, and the Governor authorized to appoint Commissioners to act with other Commissioners to be appointed by the State of Arkansas, to run and mark the line, and also to report to the Governor the extent and value of such lands. The General Assembly of Arkansas passed a similar act, but it was vetoed by the Governor of that state, and therefore no commissioners were appointed under the act passed by

the Legislature of Tennessee. This suit was brought by the direction of the Governor of this state, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the Acts of Congress admitting other states bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them, and controlling in this and other cases involving the question."

(Rec. p. 658.)

In the case of Morgan v. Reading, in discussing the boundary line between Mississippi and Louisiana, and particularly with reference to the treaty of 1763, Judge Sharkey said:

"France, although not the first to discover, was the first owner, by appropriation, of the Mississippi and all the territory of its tributaries. By treaty with Great Britain in 1763, to which Spain was a party, France ceeded to Great Britain all her territory east of the Mississippi and north of the river Iberville, and the two powers fixed the boundary between them 'by a line drawn along the middle of the river, and the Lakes Maurepas and Pontchartrain to the sea.' Great Britain continued to be the power of the ceded territory until the 30th of November, 1782, when, by a provisional treaty, she acknowledged the independence of the United States, bounded on the west above the 31st degree of north

latitude by a line drawn along the middle of the Mississippi river, corresponding exactly with the boundary in the treaty with France. This provisional treaty with France and Great Britain, and all its provisions, were incorporated in the definitive treaty of peace concluded on the 3rd of September, 1783. Great Britain, at the same time, ceded West Florida, which by that government had been extended to the mouth of the Yazoo, to Spain; but as, by the provisional treaty, the southern boundary of the United States had been fixed at the 31st degree of north latitude, Spain acquired nothing above that parallel, as Great Britain had previously disposed of it. Thus, the United States succeeded to all the territory east of a line drawn along the middle of the Mississippi above the 31st degree of latitude. This left Louisiana bounded on the east by the same line, the middle of the river, about Iberville, as it had been established by the treaty of 1763; and by that boundary it was ceded by France to Spain, and by Spain retroceded to France, and ultimately by France in 1803 to the United States; so that no variation of this line, up to that time, had taken place. In 1798, whilst this was still the line between the United States and the province of Louisiana, Congress established the Mississippi territory, bounding it on the west 'by the Mississippi.' ''

3 Sm. & Marsh., Rep. p. 397.

V.

''This Court has many times held that as between the States of the Union long acquiescence in the assumption of a particular boundary and the exercise of dominion

and sovereignty over the territory within it should be accepted as conclusive whatever the international rule may be.

R. I. v. Mass., 4 Howard, 591, 639;
Mo. v. Ky., 11 Wall. 395;
Ind. v. Ky., 136 U. S. 479;
Va. v. Tennessee, 148 U. S. 503;
La. v. Miss., 202 U. S. 54;
Md. v. Va., 217 U. S. 1-41-43.

In the case of Rhode Island v. Massachusetts above, Mr. Justice McLean, speaking for the Court, said:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall within the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in the case of disputed boundary."
>
> R. I. v. Mass., 4 Howard, 637.

In Indiana v. Kentucky, Justice Field said:

> "It is a principle of the public law unanimously recognized that long acquiescence in the possession of a territory and in the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority."
>
> Ind. v. Ky., 136 U. S. p. 471.

In Virginia v. Tennessee, Mr. Justice Field said:

> "A boundary line between states or provinces as between private persons, which has been run and located and made upon the earth, and afterwards acquiesced in by the parties for a long course of years is conclusive.
>
> Va. v. Tenn., 148 U. S., p. 521.

This Court has so construed the law from its organization to this day, and so also declare the text writers on international law.

Vattells on the Law of Nations, 2nd Book, ch. 11, Sec. 149;
Wheaton on Int. Law, Pt. 2, ch. 4, Sec. 164;
Twiss on Int. Law, 137;
Halleck on Int. Law, 50.

The reason for this rule is given by Vattel: "The tranquillity of the people; the safety of states; the happiness of the human race do not allow that possession, empire and other rights of the nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars."

VI.

Where two nations or states have as a common boundary line a navigable river, and the original property is in neither, and there is no convention respecting it, each holds to the middle of the stream, and the line is not affected by accretions or erosions on its banks.

Washington v. Oregon, 211 U. S. 127-134.
Louisiana v. Mississippi, 202 U. S. 1.

Missouri v. Nebraska, 196 U. S. 23-35.
Nebraska v. Iowa, 143 U. S. 359.
Iowa v. Illinois, 147 U. S. 1.
Handley v. Anthony, 6 Wheat. 374.

VII.

When an avulsion occurs and the river leaves the old bed or channel and makes for itself a new channel wholly within the territory of one state, the rule is that in such case the boundary is the center of the abandoned bed of the stream, and not the line of steamboat navigation, or the point of deepest water.

Halleck on Int. Law, Sec. 24.
Farnham on Water, Vol. 3, p. 2495.
Woolsey Int. Law, Sec. 58.
Wharton's Digest of Int. Law, Vol. 1, Sec. 30.
Opinions of Attorneys General, Vol. 8, p. 177.
Sandar's Justinian, pp. 168, 169.
Missouri v. Kentucky, 11 Wall. 395.
Buttenuth v. St. Louis Bridge Co., 123 Ill. 535.
Nebraska v. Iowa, 143 U. S. 359, 361, 363.
Indiana v. Kentucky, 136 U. S. 47.
Louisiana v. Mississippi, 202 U. S. 1, 49, 51.
Washington v. Oregon, 211 U. S. 134, 135.
Railroad Company v. Clinton, 88 Iowa 188.
Belle Fontaine Improvement Co. v. Neidringhaus, 181 Ill. 426.

VIII.

Hence, where by an avulsion the main channel changes by cutting off a peninsula from one state and forming an island, or the channel changes so that an island which

was on one side of the main channel of the river is left on the other side, these work no change of boundary or ownership of the island. The dominion and jurisdiction of a state bounded by a river continue as they existed at the time when it was admitted to the Union, unaffected by the action of the forces of nature upon the course of the river, except such changes as may be made imperceptibly and gradually by accretions and erosions.

Missouri v. Kentucky, 11 Wall. 395.
St. Louis v. Rutz, 138 U. S. 226, 246, 247.
Indiana v. Kentucky, 136 U. S. 479.
Washington v. Oregon, 211 U. S. 127, 134, 135, 136.
Letters of Mr. Frelinghuysen, Secty. of State, to Mr. Romero, Mexican Minister, in regard to islands in the Rio Grande.
Wharton's Digest of Int. Law, Sec. 30, pp. 85 to 94.
Letters of Mr. Bayard, Secty. of State, to Mr. Bowen, June 12, 1886.
Wharton's Digest Int. Law, Sec. 30, pp. 94, 95.

IX.

The rule above announced that the boundary line is the center of the abandoned channel or bed of the river, is further modified by the rule that, as the soil under the Mississippi River east of the western boundary of Tennessee belongs to that State, when as the result of an avulsion the water ceases to flow over it, that which has been lost by submersion as the result of erosion, as well as that which has been gained as the result of accretion,

will, when capable of identification, be restored to the original owners.

St. Louis v. Rutz, 138 U. S. 226.
Hardin v. Jordan, 140 U. S. 382.
Stockley v. Cissna, 119 Fed. 831.
Mulry v. Norton, 100 N. Y. 426, 53 Am. Rep. 215.
Packer v. Bird, 137 U. S. 666.
Hughes v. Birney, 107 La. 664.

In applying the rule of reliction as between nations, the Court will follow, as it does in the case of erosions, accretions and avulsions, the rule as applied to individuals.

Rhode Island v. Mass., 12 Pet. 654.
Nebraska v. Iowa, 143 U. S. 361.
Opinions of Attorneys General, Vol. 8, p. 175.

X.

The question of the right of navigation can have no bearing in the decision of the boundary between the States of Arkansas and Tennessee, because the river has at all times been open to navigation under the acts of Congress.

State v. Pulp Company, 119 Tenn. 47, 94.
Handley v. Anthony, 5 Wheat. 374.
Bedford v. U. S., 192 U. S. 225
Jackson v. U. S., 230 U. S. 1.
Wharton's Dig. Int. Law, Sec. 30.
Gould on Waters, Sec. 202.
Treaty between United States and Great Britain, 1783.

Treaty United States with Spain, 1795.
First Statutes, 464, ch. 27, 277, ch. 35, 641, ch. 21, 662, ch. 46, 701, ch. 50, 743, ch. 95.
Third Statutes, 348, ch. 23.

XI.

The whole contention of plaintiff in error is best set forth by him on page 36 of his brief, where he says:

"His whole claim is that while state and property lines or boundaries may be altered by accretion or erosion (being gradual and imperceptible processes or operations) said lines are unaffected by avulsion," and in the legal proposition laid down by him "the doctrine of reliction only applies when land is uncovered gradually and imperceptibly. It has no reference to the effect of an avulsion."

The position of the State of Tennessee is, in applying the rule of relicion as between states, the Court will follow, as it does in the case of erosion, accretion and avulsion, the rule as applied to individuals. That in a case where there has first been erosions from one bank, and later an avulsion takes place, the Court will seek to give effect to the rule governing accretion and reliction on the one part, and that governing avulsion on the other, so as to, as far as possible, reconcile them, and not to permit their seeming repugnance to destroy either the one or the other; in other words, to endeavor to so construe both rules as to preserve the true intent of each.

It was upon this theory that the Supreme Court of Tennessee said:

"These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted.

It restored all parties to their original status and does justice to them all. If the result of the avulsion had only affected the waters of the river so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned can not change the rights of the parties. The others interested can not be restored to their own by the forces of nature and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She can not in this way be deprived of the property when the same can without doubt be identified and located."

(Rec. p. 683.)

And upon the same theory the Court acted in Mulry v. Norton, supra, when it said:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the

property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main-land have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land, by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Angell Tide Waters, 76, 77; Houck Rivers, p. 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Angell Tide Waters, 77-80, and cases cited."

Mulry v. Norton, 100 N. Y. 426.

The rule of reconciliation was laid down by Mr. Chief Justice Marshall in the case of Cohens v. Virginia, when he decided that the Supreme Court of the United States had jurisdiction to review the decision of the highest Court of a State, in a case where a State was a party, and where a question arose under the Constitution and laws of the United States:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate from are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, *so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them,* and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."

Cohens v. Virginia, 6 Wheat., 293.

So in this case when the Mississippi River left its old bed and made a new channel for itself, the boundary line between the States of Arkansas and Tennessee and the property lines of those individuals in each State owning property bordering upon the River became fixed, that is, permanent and stationary, and the Supreme Court of Tennessee in locating the lines of the states and of individuals sought as far as possible to so construe the two rules—the one governing an avulsion, and the other accretion and reliction—as to preserve the true

intent and meaning of each. The original owners of the property, the surface of which had been temporarily washed away, were entitled to their property on its reappearance, the States of Arkansas and Tennessee to theirs. In this way the intent of both rules were preserved and even and exact justice done to all. An avulsion does not make property lines. The lines are there and were made by covenant, treaty, compact or grant, subject to change it is true, because of erosions and accretions so long as the stream remains the boundary line. When by avulsion the stream changes its course and the old bed is abandoned, it is said the lines become fixed, and so they do. They become fixed because they are no longer subject to change by the action of the waters; still they must be located, and when located and marked the location is permanent and not subject as before to the action of the waters. Through an avulsion lines which theretofore were not permanent, become permanent, when located, and in locating the lines, we submit, it is proper to apply the rule of reliction and restoration to that property which has been lost to its owners by erosion.

XII.

THE LINES OF 1823 AND 1836 THE SAME.

Plaintiff in his brief on pages 36 and 37 lays great stress upon the finding of the Court:

> "The erosive effect of water on the Tennessee shore between 1823 and 1836 necessarily operated to increase the width of the river so that in 1836

it is bound to be true that the river was wider than it was in 1823.

There has been no effort by the State of Tennessee to establish, locate and designate the middle of the Mississippi River as it existed in 1836 and yet, even on the theory of the defendant in error, that must be the boundary line between the two states, for the middle of the river of 1823 was not the boundary line in 1836."

Plaintiff's Brief, pp. 36 and 37.

The river and the property lines set out on Humphrey's map are the river and property lines of 1836. The map is referred to as the map of 1823 as a means of identification, because that was the date of the first grant from the State of Tennessee to Simon Huddleston of two thousand acres. The Court in its opinion in one or more places refers to the river lines as the lines of 1823 to 1830 and Maj. Humphreys in his deposition giving the dates of the grants and surveys upon which he surveyed the river and property lines refers to the same as of the dates of 1823 and 1830, but there is even a more accurate method of ascertaining the exact time of the lines. The grants and surveys were made mostly in 1836, and the Humphrey's map shows each grant and each owner, and the grants and surveys themselves show the date thereof. Taking the grants along the river from just north of the property in controversy and extending south of its south line we find:

Grantee, No. of acres, Date of Grant, Date of Survey and Record Page:

John Trigg, 151 1-3 acres, Sept. 5, 1836, Oct. 14, 1837, page 216.

John Trigg, 152 acres, Sept. 5, 1836, Oct. 14, 1837, page 214.

John Trigg, 37 acres, Sept. 5, 1836, Oct., 1837, page 219.

S. Huddleston, 2000 acres, July 2, 1822, Dec. 19, 1823, page 237.

G. B. Bateman, 155 acres, Dec. 23, 1834, Mar. 7, 1836, page 251.

G. B. Bateman, 256 acres, 1836, Feb. 2, 1837, page 253.

John Trigg, 253 acres, Sept. 1, 1836, page 256.

All of the grants, except the Huddleston grant of two thousand acres and the G. B. Bateman grant of 155 acres were made in 1836, and several of them were actually surveyed in 1837, so, therefore, it was impossible for any change to have taken place in the banks of the river between 1823 and 1836, because the actual lines were surveyed in 1836.

XIII.

Plaintiff also devotes considerable attention to the findings of the Court quoted on page 38 of his brief:

> "(1) The width of the channel, by erosion and caving in of the Tennessee bank south, southwest and

west of Dean's Island along the main land and Island 37, had increased from its former width to that of one mile and a quarter or one mile and a half.

Rec. 650.

(2) We find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

Rec. 675.

Plaintiff's Brief, p. 38.

The quotations do not constitute the finding of the Court on the question of erosions from the Tennessee bank. What the Tennessee Court did find was:

"When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, *much more immediately south of that island than west of it where the premises sued for are situated.* While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

Rec. pp. 674, 675.

The Tennessee Court, of course, meant all of what it said regarding the increase in width of the river at this point, and that was that the river had increased in width

"much more immediately south of that Island (referring to Dean's Island) than west of it where the premises sued for are situated." By referring to Humphrey's map it will be noted that all of the property here in controversy is west and not south of Dean's Island, and the Court says that most of the increase in the width of the river was south of said island and not west.

XIV.

Plaintiff in error insists that when it was brought to the attention of the Chancellor that the State of Arkansas had filed a suit against the State of Tennessee to settle the boundary line between the two States that the Chancery Court should have suspended action in this case until after the decision of the case of Arkansas v. Tennessee. He further insists that the pending suit between Arkansas and Tennessee, or rather the fact that Arkansas had filed a bill against Tennessee, having been brought to the attention of the Supreme Court of Tennessee by the exceptions of the plaintiff in error, that the Tennessee Supreme Court itself should then have suspended action in this cause, until after the decision of the case of Arkansas v. Tennessee.

We submit to the Court that no such action should have been taken by either the Chancellor or the Supreme Court of the State of Tennessee. The bill was filed by Arkansas some eight years after this suit was instituted, six years after the case was first tried by the Chancery Court of Shelby County, four years after

the Supreme Court of Tennessee had decided the case on the plea in abatement of plaintiff in error, and after the case had been remanded to the Chancery Court of Shelby County, the bill of the State of Tennessee amended, additional proof taken by all parties, and the case set for trial, and some two months after the case had been argued in the Chancery Court, and after counsel for the State of Tennessee and counsel for the plaintiff in error had submitted final decrees to the Chancellor. In other words, at the time the petition of Mr. Cissna, asking that proceedings be suspended, was filed, this case had ben tried, the decision of the Chancellor had been announced, and the only thing further to be done was for the Chancellor to pass on the decrees submitted to him. The decree in the Chancery Court was actually entered only four days after Mr. Cissna's petition was filed, and we submit to the Court that it would have been an unheard of action for the Chancellor to hold up the final decree under the circumstances presented.

We submit further that it was not the duty of the Supreme Court of Tennessee to suspend action, pending the determination of the suit of Arkansas v. Tennessee. The question before the Supreme Court of Tennessee was the location of the boundary lines of private property and property belonging to the State of Tennessee, and not the location of the boundary line between Arkansas and Tennessee. There was no Federal question involved. The location of the boundary line was merely

an incident and was necessary only because one of the lines of the property claimd by the plaintiff in error happened to be the boundary line of the States.

The State of Arkansas had already at this time twice declined to join in with the State of Tennessee in locating the boundary line between the States in the abandoned bed of the river. The Supreme Court of the State of Arkansas had more than thirty years ago decided that the State of Arkansas owned to the middle of the bed of the Mississippi River, and the Circuit Court of Appeals of the United States had handed down a similar decision in the case of Stockley v. Cissna. There was no disagreement between the States; on the contrary there was perfect agreement, and acquiescence by each state in the claims of the other. There was no reason, therefore, for the Supreme Court of Tennessee to suspend its decision in this cause for an indefinite period of time.

We submit further that this is not a case in which this court can, should it reach the conclusion that it has jurisdiction of this cause, or should it even reach the conclusion that the Supreme Court of Tennessee was in error, order the bill filed by the State dismissed.

The original bill in this cause was filed against W. A. Cissna, the plaintiff in error, the Muncie Pulp Company, a New York corporation, and Vince Beard.

Original Bill, Rec. p. 393.

The object of the bill was not only to recover the land claimed by the State, but an injunction was also prayed to stop the cutting and removing of timber, pending the decision of the court, and to stop the removal of timber that had already been cut.

Original Bill, Rec. p. 397.

The injunction was granted and issued (Rec. p. 397, 398), but later was modified on the petition of the Muncie Pulp Company, and that company gave a bond in the penal sum of Ten Thousand Dollars, and was allowed to remove the timber that had been cut from the land prior to the issuance of the injunction.

Order Modifying Injunction, Rec. p. 403.

The bond was signed by the American Surety Company.

(Rec. p. 404.)

Later, by agreement of parties, the injunction was again modified, upon the Muncie Pulp Company giving a second bond in the penal sum of Fifteen Thousand Dollars, and the Pulp Company was allowed to cut and remove the balance of the timber from the land. The order modifying the injunction the second time and the bond appear to have been lost.

(Rec. p. 411.)

The second bond issued in the penal sum of Fifteen Thousand Dollars, was also executed by the American Surety Company, and while this bond and order are not

in the record, the facts concerning the execution of the two bonds are given in the deposition of Mr. R. G. Brown, attorney for the Muncie Pulp Company, and later for Leo Oppenheimer, first receiver and then trustee in bankruptcy.

(Rec. pp. 740, 741.)

Pending the decision in this cause in the Chancery Court, the Muncie Pulp Company filed a petition in bankruptcy, and Leo Oppenheimer appointed first receiver and later trustee in bankruptcy, intervened and thereafter appeared as one of the defendants in this cause.

Under an agreement between Mr. Caruthers Ewing, counsel for W. A. Cissna, and Mr. R. G. Brown, counsel for the Pulp Company, and later for Oppenheimer, the timber that had been cut at the time the injunction was granted, and the timber left standing and later cut and removed, was sold, and a part of the proceeds were remitted to Oppenheimer. The amount remitted in round numbers was about the sum of Twenty-three Thousand Dollars.

See Deposition of R. G. Brown, p. 741.

The funds derived from the timber cut from the lands claimed by the State were held by Leo Oppenheimer, trustee in bankruptcy, subject to the order of the United States District Court for the Southern District of New York.

On May 18th, 1910, Oppenheimer was authorized and directed to deposit the sum of Nineteen Thousand Sixty-eight Dollars and Ten Cents, being the balance of said fund on hand after paying some expenses, in the Chancery Court of Tennessee, the State having agreed to release the said Oppenheimer and the American Surety Company from further liability when said fund had been deposited in said Court.

(Rec. pp. 905, 906.)

An order was entered in the United States District Court for the Southern District of New York overruling the order dated May 18th, 1910.

(See Rec. pp. 906, 907.)

A petition was filed by Oppenheimer in the Chancery Court of Shelby County, asking the privilege of depositing said fund in said court. This petition was denied by the Chancellor. It appears that the proceedings on this petition have been omitted from the record, we suppose through an error, but the facts of the filing of the petition, the action of the Chancellor, and the final ruling of the Supreme Court of the State of Tennessee, are set forth in Sec. 8 of the decree of the Supreme Court of Tennessee, Rec. p. 933. The fund there referred to was later paid into the hands of T. B. Carroll, Clerk of the Supreme Court, and is subject to the order of the court in this cause, to be applied on the judgment of the State herein.

We suppose that the omission of the proceedings concerning the payment of this fund into the hands of the Clerk of the Supreme Court of Tennessee, is simply an error on the part of the Clerk in making up the record. It has just come to the attention of counsel for the State, and is not material in this cause further than that with said fund in the court subject to the order of the court to be applied as directed by it should this court order the bill filed in this cause by the State dismissed, this fund would be carried beyond the jurisdiction of the Tennessee Court, and probably dissipated, and the effort of the State to recover its land, and the value of the timber taken from the land, would be defeated, or at least in order to recover the value of the timber it would be necessary for the State to seek recovery outside of the State and beyond the jurisdiction of its courts.

We submit to the Court:

(1) That this Court has no jurisdiction to review the decision of the Supreme Court of Tennessee in this cause, this being a suit between a State and a citizen of another State over the lines of property owned by the State and by an individual, and there being no Federal question involved.

But should the Court differ with counsel for the State in the above conclusion, we submit:

(2) That the boundary line between Tennessee and the property of plaintiff in error is the middle of the main channel or main bed of the river as defined in the Treaty of 1763, and as further defined in the Treaty between the United States and Spain in 1795, and as adjudged in Cessill v. the State, 40 Ark. 501, in Stockley v. Cissna, 119 Tenn. 812, and as further adjudged in this cause.

(3) That the State of Tennessee owns the property lying between low water mark and the middle of the bed of the Mississippi river as shown by Humphrey's map of 1823 to 1836.

(4) That it would be an injustice for this Court to order the bill in this cause dismissed, and thereby to allow funds in the hands of the Clerk of the Supreme Court of Tennessee, the proceeds of timber cut from the State land and now subject to be applied to the judgment of the State in this cause, to be carried beyond the jurisdiction of the Tennesse Courts.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General,

JOHN P. BULLINGTON,
Solicitors for State of Tennessee.

Office Supreme Court, U. S.
FILED
AUG 6 1917
JAMES D. MAHER
CLERK

No. 20

In the Supreme Court of the United States

W. A. CISENA,
Plaintiff in Error,

VS. No. 89, October Term, 1916.

STATE OF TENNESSEE,
Defendant in Error.

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CARUTHERS EWING,
Solicitor for Plaintiff in Error.

E. C. TOOF & CO., PRINTERS, MEMPHIS

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In the Supreme Court of the United States

W. A. CISSNA,
Plaintiff in Error,

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STATE OF TENNESSEE,
Defendant in Error.

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This case is before the Court on a writ of error, granted by the Chief Justice of the Supreme Court of Tennessee, to reverse the judgment of the highest court of the State.

The case was originally argued on November 10th, 1916, and on December 11th, 1916, the Court, through Mr. Chief Justice White, handed down an opinion, in substance, that as the immediate and determinative question was the location of the boundary line between the states of Tennessee and Arkansas and as the decision of the merits of the case at bar would "be the equivalent of a decision of

the boundary suit" herein pending "between the two states" the determination of the merits was pretermitted with directions that this case be restored to the docket to the end that it might be heard "at the same time and immediately after the coming on for hearing of the original boundary suit between the two states."

Cissna vs. Tennessee, 242 U. S. 195.

Prior to the hearing of this cause on November 10, 1916, the plaintiff in error assigned errors and submitted brief and argument, but for the convenience of the Court on this hearing, it is deemed proper to restate the case, reassign errors (reducing as far as possible the questions to be determined) and submit at this time a brief and ar-argument with respect only to those matters that are deemed necessary to a correct determination of the questions presented.

In March, 1876, the Mississippi river flowed to the east of Dean's Island, Arkansas, almost due south; it then turned and ran almost due north, around "Island 37,"—thus separating Dean's Island, Ark., and Island 37, Tennessee; encircling Island 37 and pursuing a general course to the south, it made almost a perfect elbow, known as "Devil's Elbow." It then turned almost due east and before again curving to the south ran east until it reached a point about one mile from the place where it had turned to the north and flowed between the two islands above mentioned. In other words, following the course

of the river one traveled fifteen or twenty miles and was then only about one mile from the starting point.

The Mississippi River has a fall of about six inches to the mile (Rec. 273) so the river, when it reached this neck of land, was possibly more than six feet lower than the river on the upper side of the strip. (Rec. 273-274). The strip or neck of land being only about one mile wide and the fall being six or eight feet, the river, at flood-tide, on March 7th, 1876, broke across this strip or neck of land and deserted the former channel around Island 37.

A very clear and lucid account of the "cut-off" is to be found in the record. (Rec. 48, 77).

On May 13th, 1901, H. W. Stockley sued W. A. Cissna (present plaintiff in error) in the Circuit Court of the United States, Western District of Tennessee, claiming to own practically the same land which is involved in the instant case.

Rec. 1-3.

The defendant, (plaintiff in error here), pleaded that the Tennessee Court was without jurisdiction, claiming that the land was in Arkansas and not in Tennessee.

Record 8.

On a trial of that case before Hon. Eli S. Hammond, Judge, (since deceased) and a jury, the defendant Cissna, conceiving that plaintiff Stockley had failed to prove title in himself, withdrew his plea in abatement, (which

went alone to the question of jurisdiction), admitted "that a small part of the land sued for is situated in the State of Tennessee," that the Court had jurisdiction "of a part of the subject matter" of the suit and moved for a directed verdict in his favor. This motion was granted.

Record 15-16.

Mr. Stockley carried the case to the Circuit Court of Appeals, Sixth Circuit, and on Nov. 10th, 1902, the judgment of the lower court was affirmed.

Record 337.

Stockley v. Cissna, 119 Fed. 812.

Petition to rehear was filed on Jan. 8th, 1903, (Rec. 361) and on Feb. 3rd, 1903, was denied. (Rec. 388).

In the original opinion, handed down by Judge, later Mr. Justice Lurton, the position seemed to be taken that neither party owned the land but that it belonged to the State of Tennessee. This question was not before the Court.

Record 389.

The litigation in the Federal Court between private individuals being terminated in February, 1903, the learned Attorney-General of the State of Tennessee, assuming from Judge Lurton's opinion that the land could be recovered by defendant in error here, caused this action to be instituted on Dec. 14th, 1903. The suit was brought in the Chancery Court of Tipton County, Tennessee (Rec. 393), because if the land is in Tennessee it is in Tipton County. There were a number of defendants to the

bill as filed, but the rights of all parties were dependent on the right and title of W. A. Cissna, so they were not active litigants and ultimately were without interest in the result. All counsel in the case lived at Memphis, Shelby County, Tennessee, so by agreement (Rec. 418) the cause was transferred to the Chancery Court of Shelby County (Rec. 419-420) and thereafter remained in that Court.

In this ejectment bill filed in 1903, the State of Tennessee alleged that in March, 1876, "a sudden change was made in the direction of the main current or channel of said river whereby in a single night or a very short time, a new channel was formed for said river," (Rec. 394), and the claim was:

> "As a result of said sudden change, the old bed of the Mississippi river in a short time became dry land, and the State of Tennessee is now, as it was then, the owner of that part of the bed of the river lying between the low-water mark on the Tennessee side, and the center of said river, *as it flowed prior to the cut-off in* 1876."
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> Record 394.

It was charged that W. A. Cissna had, "without right or authority," taken possession of the land, sold and removed timber therefrom and the purpose of the suit was to recover (1) the land and (2) the value of the timber which had been taken.

Rec. 393-397.

The defendant Cissna (plaintiff in error here) pleaded in abatement and, among other things, set out:

> "That the land mentioned and described in the bill is not situated nor does it lie in the County of Tipton in the State of Tennessee, except as hereinafter shown, and to such part of said property as lies in the State of Tennessee and County of Tipton, the defendant has never asserted a right, title, or claim of possession, nor does he now assert such right, title or claim of possession; he is not in possession thereof and never has been."
>
> Rec. 400.

This plea contained the following:

> "Defendant says that in the said year 1823, all of the property mentioned and described in the bill was on the Tennessee side of the middle of the Mississippi river as it then ran; that from the year 1823 to 1874, continuously, there were erosions into the Tennessee shore and accretions to the Arkansas shore, or to Dean's Island, so that by the year 1874 Dean's Island had by gradual and imperceptible accretions become much enlarged, and by the gradual and imperceptible encroachments of the river the land on the Tennessee side had been washed away."
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> Record 400.

(The reference to 1874 instead of 1876, was because there was in 1874 a map made by Col. Suter, which was exhibited to the Court).

It was set out that by the erosive action of the water on the Tennessee shore the river had widened and the

Arkansas shore had been correspondingly projected so that when the "cut-off" took place the line was left at the exact spot where it existed when the avulsion occurred.

Record 401.

Much proof was taken and in order to get the case finally heard, W. A. Cissna filed an answer (Rec. 642-644) and made practically the same defense as was embodied in his plea in abatement:

> "The land mentioned in the bill is not in the State of Tennessee, but is in the State of Arkansas."

Rec. 643.

At the hearing the trial Court sustained "the plea of the defendant to the jurisdiction," adjudging that the land was in Arkansas, and from this decree the State of Tennessee appealed to the April term, 1905, of the Supreme Court of the State.

Rec. 646.

The case was argued and submitted at the April Term, 1905, of the Supreme Court of Tennessee, but was not decided; the case was not decided at the next term, April, 1906; it was not decided at the next term, April, 1907.

In the meantime other litigation had taken place with respect to property rights as affected by the "cut-off" of 1876, known, because of the year in which it took place, as the "Centennial Cut-off."

Stockley v. Cissna, 119 Tenn. 135.

(The above case is not pertinent to the matter before this Court, but is merely mentioned in stating what has transpired).

The result in the Supreme Court of Tennessee was that on June 14th, 1914, a final judgment was rendered in favor of defendant in error and against plaintiff in error for $110,103.80, being the alleged value of the timber taken from the land in controversy, and it was likewise adjudged that the State of Tennessee was the owner and entitled to the possession of said land.

Rec. 937-943.

The opinion of the Supreme Court of Tennessee appears at pages 648-683 of the printed record and in 119 Tenn. p. 47, 104 S. W. R. 437.

Attention is called to the following: On January 30th, 1911, the State of Arkansas applied to this Honorable Court for leave to file its original bill against the State of Tennessee, to the end that the true boundary line between the two states should be fixed and determined; on February 20th, 1911, this Honorable Court granted the application of the State of Arkansas and its original bill was accordingly filed. (Rec. 854). This situation was brought to the attention of the Chancery Court of Shelby County, Tennessee, (to which the cause had been remanded, *State vs. Pulp Co.*, et al, 119 Tenn. 47) and application was made to that Court to stay proceedings until the boundary line had been settled and this application by plaintiff in error was denied.

Rec. 926.

From the judgment of the Chancery Court, in accordance with the opinion of the Supreme Court above mentioned, plaintiff in error appealed to the Supreme Court of Tennessee, April Term, 1912, and that Court reaffirmed its original judgment (Rec. 949) and directed a reference to the Clerk of that Court to ascertain and determine the value of the timber removed from the land in controversy by plaintiff in error and, in the order of reference, the defendant in error was adjudged to be the owner of the land here involved.

Rec. 931.

The Clerk did not make a report until the April Term, 1914, because the matter was continued by consent of counsel from time to time (Rec. 937) and the Clerk reported his findings based on the idea that the middle of the Mississippi River, as it ran at the time of the avulsion, was not the boundary line between the States but that the effect of the avulsion was to press the line back to another and a different point, (following the judgment of the Supreme Court of Tennessee). Thereupon the plaintiff in error excepted to this report on the ground "that the proof was taken on an erroneous theory" and insisted that the territorial limits of Tennessee "went only to the middle of the Mississippi River as it ran in 1876, being the year in which an avulsion took place, the legal result of which was to leave the boundary line between Tennessee and Arkansas in the middle of the river as it ran just preceding the avulsion," (Rec. 941) and W. A. Cissna also appeared in open Court "objecting and

protesting that the Supreme Court of Tennessee had no jurisdiction" and specially brought to the attention of that Court the pendency of the suit of the *State of Arkansas* v. *the State of Tennessee* and insisted—

"that the decision of said Court will be final and conclusive on all parties; that after the submission of said case to the only court having jurisdiction of the subject matter and while said Honorable Court is considering said case no steps or proceedings shall be had in the present case, that this case should be stayed until it is settled and determined by the Supreme Court of the United States where the line between Tennessee and Arkansas is to be located, because if the determination by this Court be not in accord with the determination of the Supreme Court of the U. S., it is void and would be in conflict with the decision of the Supreme Court of the U. S."

Rec. 941.

All objections and insistences of W. A. Cissna were overruled and judgment went against him, as hereinbefore stated,—the Clerk's report being confirmed.

Rec. 942.

The judgment then rendered being final, W. A. Cissna applied for a writ of error (Rec. 943-945), which was allowed. (Rec. 946).

It is not thought necessary at this time to invoke the judgment of this Court on all errors assigned with the

petition for writ of error, nor is it thought necessary to present to this Court any of the questions that arise on the record other than those that are necessarily determinative. The plaintiff in error, however, does not desire to be in the position of waiving any error assigned in connection with the writ of error, nor heretofore assigned in this Court, if in the opinion of the Court the same might be regarded as material to his rights.

ASSIGNMENT OF ERRORS.

I.

On February 27th, 1911, the plaintiff in error petitioned the Chancery Court of Shelby County, Tennessee, to stay proceedings pending the determination of the suit instituted in the Supreme Court of the United States by the State of Arkansas against the State of Tennessee, and therein set up the pendency of said cause, the pleadings therein and made the Court acquainted with the purpose of the litigation.

Rec. 853-859.

The Chancellor declined to allow said petition and declined to stay the proceedings (Rec. 926) and in the Supreme Court, to which the case was carried by appeal, plaintiff in error insisted that the Tennessee Court was without jurisdiction and "that this case should be stayed until it is settled and determined by the Supreme Court of the United States where the line between Tennessee and Arkansas is to be located because if the determination by this Court be not in accord with the determination of the Supreme Court of the United States, (the same would be) void and would be in conflict with the decision of the Supreme Court of the United States." (Rec. 941.) And the Supreme Court of the State of Tennessee disallowed said motion and proceeded to judgment, over the protest of the plaintiff in error.

Rec. 943.

The above action of the Supreme Court of the State of Tennessee was challenged by the fourth assignment of error in that Court as follows:

> "The Court erred in not granting the petition of plaintiff in error for the stay of proceedings pending the settlement of the true boundary line between the States of Tennessee and Arkansas because said question was then pending in the Supreme Court of the United States and seasonable application was made to the Court for such stay of proceedings pending the settlement of the question by the Supreme Court of the United States.
>
> "The Court erred in proceeding with and determining the case because the Court was without jurisdiction on the statement of the Court that this proceeding affected 'the States of Tennessee and Arkansas in their sovereign capacity and their jurisdiction along this entire joint boundary line.' The Court was without jurisdiction to settle the boundary line between the States mentioned."
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> Rec. 951.

The above assignment of error is relied on in this Court and the plaintiff in error submits that under the circumstances the Honorable Supreme Court of the State of Tennessee erred in not granting the petition of the plaintiff in error to stay proceedings until, in a suit pending before this Honorable Court, (*Arkansas* vs. *Tennessee*), the true boundary line between the two states could be settled, because the rights of the plaintiff in error and

of the defendant in error in this action depended upon the location of said boundary line. That the location of the boundary line was the question involved was expressly stated by the Supreme Court of Tennessee in its opinion:

> "The location of the boundary line between Tennessee and Arkansas, and the right of the former to recover the lands in question are practically the same question and will therefore be considered together."
>
> Rec. 648.

In that opinion it was further said that the question involved was "an important question, affecting the States of Tennessee and Arkansas in their sovereign capacity and their jurisdiction along this entire joint boundary line."

Rec. 354.

And it was further said in the opinion of the Court:

> "We are now to determine where the line between Tennessee and Arkansas should be located at the place where the lands sued for lie and are bounded by it."
>
> Rec. 673.

And further:

> "The question involved is the location of a boundary line."
>
> Rec. 678.

II.

The Supreme Court of Tennessee erred in holding that the true boundary line between Tennessee and Arkan-

sas was the middle of the Mississippi River as that river ran in 1823. The said Court should have held that the true boundary line between the two states was the middle of the Mississippi River just prior to the avulsion of 1876. Said avulsion wrought no change in the boundary line between the two states. The Court erred in holding with respect to the avulsion of 1876:

> "The effect of it was *to press back* the line of the State, as it ran at low-water mark, to the eastern boundary line along the river back to the grants it had made, *so as to restore* the grantees and their assigns to their property, and at the same time *to press back to the center of the old channel,* as it ran previous to the submergence of those grants, the line between the two States, *so as to restore to Tennessee what it held before the erosions upon its banks.*"
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> Rec. 950.

III.

The Supreme Court of Tennessee erred in holding, as above indicated, that the true boundary line between the States was other than the middle of the channel of the Mississippi River which was abandoned on account of the avulsion of 1876; the State of Arkansas could not lose land by an avulsion which it had acquired by accretion to its territory; nor could the territorial limits of said State, which had been increased by erosion of the Tennessee shore, be correspondingly diminished because of an avulsion.

Rec. 950-951.

IV.

The Court erred in holding that the Act of Congress admitting the State of Arkansas into the Union, approved June 5th, 1836 (5 *Stat.*, 51-51), did not have the effect of fixing the boundary line of the State of Arkansas, as fixed by said Act of Congress.

Rec. 951.

The Court erred in holding that the decision of the Supreme Court of the United States in *Iowa* v. *Illinois*, 147 U. S. 1, was not controlling and was in direct conflict with other decisions of the Supreme Court of the United States on this subject.

Rec. 663.

By treaty between Great Britain, France and Spain made in February, 1763, the western boundary of that territory out of which Tennessee was subsequently carved was described as the "middle of the Mississippi River."

In Sec. 32, Art. 11, of the Constitution of Tennessee, adopted in 1796, the western boundary was merely designated "as described in the Act of Cession of North Carolina to the United States of America."

The Tennessee Legislature designated the western boundary as "*the middle of the stream* of the Mississippi River" and the eastern boundary of Arkansas was described as "*middle of the main channel* of the Mississippi River."

Code of Tennessee (Shannon), Sec. 80.
5 *U. S. Stat. L.* 50151.

The Tennessee Court held that the boundary line was midway between the well defined banks of the river without regard to the main channel or channel of navigation.

Plaintiff in error insisted and yet insists that the true line is the middle of the main channel of the river, *i. e.*, the navigable channel.

V.

The Supreme Court of Tennessee erred in assuming jurisdiction of this cause in view of the facts to which its attention was called, as hereinabove shown; and said Court erred in ordering a reference to the Clerk of said Court to be executed on the idea and theory that the avulsion of 1876 materially altered the boundary line between the states of Arkansas and Tennessee; and said Court erred in awarding a decree against plaintiff in error, based on the report of the Clerk made in obedience to said order of reference.

Rec. 952.

PROPOSITIONS OF LAW.

I.

The boundary line between Tennessee and Arkansas followed the gradual and imperceptible shiftings of the river. When the river, by an avulsion, made a new channel for itself, the line remained along the center of the abandoned river bed.

Coulthard v. McIntosh, (*Ia.*), 122 *N. W. R.* 233.
Fowler v. Woods (*Kan.*), 6 *L. R. A.* (*N. S.*) 162.
McBride v. Steinweden, 72 *Kan.* 508.
Michans v. Shapherd, 26 *Ohio St.* 40.
Missouri v. Kansas, 213 *U. S.* 78.
Missouri v. Nebraska, 196 *U. S.* 23.
Philadelphia Co. v. Stimson, 223 *U. S.* 605, 624.
Rees v. McDaniel, 115 *Mo.* 145.
Rober v. Michelson, (*Neb.*), 116 *N. W. R.* 949.
State v. Bowen, 149 *Wis.* 203; 39 *L. R. A.* (*N. S.*), 200.
Stockley v. Cissna, 119 *Tenn.* 135.
Wallace v. Driver, 61 *Ark.* 428; 31 *L. R. A.* 317.
Washington v. Oregon, 214 *U. S.* 205.
Whiteside v. Norton, 205 *Fed.* 5.

II.

The middle of the Mississippi river, as a boundary line, means the middle of the main or navigable channel.

Branham v. Turnpike Co., 1 *Lea*, 703.
Buttenuth v. St. Louis Bridge Co., 123 *Ill.* 535, 69.
Cooley v. Golden, 52 *Mo. App.* 229.

Dunleith & D. Bridge Co. v. Dubuque, 55 *Ia.* 558.
Flynn v. Boston, 153 *Mass.* 372.
Franzini v. Layland, (1903), 97 *N. W.* 499.
Handley's Lessee v. Anthony, 5 *Wheat.* 375.
Iowa v. Illinois, 147 *U. S.* 1.
Jones v. Soulard, 24 *How.* 41.
Keokuk & Hamilton Bridge Co. vs. Illinois, 175 *U. S.* 626, 631.
Louisiana v. Mississippi, 202 *U. S.* 1, 49.
McBride v. Steinweden, 72 *Kan.* 508.
Missouri v. Nebraska, 196 *U. S.* 23.
Missouri v. Kansas, 213 *U. S.* 78.
Moore v. McGuire, 205 *U. S.* 214.
Morgan v. Reading, 3 *Smedes & M.* 366.
Myers v. Perry, 1 *La. Ann.* 372.
State v. Keane, 84 *Mo. App.* 127.
St. Joseph & G. I. R. R. Co. v. Devereux, 41 *Fed.* 14.
St. Louis v. Rutz, 138 *U. S.* 226, 249.
Washington v. Oregon, 211 *U. S.* 127, 134.
Washington v. Oregon, 214 *U. S.* 205.
Whiteside v. Norton, 205 *Fed.* 5.

III.

In a seeming effort to justify the holding that the boundary line between Tennessee and Arkansas was affected by the avulsion, the Supreme Court of Tennessee invoked the doctrine of reliction, citing:

Harding v. Jordan, 140 *U. S.* 371.
Hughes v. Birney's Heirs, 107 *La.* 664.
Matter of City of Buffalo, 206 *N. Y.* 319.
Morris v. Brooks, 53 *Am. R.* 215.
Mulry v. Norton, 100 *N. Y.* 246.
St. Louis v. Rutz, 138 *U. S.* 226.

In the above cases the land had been lost by an avulsion.

The doctrine of reliction only applies when land is uncovered gradually and imperceptibly. That doctrine has no reference to the effect of an avulsion.

Boorman v. Sunnuchs, 42 *Wis.* 233, 245.
Bouvier v. Stricklett, 40 *Neb.* 793.
Carr v. Moore, (*Ia.*) 93 *N. W.* 52.
Collins v. State, 3 *Tex. App.* 323.
Cox v. Arnold, 129 *Mo.* 337, 341; 50 *Am. St. R.* 450.
Degman v. Elliott, (*Ky.*), 8 *S. W. R.* 10.
Farnham on Waters and Water Rights, Vol. 1, *p.* 320; *Vol.* 3, *p.* 2490.
Fowler v. Wood, 85 *Pac.* 763; 6 *L. R. A.* (*N. S.*) 162.
Hammond v. Shapherd, 186 *Ill.* 235; 78 *Am. St. R.* 274.
Jones v. Johnston, 18 *How.* 150, 156.
Mulry v. Norton, 100 *N. Y.* 246.
Naylor v. Cox, 114 *Mo.* 232, 243.
Noyes v. Collins, (*Ia.*), 26 *L. R. A.* 609.
Perkins v. Adams, 132 *Mo.* 131.
Peuker v. Canter, 62 *Kan.* 363.
Sapp v. Frazier, 51 *La. Ann.* 1718; 72 *Am. St. R.* 493.
St. Louis v. Rutz, 138 *U. S.* 226.
Vogelsmeier v. Prendergast, 137 *Mo.* 271.
Wallace v. Driver, 61 *Ark.* 429; 31 *L. R. A.* 317.
Warren v. Chambers, 25 *Ark.* 120; 91 *Am. Dec.* 538.
Wilson v. Watson, (*Ky.*), 138 *S. W.* 283.

IV.

The Supreme Court of Tennessee, in an effort to defend the proposition that the avulsion of 1876 altered the

boundary line between the States of Tennessee and Arkansas, adverted to the presumption in favor of the permanency of a boundary line. (Rec. 678). The learned Court found as a fact "that the width of the channel of the river had increased fully and perhaps more than the erosion of the Tennessee bank." (Rec. 675). And further found that the width of the river had greatly increased "by erosion from the Tennessee side."

Rec. 674-675.

A presumption that a line is permanent is not allowed against the ascertained and established fact that it has shifted.

Bryant v. State, 7 *Bax.* 67.
Coffee v. State, 3 *Yer.* 283.
Hammon on Evidence, *p.* 45.
Keller v. Over, 136 *Pa. St.* 1.
Lincoln v. French, 105 *U. S.* 614.

And a presumption as to the continuance of a given status only arises with respect to things continuous in character and not to the shifting channel of a river.

Greenfield v. Camden, 74 *Me.* 56, 64.
Martyn v. Curtis, 67 *Vt.* 263.
Murdock v. State, 68 *Ala.* 567.
Walrod v. Ball (*N. Y.*), 9 *Barb.* 271.
Watkins v. Specht, 7 *Cold.* 585.

BRIEF AND ARGUMENT.

On Feb. 25th, 1790, North Carolina ceded to the United States that territory which subsequently became the State of Tennessee and in the deed of cession the western boundary of the territory was described as "the middle of the Mississippi River."

Vol. 1, *Am. St. Papers, Pub. Lands*, p. 17.

Tennessee has designated its western boundary as "the middle of the stream of the Mississippi River."

Shannon's Code of Tenn., Sec. 80.

Arkansas was admitted into the Union on June 23, 1836, and its boundary was fixed as "the middle of the main channel of the Mississippi River."

5 *U. S. Stat.* L. 50-51.

The Arkansas Constitution of 1836, Article 1, adopted the above language—"the middle of the main channel of the Mississippi River."

The Supreme Court of Tennessee found that in or about the year 1823 the land in controversy was under the waters of the Mississippi River.

Rec. 648-649.

The reference to the year 1823 has no pertinency except there is no recorded map or survey of the land and

river lines as they existed in 1796, when Tennessee was admitted to the union, but in 1821 the government caused the territory west of the Mississippi River (out of which the State of Arkansas was later carved), to be surveyed and a plat was made and recorded in 1823. (Rec. 33, 673). J. H. Humphreys, a surveyor, by using the plat of 1823, based on the so-called survey of 1821, and starting from the Arkansas shore, using sectional lines as thereon indicated, undertook to locate the Tennessee shore line and thereon based his map which figures so largely in the record and in the opinion of the Supreme Court of Tennessee.

Rec. 33, 505, 673.

The basic idea underlying the judgment of the Supreme Court of Tennessee was that the effect of the avulsin of 1876 "*was to press back the line of the State*" (Rec. 683) of Tennessee so as to destroy and devitalize the changes in that boundary line which had been made by changes in the river "*by erosion from the Tennessee side.*" (Rec. 674). This is the underlying idea and opinion of the Supreme Court of Tennessee, despite the fact that the Court held that the avulsion "did not alter the boundary line" between Tennessee and Arkansas.

Rec. 669-670.

It is not necessary that this Court deal with whether the opinion of the Supreme Court of Tennessee is consistent, but it is necessary that it be determined whether (1) in view of the situation, the Tennessee Court had any

jurisdiction of a case which essentially and admittedly involved the settlement of the boundary line between the states of Arkansas and Tennessee, and (2) whether the Tennessee Court reached a right conclusion when it ultimately concluded that the avulsion of 1876 operated to alter the boundary line between said states.

The authorities heretofore cited are conclusive on the proposition that the Supreme Court of Tennessee was correct in holding that the avulsion of 1876 "did not alter the boundary line" and that said Court erred in concluding, that the effect of the avulsion "was to press back the line" of the State of Tennessee to a point from which it had moved "by erosion from the Tennessee side."

It is recognized by all the authorities that boundary lines are unaffected by an avulsion. The river's sudden abandonment of its bed left the line between the two states exactly as it existed at the time of this sudden and visible abandonment. Otherwise, an avulsion does affect and alter the boundary line.

It is equally clear that the Tennessee Court was in error in applying the doctrine of reliction to the situation affected or brought about by an avulsion.

The one case which would seem to give support to the holding of the Tennessee Court is *Mulry vs. Norton*, 100 N. Y. 246. That case was discussed in *Matter of City of*

Buffalo, 206 N. Y. 319, 326, and the Court, in the latter case, said:

> "In that opinion there are quite a number of quotations from learned text writers and many original observations of a general character relating to littoral and riparian rights, loss of lands by avulsion or erosion, and acquests of land by recession of water, alluvion or accretion, which were doubtless used to illustrate the rule applicable to the specific facts of that case. This becomes evident when we consider the breadth of the discussion and the limited scope of the decision."

And after stating exactly what was involved in *Mulry vs. Norton*, the New York Court, in the *Matter of City of Buffalo*, proceeded:

> "In the Mulry case the land which had been temporarily lost by the violent and perceptible impact of the elements was reformed within the boundaries of the plaintiff's title."

And, in the *Matter of City of Buffalo*, the Court further said:

> "It is obviously a rule of necessity and justice that the loss of land by erosion carries with it all incidents of ownership." (*Welles vs. Bailey*, 55 Conn. 292; *Nixon v. Walter*, 41 N. J. Eq. 103).

I have referred to *Mulry v. Norton* because, in my opinion, it is practically the sole support for the contention that the doctrine of reliction can be invoked in a case where land is uncovered as the result of an avulsion.

In every case cited by the Supreme Court of Tennessee, it will be found that the land which was uncovered had been submerged by an avulsion, or that the recession of the water was the result of the avulsion, and the courts adhered to the principle that property lines and property rights were not affected by an avulsion.

The cases heretofore cited to this point are conclusive and I cannot improve upon the statement of the Iowa Court in *Noyes v. Collins,* 26 L. R. A. 609:

> "The rule is, in order to entitle the adjoining property holders to the right of possession of land left bare by receding water, that the recession must be gradual, slow and imperceptible. In case of a sudden and sensible recession of water, the ownership of the land will not be changed."

There is another definite and distinct difference between the parties hereto: Plaintiff in error contends that the middle of the main channel of the Mississippi River means the middle of the main channel of navigation and does not mean a line equidistant beween the well defined banks of the river.

Frequently along the Mississippi river there will be on one side a very high bank and on the other a sloping bank, so that, except at low water stage, the stream is not confined within a bed which gives any certainty as to the real channel of the river. A bank-full stage on one side of the river may run forty miles on the other side and it is part of the history of this country that a bank-

full stage at Memphis, without one drop overflowing on the Tennessee side, would send the waters of the Mississippi twenty-five miles across the lower and sloping lands of Arkansas. That is, this situation yearly arose before the inauguration of the levee system. In dealing with small rivers which have well-defined banks, no trouble can arise in ascertaining what would be the center of the river. There could never be a variation of more than a few feet.

It was said in *Handley's Lessee v. Anthony,* 5 Wheat. 375:

> "Wherever the river is a boundary between the States, it is the main, the permanent river, which constitutes that boundary; and the mind will find *itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.*"

In the case of *Lamb v. Rickets,* 11 Ohio 311, it was held that "*the center of the river*" was ascertained by "computing the quantity of land *between low-water mark and the center of the river,*" and this upon the theory that in Ohio a riparian owner had title to "the water's edge at low-water mark."

The Supreme Court of Wisconsin held in *Franzini* v. *Layland,* (1903), 97 N. W. 499:

> "1. The boundary line between this State and the State of Minnesota, where the Mississippi River divides them, is the center line of the main channel of said river.

2. The main channel of the Mississippi River means the principal navigable channel, the one customarily followed in steamboat navigation.

3. Said boundary line may be very near the Wisconsin shore at some points and very near the Minnesota shore at others, according to the location of the main navigable and navigated channel. It is a changing line, subject to property rights, as the pathway of navigation changes, according to the purpose designated in locating it at the center of the main channel, that being to preserve for all time, within the boundary of this State, one-half of the navigable pathway of the river, wherever located."

In the case of *Iowa v. Illinois,* 147 U. S. 1, it was said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separate is well established to be the middle of the main channel and the stream. The interest of each State in the navigation of the river admits of no other line."

The Court reviewed *Dunleith & D. Bridge Co.* v. *Dubuque,* 55 Ia. 558, and *Buttenuth* v. *St. Louis Bridge Co.,* 123 Ill. 535, (in the former case the Court held that the line was equidistant between banks and in the second case the Court held that it was the middle of the navigable channel), and said:

"The opinions in boh of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring

States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We, therefore, hold, in accordance with this view, that the line which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the 'mid-channel,' and if there be several channels, to the middle of the principal one, or rather, the one usually followed."

The State of Tennessee is a recent convert to the idea that the rule announced in *Iowa* v. *Illinois* was extraordinary, because in *Branham* v. *Turnpike Co.*, 1 Lea 703, reference was made to *Missouri* v. *Kentucky*, 11 Wall. 401, as follows:

> "The Supreme Court of the United States take for granted that the boundary of States which calls for the middle of the River Mississippi means the *middle of the main channel*, not the *filum equae*, measuring from the outside bank on the one side to the bank on the other side. The inconvenience of a different construction is obvious, for it might result in running the line through islands in every imaginable drection."

(In the report of this case is to be found an accurate review of various treaties wherein our western territory, or its boundary, is mentioned. 20 L. Ed. 117).

Without reviewing the authorities at great length, it is submitted that "the middle of the Mississippi River"

(the description of Tennessee's western boundary line) and "the middle of the main channel of the Mississippi River" (the description of Arkansas's eastern boundary line) mean exactly the same thing, to-wit: the channel of navigation, the main or deep-water channel, This must mean, as applied to this great river, a line equidistant from the shore line at a low water stage or the result would be, as pointed out by Chief Justice Marshall in *Handley's Lessee* v. *Anthony*, 5 Wheat. 374, that the boundary line would be sometimes at one place and sometimes at another.

This Court will find in the opinion of the Supreme Court of Tennessee a suggestion that the line was settled in the case at bar according as the two states had treated that line. (Rec. 666). There is absolutely no basis for that conclusion.

In *Cessill* v. *Arkansas*, 40 Ark. 501, the court dealt with the alleged illegal sale of liquor within the territoral lmits of Arkansas, and it was said by the Court:

> "It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendant guilty or innocent accordingly."

The Court will find references in the opinion of the Supreme Court to alleged acquiescence, ratification, etc., the effort being by the Tennessee Court to further fortify its conclusion by the suggestion that it was accommodating its judgment to a matter already settled by the

State of Arkansas. Nothing has ever been pointed out as supporting this idea except *Cessill* v. *State, supra.* The only other thing we have is that Arkansas declined to arbitrate the matter and filed a bill in this Court claiming that the line is as the plaintiff in error here insists. Beyond these things there is nothing in the record nor in the history of Arkansas justifying the conclusion that she approved the change which the Tennessee Court has undertaken to make in the boundry line.

The Tennessee Legislature in 1903 passed an Act, being chapter 420, and in the preamble to the Act stated not only the facts, but correct principles of law:

> "Whereas, the western boundary of the State of Tennessee, prior to the year 1876, was the center of the main channel of the Mississippi River. And the true boundary between Tennessee and Arkansas is still the center of the channel of the Mississippi as it then flowed, but by a sudden and very remarkable change in the channel in 1876, a part of Tennessee was thrown to the western side of the river, and today, nearly an entire civil district is on the western, or Arkansas side of the Mississippi. Prior and up to 1876, the channel of the Mississippi River at a point some thirty or forty miles above the city of Memphis, in Tipton County, made a bend embracing some fifteen or twenty miles in the circuit, and returned to a point some two miles from where the circuit began. This bend was known as the 'Devil's Elbow,' and the center of this channel and the recognized line between Tennessee and Arkansas. A peninsula was thus formed, separated from Arkansas by

the Mississippi River and connected with the main land on the Tennessee side by a narrow strip or neck.

In 1876 the Mississippi River by a sudden avulsion or change of its channel, cut across this neck at what is called 'Centennial Cut-off,' and abandoned its former channel around 'Devil's Elbow,' thus throwing a large body of land, a part of the territory of Tennessee, west of the present channel of the Mississippi. In a few years after this change was made, the water entirely disappeared from the old and abandoned channel, so that what was formerly the center of the Mississippi River and the boundary between Tennessee and Arkansas, is now dry land, a large part of which has grown up in willows and cottonwood trees.

Under well known principles of law, recognized by the highest authorities, this avulsion or sudden change in the channel of the Mississippi River, did not operate to change the boundary line between Tennessee and Arkansas. That boundary is still the center of the old and abandoned channel of the Mississippi River, but that line has never been marked and located since the channel was abandoned and became dry land."

The State of Tennessee, to sustain the judgment here assailed, must repudiate the Legislative declaraion of the State and the claim made in the bill as it was originally filed.

The presentation of this cause is so interwoven with the case of *Arkansas* v. *Tennessee,* that in connection with

what is said in that cause and what has heretofore been presented on behalf of the plaintiff in error, his rights are submitted to the judgment of this Court.

It is believed that the decree pronounced by the Supreme Court of Tennessee, should be reversed and the cause remanded, with directions to that court to adjudge the rights of the parties hereto to be according to the boundary line between Arkansas and Tennessee as this Court adjudges same.

In other words, this Court alone can fix the boundary line between Arkansas and Tennessee and obviously the rights of the parties hereto must be governed by and follow the location of said line as fixed by this Honorable Court.

Respectfully submitted,

CARUTHERS EWING,

Solicitor for Plaintiff in Error.

NOV 9 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

W. A. CISSNA,
Plaintiff in Error,

vs.

No. [redacted]

STATE OF TENNESSEE,
Defendant in Error.

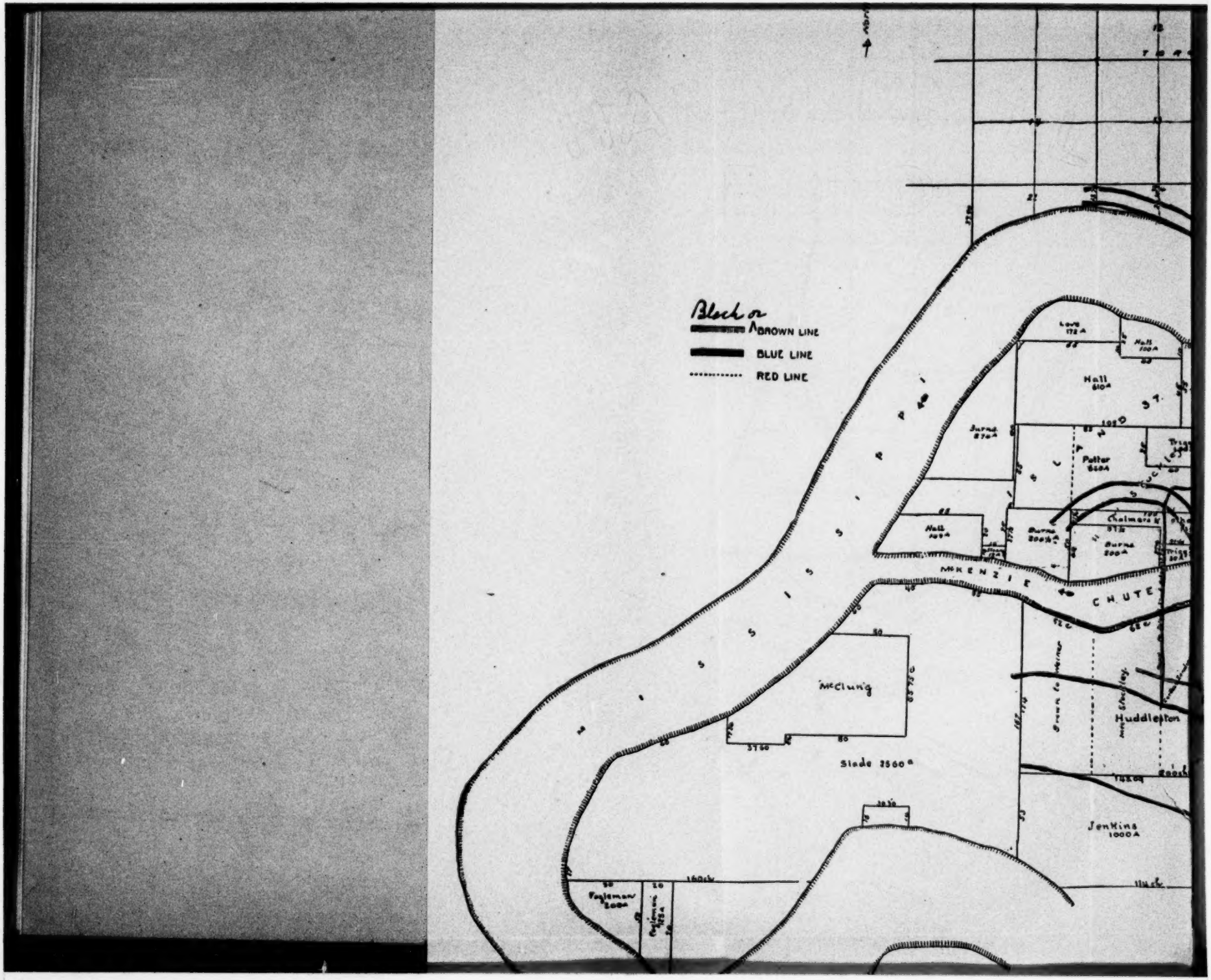
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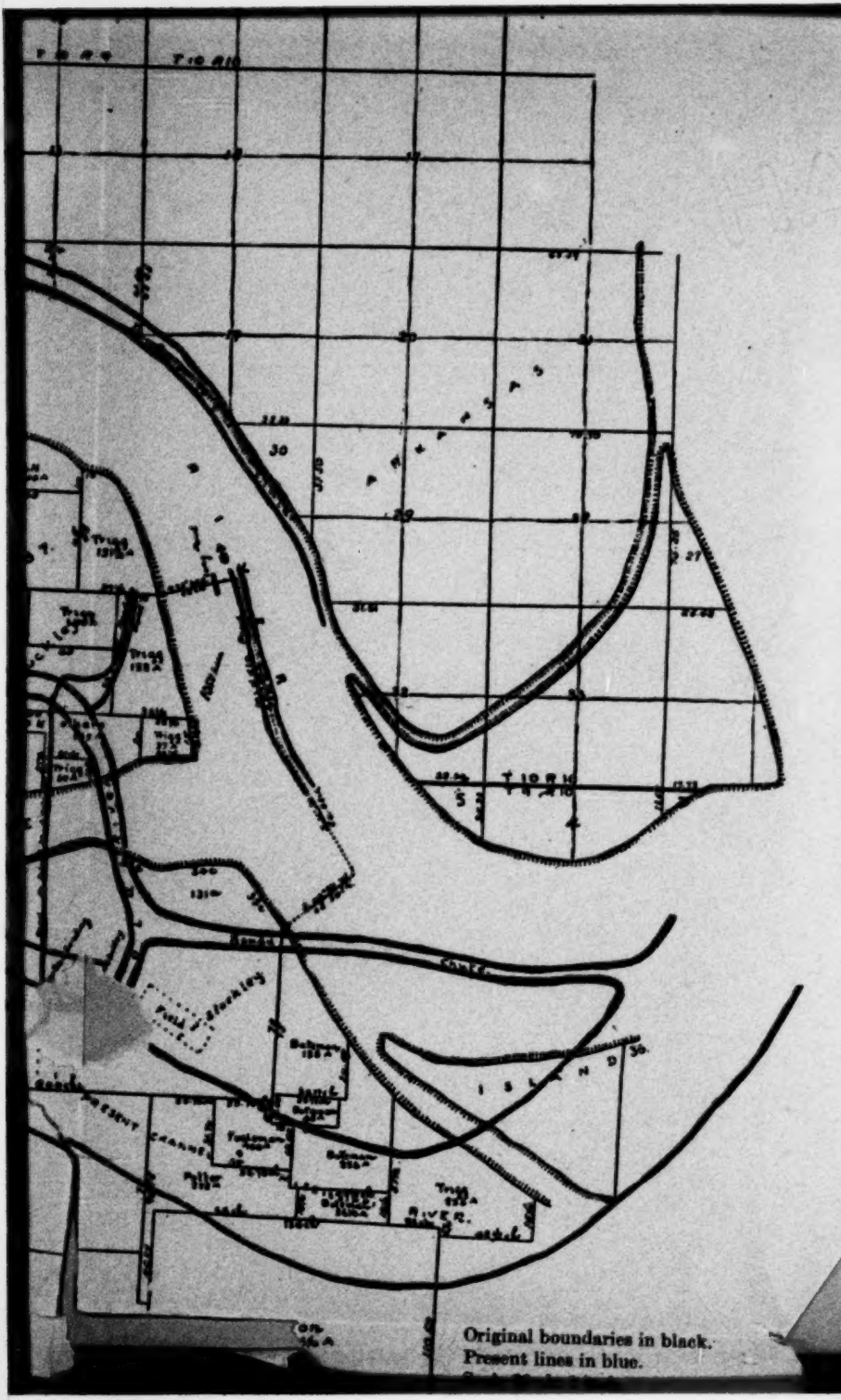
On Behalf of the

STATE OF TENNESSEE.

FRANK M. THOMPSON,
Attorney General,
JOHN P. BULLINGTON,
Solicitors for State of Tennessee.

E. C. TOOF & CO., PRINTERS, MEMPHIS


Block or
BROWN LINE
BLUE LINE
RED LINE
Hall 610A
Potter 660A
Burns 800A
Kalmers
MCKENZIE
CHUTE
McClung
Slade 2560a
Huddleston
Jenkins 1000A
Fogleman 200A


T 10 R 10
T 10 R 11
30
29
27
Original boundaries in black.
Present lines in blue.

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The Supreme Court of the United States has no jurisdiction to review a decision of a State Court in a controversy between the State and a citizen of another State arising out of the location of a boundary line between the property of the State and the property of the individual.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

W. A. CISSNA,
Plaintiff in Error,

vs. No. 89

STATE OF TENNESSEE,
Defendant in Error.

BRIEF AND ARGUMENT

On Behalf of the

STATE OF TENNESSEE.

May It Please the Court:

This is a suit between the State of Tennessee and a citizen of the State of Illinois owning land in the State of Arkansas, and claiming, by virtue of possession, a considerable tract of land which was in the old bed of the Mississippi River, and which was at the time of the insti-

tution of this suit dry land and very valuable on account of the timber growing upon it.

A full statement of the pleadings and of the facts established by the proof will not be made. Accepting the statement in the brief filed by counsel for the plaintiff in error as sufficient, we will only call attention to certain material matters that have been omitted or that appear to have particular bearing on the contentions of the defendant in error.

The property in controversy is a part of the old bed of the Mississippi River, which in one night in 1876 changed its course as set forth on page 2 and 3 of plaintiff's brief. After the "cut-off" the old bed of the river rapidly filled up and soon became, except in high water, dry land.

Cottonwood trees shortly began to grow upon the land, and when this suit was instituted, had grown to considerable size and the timber had become very valuable.

W. A. Cissna, a citizen of the State of Illinois, owning Dean's Island, which lay directly east of the property in controversy (Humphrey's Map, Rec. p. 930), took possession of all, or a considerable portion of this property, claiming the same as accretions to Dean's Island, and on August 7th, 1901, sold the timber on this and perhaps other land, to the Muncie Pulp Company for $35,000.00 (Rec. p. 747-8). The Pulp Company immediately began cutting and removing the timber. The immense volume

and value of this timber, and, therefore, the necessity of the State's protecting and conserving its property may be judged from the report of the Clerk of the Supreme Court of Tennessee on the reference ordered by that court and made and returned in 1914 (Rec. p. 937-40).

One H. W. Stockley, of Tipton County, Tennessee, owning lands bordering on the Mississippi River on the Tennessee side, and having secured a grant from the State of Tennessee to a portion of the old river bed (Rec. p. 263), and thereby conceiving himself to be the owner of the particular land now in controversy, filed an ejectment proceeding against the now plaintiff in error, W. A. Cissna, in the United States Circuit Court on May 13th, 1901 (Rec. p. 1 and 2).

The entire record of the ejectment proceeding between Stockley and Cissna is made a part of this record (Rec. pp. 1 to 292). The result of that proceeding is stated in the brief of plaintiff in error (pp. 4, 5, and 6), and in the opinion of Judge Lurton (Rec. p. 336, et seq.).

All of the land now in controversy between plaintiff in error and defendant in error was involved in the above proceeding; it was so shown on Humphrey's Map, which was a similar map to Exhibit "A" of the original bill in this cause.

In that case the defendant filed a plea in abatement to the jurisdiction of the Court on the ground that the land was in Arkansas and not in Tennessee, but later with-

drawing his plea admitted that a part of the land in controversy, but not describing what part, was in Tennessee, and that, therefore, the court had jurisdiction, filed his answer and proof was taken by the complainant (Brief of plaintiff in error, p. 5).

When the complainant had completed his proof, the defendant moved for peremptory instructions on account of the failure of the complainant to show a perfect title, and the Court instructed the jury to bring in a judgment in favor of the defendant Cissna.

The case was carried, on appeal, to the Circuit Court of Appeals, Sixth District, by Stockley, and on November 10th, 1902, the judgment of the lower court was affirmed, Judge (later Mr. Justice) Lurton handing down the opinion of the Court.

Judge Lurton, in a most able and learned opinion, among other things, said:

> "It is clear whatever the interpretation placed upon the ambiguous judgment relied upon to show that the defendant withdrew his plea to the jurisdiction, that the lands in dispute are on the east side of the middle of the channel of the Mississippi River, and, therefore, within the boundary of Tennessee, although now west of the present channel of the Mississippi River."
>
> (Rec. pp. 344-45.)

Also holding that the lands were not subject to grant within the meaning and purport of the law when the Tennessee Act of 1847 was passed (Rec. p. 360).

It is important that the Court, in considering this cause, keep in mind a sequence of events. This is important because of claim made by plaintiff in error that the "question involved is the boundary line between the State of Tennessee and the State of Arkansas," and the effort to import into this cause an injustice that may be done to the State of Arkansas, or to a citizen of that State.

The case of Stockley v. Cissna, above, was decided by Judge Lurton on November 10th, 1902 (Rec. p. 337). Petition to rehear was filed on January 8th, 1903 (Rec. p. 361), and was denied on February 3rd, 1903 (Rec. p. 388).

After the opinion of Judge Lurton was handed down and the petition to rehear was denied, the position of Tennessee was such that some action was necessary.

Under the ruling of Judge Lurton the property involved in the controversy between Stockley v. Cissna belonged to the State of Tennessee; it had been seized and was being held by a citizen of the State of Illinois, who had sold the timber to a New York corporation, which was rapidly cutting and removing the timber beyond the jurisdiction of the Courts of Tennessee.

Immediate action was necessary in order to stop this waste. It was the duty of the proper officials of the

State of Tennessee to act quickly in order to prevent the loss to the State of its property, for the land was then chiefly valuable on account of the timber growing upon it.

In order to avoid any possible question that might arise with Arkansas on account of a disagreement as to the proper location of the boundary line as related to the line of the property at issue, the Legislature of the State of Tennessee, on April 13th, 1903, some eight months prior to the filing of the bill in this cause, passed an Act entitled "An Act to authorize and empower the Governor to appoint a Commission to consist of three men to survey and locate the line between the States of Tennessee and Arkansas at a point where the channel of the Mississippi River has changed since the establishment of the lines between said States, etc." (Acts of Tennessee, 1903, Ch. 420, p. 1215), and further setting forth in the caption of said Act that the purpose thereof is to establish the true line, and thus avoid a possible "unfortunate controversy with our sister State of Arkansas."

Caption of Acts of 1903, Ch. 420, p. 1216.

This Act provided:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the Governor is hereby authorized and empowered to appoint a Commission to consist of three men, citizens of Tennessee, one of whom shall be a practical civil engineer, and shall do the actual surveying of the line, and who are hereby authorized and empowered to confer with a like Commission appointed by the governing au-

thorities of the State of Arkansas, relating to the boundary line between the States of Tennessee and Arkansas, and to survey and locate the line between said States, at all points where the channel of the Mississippi River has been changed since the line was originally established between said States, and the said Tennessee Commission is further authorized and required to survey and locate the line between low water mark of the said abandoned channel of the Mississippi River around 'Devil's Elbow' and any other points surveyed and located, and the adjoining land owners on the Tennessee side of said river; to estimate the number of acres of land lying between the State of Tennessee and Arkansas herein authorized to be surveyed and located, and to examine and consider the character and value of said lands, and when they will have finished the work herein required of them prepare a written report, showing the result of their work in all matters herein required of them, and transmit the same to the next General Assembly of the State of Tennessee for ratification or rejection."

Acts of 1903, Ch. 420, p. 1216.

A similar Act was passed by the Legislature of Arkansas, but was vetoed by the Governor, and thus the effort of the State of Tennessee to locate the boundary line by agreement was defeated. The bill was vetoed, learned counsel for plaintiff in error states, "evidently on the ground that Arkansas owned the land and a Commission was unnecessary."

Plaintiff's Brief, p. 12.

How counsel reached this conclusion is to us somewhat of a mystery; certainly the Legislature of Arkansas did not so believe when it passed an Act similar to that passed by the Legislature of Tennessee; nor was this belief generated by the very able, learned and elaborate opinion of Judge Lurton in the case of Stockley vs. Cissna, supra. It would rather seem to us that the Governor of the State of Arkansas vetoed the bill for the reason that having read the opinion of Judge Lurton he could see no possible benefit to be derived by the State of Arkansas from a joint Commission, and did not, therefore, wish to put the State to the expense necessary in order to locate the line to a tract of land that had already been adjudged to belong to the State of Tennessee; or it might even be possible that the Governor of Arkansas could find no reasonable excuse to intervene between the State of Tennessee and a non-resident of the State of Arkansas in a controversy in which, after reading Judge Lurton's opinion he did not believe the State of Arkansas was interested.

The State of Tennessee was then left in this position: Arkansas had declined to join with it in locating the boundary line; a citizen of the State of Illinois was in possession of its property; a New York corporation was cutting and removing the timber from its land; it was the duty of the proper officials of the State of Tennessee to conserve the land and timber for the use of all the citizens of the State.

In December, 1903, the original bill was filed in this cause against the necessary parties and upon the bill, pleas in abatement of the defendants, replications of the State, answers of the defendants, and proof taken by all parties, proceeded to trial through the courts of Tennessee, with the result as set forth in the brief of plaintiff in error and in the opinion of Judge (now Senator) Shields (Rec. p. 646, et seq.), and further in the memorandum opinion of Judge Lansden (Rec. p. 928), and the final decree of the Supreme Court of Tennessee (Rec. p. 928).

It will be seen from the original bill (Rec. pp. 394-5) and Exhibit "A" thereto (Rec. p. 930) that the particular land described by metes and bounds and set forth as the land embraced within the letters A, B, C, D, E, F, G, and H on Humphrey's Map was exactly the same land that was finally adjudged to belong the State of Tennessee (Rec. p. 931).

In the general description of the property in the first paragraph of the original bill, it was set forth "the State of Tennessee is now, as it was then, the owner of that part of the bed of the river lying between the low water mark on the Tennessee side and the center of said river as it flowed prior to the 'cut-off' in 1876." (Rec. p. 394.)

Notwithstanding the litigation between Stockley and Cissna, the judgment of Judge Lurton, the Act of the Legislature of Tennessee in 1903 and a similar Act in

1907, and the proceedings in this cause, no claim was made by the State of Arkansas that any part of the land in controversy was within the boundary lines of that State until the winter of 1911 after this case had been tried in the Chancery Court of Shelby County, appealed to the Supreme Court of the State of Tennessee, argued and reargued, and more than four years after the opinion of Judge Shields in 1907 had been published in 119 Tennessee Report, and after additional proof had been taken in the Chancery Court of Shelby County, and the case had been argued and submitted for final hearing to the Chancellor.

The position now assumed by plaintiff in error that the boundary line between Tennessee and Arkansas is the center of the channel of navigation is a new theory and was not relied on by him in his answer to the original bill. In his answer he said "Defendant says that no part of the property described in the bill was in 1876 between the then Tennessee bank and the middle of the river. The same was wholly on the Arkansas side." (Rec. p. 644.)

His reliance was placed upon the erosion that had been made from the Tennessee bank and the accretion that had formed to Dean's Island prior to the cut-off; to accretion that had formed to the Island after the cut-off; and upon the fact that the State of Tennessee had granted all of the land described in her bill to other parties (Rec. pp. 643-644).

Again the plaintiff in error in his answer to the amended bill filed by Tennessee stated "defendant is advised that the line between the States of Arkansas and Tennessee changed and shifted with the gradual changes of the river and that the middle of the Mississippi River as it existed in 1876, when by an avulsion the channel of the river was altered, became and was and is the boundary line between the States of Tennessee and Arkansas." (Rec. p. 840.)

So also the question of an injustice that may be done to a citizen of the State of Arkansas is a novel in view of plaintiff's statement:

> "Q. State your name, age, residence?
> A. W. A. Cissna, Chicago, Illinois, 57 years old."
> (Rec. p. 595.)

THE ASSIGNMENTS OF ERROR CONSTITUTE A GENERAL ATTACK UPON THE JURISDICTION OF THE COURTS OF TENNESSEE AND UPON THE RULINGS OF THE SUPREME COURT OF THE STATE OF TENNESSEE AND WILL BE CONSIDERED ACCORDINGLY.

I.

(a) The Court held that the land in dispute was west of the middle of the main channel or bed of the Mississippi River as it ran in 1823 and that it had jurisdiction over the same.

(b) Plaintiff in error claims that the lands are all, or nearly all, in Arkansas and that, therefore, beyond the jurisdiction of the Courts of Tennessee.

II.

(c) The Court found: "We think unquestionably that the bed of the abandoned river should be equally divided between them (referring to Tennessee and Arkansas), for we apprehend that the Arkansas side belongs to that State, since the title of riparian owners under its laws is limited to high water mark. - - - the line separating their respective jurisdictions to be run along the channel midway between the banks as they existed and were surveyed in 1823, as shown in the map made by Maj. J. H. Humphrey and exhibited with the bill of complaint." (Rec. p. 682.)

(d) Plaintiff claims that the middle of the channel of navigation is and always has been the boundary line between said States.

III.

(e) The Court found that the effect of the avulsion was "to press back the line of the State as it ran at low water mark to the eastern boundary line along the river ank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the lines between the two States, so as to restore to Tennessee what it held before the erosions upon its banks. The right of restoration to their lands was one of the vested rights of those grantees, and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted." (Rec. p. 683.)

(f) Plaintiff contends that the line became fixed at the middle of the channel of navigation at the time of the avulsion, or at least in the middle of the stream of the river at the immediate moment of the avulsion; that there is no right of restoration by reliction where property lost by erosion is restored by avulsion either to the riparian owner or to the State.

QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

(1) The jurisdiction of the Supreme Court of the United States to review a decision of the Supreme Court of Tennessee in a controversy between the State of Tennessee and a citizen of the State of Illinois arising over the title to a tract of land which has been decided by the Circuit Court of Appeals of the United States (Rec. p. 336) an dby the Supreme Court of the State of Tennessee (Rec. p. 47) to be wholly within the boundary lines of the State of Tennessee.

(2) Has the Supreme Court of the United States jurisdiction to review every decision of a State Court where the question of the location of a boundary line as related to private property is raised by a citizen of a foreign State, claiming to own property in an adjoining State, when the adjoining State itself does not intervene or raise any question?

(3) Has the Supreme Court of the United States exclusive jurisdiction over every question of the location of a boundary line of a State when the question is raised by a non-resident of the States affected and the States themselves are not both parties to the controversy?

Should this Court decide that it has jurisdiction to review the decision of the Supreme Court of Tennessee in this cause, then the same questions arise here that were

presented to this Court in the case of Arkansas v. Tennessee.

(4) Is the boundary between the States of Tennessee and Arkansas, (a) the middle of the main channel or bed of the river? or (b) the center or middle of the deepest water? or (c) the center of the track of steamboat navigation?

If it is the first, it is subject to change as the result of accretions and erosions, while if it is the second, it is subject to change by reason of the shifting sands which constitute the bed or bottom of the river; while if it is the third, it not only changes by reason of the shifting of the sands in the bed of the river, but from time to time with different stages, being at one place at low water, at another place at high water, and still at another place at the flood stage. *This line is known only to the experienced river pilots and is constantly changing.*

(5) When the avulsion occurred and the boundary line between the states became fixed in the abandoned bed of the river, is that line now to be ascertained,

(a) By the only feasible and practicable plan, which at the same time gives effect to the well established rule of reliction, by taking the center of the river as it flowed in 1823 and 1836, or

(b) Taking the center of the river bed (if it can be determined and ascertained) as it flowed in 1876, just prior to the cut-off, or,

(c) Attempting to locate where the steamboat channel was prior to the avulsion in 1876.

If the latter, then, is the steamboat track at the flood state preceding the avulsion to be taken, or the track of navigation at the extreme low water of 1874, and if neither, then at what stage, and, if either, how is it to be ascertained?

(6) And was it the duty of the Supreme Court of the State of Tennessee to suspend proceedings in this cause upon the motion of W. A. Cissna, notifying said Court that Arkansas had filed a bill against Tennessee in the Supreme Court of the United States to locate and fix the boundary line between the States?

JURISDICTION.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW A DECISION OF THE HIGHEST COURT OF A STATE IN A CONTROVERSY BETWEEN THE STATE AND A CITIZEN OF ANOTHER STATE OVER A LINE BETWEEN THE STATE'S PROPERTY AND THE PROPERTY OF THE CITIZEN.

In a case between a State and a citizen of another State, the Supreme Court of the United States has original, but not exclusive jurisdiction, Section 687 of the Revised Statutes of the United States providing:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction."
>
> U. S. Rev. Stats., Sec. 687, Fed. Stats. Ann., 436.

The Supreme Court of the United States has appellate jurisdiction to review the judgments and decrees of State Courts on Writ of Error, where there is drawn into question a title, right, privilege or immunity claimed under the constitution, a treaty or statute of or authority exercised under the United States. Section 709 of the Revised Statutes of the United States; Federal Statutes Annotated, p. 467:

"(Judgments and decrees of state courts on writ of error.) A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Rev. Stats. of the U. S., Sec. 709.

Fed. Stats. Ann., p. 467-8.

In Murdock v. Memphis, Mr. Justice Miller, discussing the general question of the right of the Supreme Court of the United States to review final decisions of the highest court of a State, laid down the following rules:

"Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it

shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court.

2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court."

Murdock v. Memphis, 86 U. S. p. 444, 20 Wall. (U. S.) 635.

In the case of the Capital National Bank v. First National Bank, 172 U. S. 503, Mr. Chief Justice Fuller said:

> "The writ of error from this Court to revise the judgment of a state court can only be maintained when within the purview of Section 709 of the Revised Statutes."

In the case of California v. Southern Pacific R. R. Co., 157 U. S. 229, Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

> "The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising un-

der the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing. . . .

By the Constitution, and according to the statute, this Court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a state and its own citizens, and original, but not exclusive, jurisdiction of controversies between a state and citizens of another state or aliens."

In the above case the bill was dismissed, because the suit was between a State and citizen of another State and its own citizens.

The only exception to the above rule is that the Supreme Court has been held to have jurisdiction to review a decision of the Supreme Court of a State in controversy between a State and citizens of another State where a question involving some title, right, privilege or immunity claimed under the Constitution or a treaty or statute of or authority exercised under the United States, or the validity of a statute or authority exercised was drawn into question, or specially set up and claimed, and the opinion of the State Court was adverse to such title, right, privilege or immunity.

Cohens v. Virginia, 6 Wheat. 393.

In this case, discussing the question of the jurisdiction of the Supreme Court in a case where the State was a party, Mr. Chief Justice Marshall said:

> "The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.
>
> Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.
>
> In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything, the char-

> acter of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law."
>
> Cohens v. Virginia, 6 Wheat. 393.

The reason given by Mr. Chief Justice Marshall for this construction was that to construe it otherwise "would be to construe a clause dividing the power of the Supreme Court in such a manner as to in a considerable degree defeat the power itself."

To bring this case within the rule laid down by Mr. Chief Justice Marshall, it must appear (1) that some question stated in Section 709 of the Revised Statutes of the United States did arise, and (2) that the question was decided by the Supreme Court of the State of Tennessee, as required in that section; and it must also appear that this cause was decided on the federal question raised and not upon the construction by the Supreme Court of Tennessee of general laws or local statutes.

The case of the Commercial Bank v. Buckingham, 5 How. 342, was dismissed by this Court, because of want of jurisdiction, and Mr. Justice Greer, in discussing the question said:

"To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1, That some of the questions stated in that section did arise in the State Court; and, 2, That the question was decided in the State Court, as required in the section.

It is not enough that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the Court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and 'that this claim was overruled by the Court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

In Brown v. Atwell, 92 U. S. 327, the Court said:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts, for the record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it."

Brown v. Atwell, 92 U. S. 327.

THE CASES CITED BY PLAINTIFF IN ERROR DO NOT SUPPORT HIS CONTENTION. IN NEARLY EVERY CASE CITED THE COURT DECLINED TO ENTERTAIN JURISDICTION AND NONE OF THE CASES CITED PRESENT A QUESTION SIMILAR TO THAT NOW AT ISSUE.

In the case of Brown v. Atwell, supra, the question at issue was an accounting claimed by one individual against another on account of the joint ownership of a patent. The Court decided it had no jurisdiction, and the petition was dismissed.

Brown v. Atwell, 92 U. S. 327.

The case of Felix v. Scharnweber was a controversy between two individuals and arose through the joint ownership of a patent. The writ of error was dismissed for want of jurisdiction, Mr. Justice Gray saying:

> "This record does not present any federal question. No such question is stated in the pleadings, involved in the rulings at the trial or in the final judgment, or mentioned in the opinion of the Supreme Court of Illinois."
>
> Felix v. Scharnweber, 125 U. S. 554.

The case of Gross v. United States Mortgage Co., 108 U. S. 477, was a suit between an individual and a foreign corporation, and the Court decided it had jurisdiction, and that a federal question was involved in that an Act of the Legislature of Illinois was claimed to be in con-

flict with a provision of the Constitution of the United States.

In the case of Newport Light Co. v. Newport, the Court dismissed the writ of error for want of jurisdiction. In this case, the Court of Appeals of Kentucky, at the request of the plaintff in error, certified that the validity of an Act of the General Assembly and the authority exercised under the same was drawn in question on the ground that the same impaired the obligation of a contract between the appellant and the appellee, and was repugnant to the Constitution of the United States, and that a decision of the highest court of the State was in favor of the validity of said Act. In regard to the certificate, this Court said:

> "The above certificate of the chief justice of the Court of Appeals of Kentucky, while entitled to respectful consideration, does not in itself establish the existence of a Federal question in this case, and confer jurisdiction upon this court to re-examine the judgment complained of. This Court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under Section 709 of the Revised Statutes.
>
> Looking, therefore, as we must, to the record in the cause to ascertain whether any Federal question is really involved, we are clearly of opinion that no such question is presented, and that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment complained of."
>
> Newport Light Co. v. Newport, 151 U. S. 527.

The case of Powell v. Brunswick, 150 U. S. 433, was a bill filed by fifteen citizens and taxpayers of Brunswick to enjoin the disposition of certain bonds of the county. The writ of error was dismissed. In discussing the certificate of the presiding judge of the court, Mr. Chief Justice Fuller laid down the same rule announced in the case of Newport Light Co. v. Newport, supra.

In every case but one cited by plaintiff in error in his exhaustive and able brief, the Court dismissed the petition for want of jurisdiction. No case is cited in which a State was one party and a citizen or citizens of another State the other party, nor does the plaintiff anywhere in his brief cite any case where this Court reviewed the dedecision of any State Court in any case of like nature.

But, says plaintiff, "settling the boundary line between States is solely a matter for this Court, and a federal question arises when that is the determinative issue," and he quotes:

Florida v. Georgia, 17 Howard 479.
McCarty v. Carolina Lbr. Co., 134 Tenn. 35.

In the case of Florida v. Georgia, the bill was filed by the State of Florida against the State of Georgia to establish a boundary line between the two States, and was clearly within the first paragraph of Section 678 of the Revised Statutes of the United States. No question ever was, or ever could have been raised as to the jurisdiction of this Court in that case. The question which was raised was

the right of the United States to intervene on the motion of its attorney-general.

The case of McCarty against the Carolina Lumber Co., supra, was a suit between an individual on the one side and a private corporation on the other. The land in controversy was claimed by one to be in Tennessee; by the other to be in North Carolina. At the time this suit was brought a case was pending in the Supreme Court of the United States between the State of Tennessee and the State of North Carolina to fix a long disputed boundary line. The property involved lay within the disputed territory. The Supreme Court of Tennessee held that it had no jurisdiction or power to establish a line between the States, reither State being a party to the suit, and further held that the line must be established either by compact of the sovereign States themselves, or, if by judiciary proceedings, then by decree of the United States Supreme Court. But, it further held "but this Court in the suit of private parties may fix and adjudge the actual location of a line as affecting the boundary of their lands" (McCarty v. Carolina Lbr. Co., 134 Tenn. 55), and the Court then proceeded to fix said lines.

In the case at bar, no treaty or statute of or authority exercised under the Constitution of the United States is, or has been, at issue, nor has there been drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States;

nor has any title, right, privilege or immunity been claimed under the Constitution of or any treaty or statute of or commission held or authority exercised under the United States.

The boundary line between the States of Tennessee and Arkansas is not involved, nor could it be involved, unless both of the States were parties to this suit. The location of the boundary line was an incident. It was necessary to locate it in relation to the lines of property claimed by the State of Tennessee and held by the plaintiff in error. The questions involved are questions of general law and not federal questions.

The question upon which the plaintiff in error relies in this Court is purely a question dependent upon the general laws of the land. It was upon the construction by the Supreme Court of the State of Tennessee of the effect of the avulsion of 1876 that the Court decided that the lands here involved belonged to the State of Tennessee.

> "The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Tennessee what it held before the erosions upon its banks. The rights of restoration to their lands was one of the vested rights of those grantees, and the

> right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted."
>
> (Rec. p. 683.)

It is upon the same questions that plaintiff in error depends when in his brief he sets forth what he terms his "whole contention."

> "His whole claim is that while state and property lines or boundaries may be altered by accretion or erosion, (being gradual and imperceptible processes or operations), said lines are unaffected by an avulsion."
>
> Plaintiff's Brief, p. 36, Par. 2.

And when he says:

> "In almost every conceivable way the plaintiff in error has, from the inception of the controversy, repudiated any claim to any land not on the Arkansas side of the Mississippi River of 1876, just as it was one minute before the 'cut-off.' "
>
> Plaintiff's Brief, p. 40, Par. 3.

It has uniformly been held that in order to give this Court jurisdiction on a writ of error to the highest court of a State, it must appear not only that a federal question was presented, but that its decision was necessary to the determination of the case, or that the judgment of the State Court as rendered, could not have been given with-

out deciding it, and where the decision complained of rests upon independent grounds not involving a federal question, and broad enough to maintain the judgment the writ of error will be dismissed without considering any federal question that may also have been presented.

California Powder Works v. Davis, 151 U. S. 389-393.
Eustis v. Bowles, 150 U. S. 361.
Mo. Pac. R. R. Co. v. Fitzgerald, 160 U. S. 556.
Capital Nat. Bank v. First Nat. Bank, 172 U. S. 427.
Murdock v. Memphis, 20 Wall. 105.
Winter v. Montgomery, 156 U. S. 385.
Gillis v. Stenchfield, 159 U. S. 658.
Giles v. Little, 134 U. S. 645.
Stryker v. Goodnow, 123 U. S. 527.

In Capital National Bank v. First National Bank, supra, Mr. Justice Fuller, delivering the opinion of the Court, said:

> "Moreover, even though a federal question may have been raised and decided, yet, if a question not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this Court will not review the judgment."

This enunciation of the rule of this Court is plain, and is in line with decisions too numerous to quote.

In his plea to the jurisdiction of the Court, and in his answer to the original bill filed by the State of Tennessee in this cause, plaintiff in error avers:

"Defendant says that in the said year 1823 all of the property described and mentioned in the bill was on the Tennessee side of the middle of the Mississippi River as it then ran; that from the year 1823 to 1874, continuously, there were erosions into the Tennessee shore and accretions to the Arkansas shore, or to Dean's Island, so that by the year 1874 Dean's Island had by gradual and imperceptible accretions become much enlarged, and by the gradual and imperceptible encroachments of the river the land on the Tennessee side had been washed away."

Plaintiff's Brief, p. 8.

The question here presented for the decision of the Supreme Court of Tennessee is the question of the effect of an avulsion, and its relation to lands which had previously been lost by erosion. It is a question dependent on general laws. The same question is relied on by plaintiff in his first, second, third, fifth and sixth assignment of error, and a close examination of his brief and of the pleadings will disclose that there is no other issue between plaintiff in error and defendant. This being so, even if the Supreme Court of Tennessee has reached a wrong conclusion, or if its rulings are contrary to previous rulings of this court in other cases where the same question was raised, such error, or such difference of opinion and construction would not confer jurisdiction upon this Court.

THIS COURT HAS NO JURISDICTION TO REVIEW THE FINDINGS OF THE SUPREME COURT OF TENNESSEE IN THIS CAUSE, AND THE WRIT OF ERROR SHOULD BE DISMISSED; THERE IS NO FEDERAL QUESTION INVOLVED, BUT PURELY A QUESTION DEPENDENT ON THE CONSTRUCTION OF GENERAL LAWS.

If the plaintiff in error has the right to have the ruling of the Supreme Court of Tennessee on this case reviewed by the Supreme Court of the United States, then every squatter along the old and abandoned bed of the river, when the State undertakes to put him off its land, has the same right by claiming that the land lies within the State of Arkansas, and not within the State of Tennessee. Going even further, every claimant of land near the boundary line between two States would have the right to carry a sovereign State into the Federal Court in any contest between the State and the claimant over the lines of any of the State's property.

At the time this suit originated there was no contest between the State of Tennessee and the State of Arkansas over the boundary line. Both States had agreed upon the construction of the treaty of 1763, that the middle of the bed of the Mississippi River constituted the boundary line, and both States for many years had acted upon that assumption. Both States had asserted their jurisdiction to that line, and each State had acquiesced in the claim of the other. In the assertion of this claim

the learned Attorney-General of the State of Arkansas, Hon. Hal L. Norwood (who as Attorney-General filed the bill in the case of Arkansas v. Tennessee) in the case of Wolf v. the State, in his brief filed on behalf of the State, taking the same position as announced in the case of Cessell v. State, 40 Ark. 501, which is the same position taken by the Supreme Court of the State of Tennessee in this case, filed a brief to sustain the contention of Arkansas, from which we here quote:

> "The boundary line is a point equidistant from the principal or well-defined banks of the river, 10 Heis. (Tenn.) 283; 119 Tenn., 47; 79 N. W., 449; 138 U. S., 226; 143 Id., 359; 196 Id., 230; 5 Wheat., 375; 133 Ill., 535; 40 Ark., 501; 53 Id., 314; 24 Howard 41; 1 La. Ann., 372; 3 Sm. & M. (Miss.), 366; 55 Ia., 558; 119 Fed., 812."

There being perfect accord between the States themselves, has a citizen of a foreign State (the State of Illinois) the right to raise the question of the boundary line between the States?

The opinion of the Supreme Court of Tennessee affords sufficient evidence of the time and attention devoted by the Court to the consideration of this cause. The case was argued in the spring of 1905. It was held by the Court under advisement, and a reargument was ordered in the April Term in 1907, and the case was decided at an extra term in September, 1907. The opinion of Judge Shields, covering some eighty pages of printed matter in 119 Tennessee Reports, reviews the history of the treaties and

conventions under which the boundary line of Tennessee was fixed, and the laws and decisions of text writers and courts on questions of avulsion, reliction, erosion and accretion. The opinion also reviews the contentions of the parties; the proof introduced by each; applies the law to the conditions existing, and announces the finding of the Court on the construction of general laws, and not upon any question arising under the constitution or a law of the United States.

(a) The contention of the parties:

"The defendant has undertaken to prove that a change took place in this case by accretion to Dean's Island, and erosion upon the opposite Tennessee bank. *Their exact contentions* are that by erosion upon the banks of what are now Centennial Island and Island 37, and accretions to the banks of Dean's Island, since 1823, both before and after the cut-off in 1876, the middle of the river and the line separating the two states had advanced gradually westward towards the Tennessee bank, and that at the time of the cut-off the middle of the river was where the eastern boundary line of the Huddleston and Trigg lands had been before they were washed away and became a part of the bed of the river, and, that being the boundary between the two states, complainant can recover nothing east of it, and having previously granted that portion of the channel covering the Huddleston and Trigg lands, it can not recover that, because those who hold under the original grants are entitled to such lands since restoration or reappearance, caused by the abandonment of the

channel by the waters, and therefore the bill of complainant must be dismissed."

(Rec. p. 674.)

(b) The proof:

"The great volume of the testimony introduced in this case by both parties was for the purpose of proving that the channel of the river at that place where the lands sued for now lie, increased in width since 1823 and prior to 1876, and the extent of such increase; and by the complainant to prove that no accretions had formed upon Dean's Island after 1823, and by the defendants that the area of the island had in this way, since that date, been greatly increased and extended westward."

(Rec. p. 674.)

(c) Findings of the Court:

"When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, *much more immediately south of that island than west of it where the premises sued for are situated.* While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

(Rec. p. 675.)

"We do not think that there were any accretions to Dean's Island previous to 1876."

(Rec. p. 675.)

"It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than, the erosions upon the Tennessee bank, and therefore there was no room for any accretions to the Arkansas bank. These are facts clearly established in this record, and to our minds they demonstrate that in 1876 there had been no appreciable change in the banks of Dean's Island since 1823."
(Rec. p. 675.)

The contentions of the parties were over questions of the general law applicable to the conditions that existed. The proof was of those conditions. The findings of the Court were based on the Court's construction of the law as pertaining to those conditions. The findings of the Court on the location of the boundary line between Tennessee and Arkansas were an incident to the findings of the Court in this case, and were rendered necessary only because of the plea in abatement of the plaintiff in error, and because one of the lines of the property owned by the State happened to be the boundary line between the State of Tennessee and Arkansas, and one of the lines of the property claimed by plaintiff in error happened to be the same line.

We submit that this Court has no jurisdiction in this or in any similar case; that the question of the location of the boundary line between the two States is a question to be raised by the States themselves, and can not be raised by a citizen of another State—certainly not unless both States are parties to the litigation; that the loca-

tion of the lines of property belonging to a State in a litigation with an individual, because as an incident to the location of said lines it becomes necessary to locate the line of the State, does not confer jurisdiction upon the Supreme Court of the United States to review the decision of the highest Court of the State on the ground that the location of the boundary lines between the States is solely within the jurisdiction of this Court.

THE WESTERN BOUNDARY LINE OF THE STATE OF TENNESSEE IS A POINT EQUIDISTANT FROM THE PRINCIPAL, WELL DEFINED AND VISIBLE BANKS OF THE MISSISSIPPI RIVER WITHIN WHICH THE WATERS ARE CONFINED AND FLOW AT THEIR ORDINARY AND NATURAL STAGES.

I.

The western boundary of the Colony of North Carolina as defined in the Treaties between Great Britain, France and Spain, made in February, 1763, was a line "drawn along the middle of the Mississippi River."

3rd Jenkinson, Treaties 177.

Also as set forth in Treaty made with Great Britain November 30th, 1782, "thence by a line to be drawn along the middle of said River Mississippi until it shall intersect the northemost part of thirty-one degrees of the Northern Latitude."

Treaties and Conventions between the United States and other Powers since July 4th, 1775,

Government Printing Office at Washington, 1889, p. 371.

On February 25th, 1790, North Carolina ceded to the United States that territory which subsequently became the State of Tennessee, describing the western boundary line of said territory as "the middle of the Mississippi River."

Vol. 1, Am. St. Papers, Pub. Lands, p. 17.

The Code of Tennessee, in describing the western boundary of the State, designated "the middle of the stream of the Mississippi River, including within the State of Tennessee all such islands as are held under grants from the States of Tennessee and North Carolina."

Shannon's Code of Tenn., Sec. 80.

The Treaty of 1763 defining the western boundary line of that territory which later became the State of Tennessee, was construed by this Court as early as 1871. In Missouri v. Kentucky, Mr. Justice Davis said:

> "It is unnecessary for the purposes of this suit, to consider whether on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of an express agreement to the contrary, because the Treaty between France, Spain and England in February, 1763, stipulated that the middle of the river Mississippi should be the boundary between British and French territories on the Continent of North America, and this line established by the only sovereign powers at the time interested in

the subject, has remained ever since as they settled it."

Mo. v. Ky., 11 Wall., 395.

It was so construed by the Supreme Court of Arkansas more than thirty years ago in the case of Cessill v. the State, 40 Ark. 501.

II.

Arkansas was admitted into the Union on June 23rd, 1836, and its boundary was fixed as "the middle of the main channel of the Mississippi River."

5 U. S. Stats. L. 50, 51.

III.

The State of Tennessee having been first admitted to the Union and its boundary line fixed and determined, Congress had neither the intention nor the power to change its boundary line.

Wash. v. Oreg., 211 U. S. 127;
La. v. Miss., 202 U. S. 40;
Mo. v. W. Va., 217 U. S. 41, 43;
State v. Cissna, Rec. p. 354.

Mr. Justice Brewer in the case of Washington v. Oregon above, said:

> "The northern boundary of the State of Oregon was established prior to that of the State of Washington, and it is not within the power of the national government to change that boundary without the consent of Oregon."
>
> Wash. v. Oreg., 211 U. S. 127.

In the case of Louisiana v. Mississippi, Mr. Justice Fuller said:

> "It is enough to say that Congress after the admission of Louisiana could not take away any portion of that State and give it to the State of Mississippi."
>
> La. v. Miss., 202 U. S. 40.

IV.

The boundary line between Tennessee and Arkansas has always been construed to be the middle of the bed of the Mississippi River equidistant from the visible, well defined and substantially subsisting banks within which the waters are confined and flow at their ordinary and natural stages, and not the middle of the channel of steamboat navigation. It has always been construed and uniformly adjudicated by the highest courts of the State that the boundary line between said States is the middle of the Mississippi River, and not the middle of the channel of commerce or navigation. Every court and every authority of both States which has had occasion to consider the subject has so considered and has acted upon that assumption.

Treaty between Great Britain, France and Spain, Feb. 1763, 3rd Jenkinson's Treaties, 177;
Cessell v. The State, 40 Ark. 501;
Wolf v. The State, 104 Ark. 140;
Foppiano v. Snead, 113 Tenn. 173;
Moss v. Gibbs, 10 Heisk. 283;

Stockley v. Cissna, 119 Tenn., p. 139;
Cissna v. The State, Rec. p. 654;
Morgan v. Reading, 3rd Sm. & Mar. (Miss.) 366.

As early as 1869 Justice Nicholson, in delivering the opinion of the Court in the case of Moss v. Gibbs, above, said:

> "By the Treaty of 1763 between France, Spain and England, the middle of the Mississippi river was made the dividing line between the British and French territories on this continent."

And through his entire opinion it is evident that the phrases "middle of the river" and "middle of the main channel of the river" are used as synonymous terms to designate the center of the bed of the main stream of the river, measuring from one well defined bank to the other, and not "the channel of navigation."

Moss v. Gibb, 10 Heisk. 263.

In Foppiano v. Snead, Mr. Justice Neal said:

> "The center of the Mississippi River is the line between Tennessee and Arkansas."
>
> Foppiano v. Snead, 113 Tenn., p. 173.

The ruling of Chief Justice Shields in this cause is in strict accordance with the ruling of the highest courts of Arkansas. In the case of Cessell v. The State, Judge Eakin, speaking for the Court, said:

> "It will be observed that the principle upon which the court proceeded is, that the line of deepest water in the river bed is the boundary of the State, and

continues such as it fluctuates. No question arises in this case upon either of the two qualifications, and the sole matter left for us to decide is this: What is meant by the "Main channel" and what is the middle of it? The channel of a river, bay or sound is, in boatmen's parlance, the course over its bed over which the water is deepest, and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow, and which may be at sometimes full and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch, as it presents something of a permanent nature, or at least at all times visible; and when changed leaving traces of the old landmarks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas channels in the sense of the river pilot are ever shifting, invisble—discoverable only by patient soundings and then imperfectly. We can not suppose that such channels would be adopted as state boundaries, or as references to determine them.

The Mississippi river is full of islands, having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within the state by taking the largest of those water conduits as the true river. The middle of the main channel,

then, must mean the point or line along the river-bed equidistant from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but in a far less so and to no very inconvenient degree. Gradual attrition on one side, with accretion on the other, making a change in the permanent banks, might perhaps change the boundary with regard to absolute space. But it is not necessary, for practical purposes, that a boundary should be a fixed mathematical line, and this could only apply to changes in the banks of a channel which remain substantially the same. *For if the main body of the water were to find a new channel, and abandon the old one, leaving intervening lands in a natural state, the old boundary would still be ascertainable, and would govern.* This has been decided in the case between Kentucky and Missouri (infra) and results, with regard to surveyed lands, from the additional clause above noted, in the constitution of 1874. It seems that the largest channel determines which is the river and the central line of that makes the state boundary.

The boundary line in question is a very old one, and does not concern this state alone. It originated with the treaty between England, France and Spain in February, 1763, which made the middle of the Mississippi river the boundary between British and French territories. This line has been ever since observed in subsequent treaties, in Federal legislation, in state Constitutions and judicial decisions, and there are not lacking unmistakable indications of the meaning of the middle of the river. For instance, in the treaty between the United States and Spain,

in October, 1795, before our purchase of Louisiana, the fourth article provides 'that the western boundary of the United States, which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said states to the completion of the 31st degree of latitude north of the equator.'

In the case of Myers v. Perry et al., 1 La. Ann., which resulted from a steamboat collision on the Mississippi, it became necessary to ascertain the locus in quo as affecting jurisdiction between the states of Louisiana and Mississippi. The middle of the river was taken as the boundary line, without any reference to depth of the water. See also, on the same subject, a case very replete with historical learning, that of Morgan & Harris v. Reading, reported in 3 Sm. & Mar. 366, in which this great empire boundary is described, with reference to the treaty of 1763, as a "line drawn along the middle of the Mississippi." This would not be a good description of a steamboat track, zigzagging from bank to bank amongst sand bars in low water.

In the case of Missouri v. Kentucky, 11 Wall. 395, which was a contest between states for jurisdiction over Wold Island, in the Mississippi, Mr. Justice Davis said that by virtue of the treaties above named, together with the treaty of peace with England in 1783, the ancient right of Virginia, to which Kentucky has succeeded, extended to the middle of the bed of the Mississippi River.

It seems that where there are several channels, the principal one is considered the river, and in this the medium filum makes the boundary.

There was only one channel in this case, which was the river bed between the Arkansas and Tennessee shores at Osceola. The court and attorneys treated the case throughout as if the channel meant the line of the deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1784, no question could arise as to change of channel. The instructions asked by defense were erroneous, but those given for the state were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendants guilty or innocent accordingly."

Cassill v. State, 40 Ark. 501.

In the case at bar Judge Shields said:

"We concur fully with the Supreme Court of Arkansas in the construction given the treaties of 1763 and 1783 in that opinion and hold, as held by that Court, that the boundary line between the British possessions in America, which then included all the territory now composing the states bordering upon and having for their western boundary the Mississippi river, and the territory of Louisiana, then belonging to Spain, was fixed and defined as a line along the middle of the main channel of the river, equidistant from the visible and permanent

banks confining its waters, and that the several acts of Congress admitting into the Union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties and must be construed to mean the same thing. This question has not before been before this court, but in a case involving property rights upon an unnavigable stream called for as a boundary line of private estates it was held that 'the thread of the stream is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary state of the water, at medium height, neither swollen by freshets nor shrunk by drouths.' Barnham v. Turnpike Co., 1 Lea 706.

The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating this state from Arkansas is as defined in the case of Cessill v. State, supra. This appears from an act of the General Assembly of the state approved April 15, 1903, Chapter 420, Acts of 1903, in which the lands in controversy and all others lying upon the Tennessee side of the old bed of the river are declared to be the property of the state, and the Governor authorized to appoint Commissioners to act with other Commissioners to be appointed by the State of Arkansas, to run and mark the line, and also to report to the Governor the extent and value of such lands. The General Assembly of Arkansas passed a similar act, but it was vetoed by the Governor of that state, and therefore no commissioners were appointed under the act passed by

the Legislature of Tennessee. This suit was brought by the direction of the Governor of this state, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the Acts of Congress admitting other states bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them, and controlling in this and other cases involving the question."

(Rec. p. 658.)

In the case of Morgan v. Reading, in discussing the boundary line between Mississippi and Louisiana, and particularly with reference to the treaty of 1763, Judge Sharkey said:

"France, although not the first to discover, was the first owner, by appropriation, of the Mississippi and all the territory of its tributaries. By treaty with Great Britain in 1763, to which Spain was a party, France ceeded to Great Britain all her territory east of the Mississippi and north of the river Iberville, and the two powers fixed the boundary between them 'by a line drawn along the middle of the river, and the Lakes Maurepas and Pontchartrain to the sea.' Great Britain continued to be the power of the ceded territory until the 30th of November, 1782, when, by a provisional treaty, she acknowledged the independence of the United States, bounded on the west above the 31st degree of north

latitude by a line drawn along the middle of the Mississippi river, corresponding exactly with the boundary in the treaty with France. This provisional treaty with France and Great Britain, and all its provisions, were incorporated in the definitive treaty of peace concluded on the 3rd of September, 1783. Great Britain, at the same time, ceded West Florida, which by that government had been extended to the mouth of the Yazoo, to Spain; but as, by the provisional treaty, the southern boundary of the United States had been fixed at the 31st degree of north latitude, Spain acquired nothing above that parallel, as Great Britain had previously disposed of it. Thus, the United States succeeded to all the territory east of a line drawn along the middle of the Mississippi above the 31st degree of latitude. This left Louisiana bounded on the east by the same line, the middle of the river, about Iberville, as it had been established by the treaty of 1763; and by that boundary it was ceded by France to Spain, and by Spain retroceded to France, and ultimately by France in 1803 to the United States; so that no variation of this line, up to that time, had taken place. In 1798, whilst this was still the line between the United States and the province of Louisiana, Congress established the Mississippi territory, bounding it on the west 'by the Mississippi.' "

3 Sm. & Marsh., Rep. p. 397.

V.

"This Court has many times held that as between the States of the Union long acquiescence in the assumption of a particular boundary and the exercise of dominion

and sovereignty over the territory within it should be accepted as conclusive whatever the international rule may be.

R. I. v. Mass., 4 Howard, 591, 639;
Mo. v. Ky., 11 Wall. 395;
Ind. v. Ky., 136 U. S. 479;
Va. v. Tennessee, 148 U. S. 503;
La. v. Miss., 202 U. S. 54;
Md. v. Va., 217 U. S. 1-41-43.

In the case of Rhode Island v. Massachusetts above, Mr. Justice McLean, speaking for the Court, said:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall within the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in the case of disputed boundary."
>
> R. I. v. Mass., 4 Howard, 637.

In Indiana v. Kentucky, Justice Field said:

> "It is a principle of the public law unanimously recognized that long acquiescence in the possession of a territory and in the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority."
>
> Ind. v. Ky., 136 U. S. p. 471.

In Virginia v. Tennessee, Mr. Justice Field said:

> "A boundary line between states or provinces as between private persons, which has been run and located and made upon the earth, and afterwards acquiesced in by the parties for a long course of years is conclusive.
>
> Va. v. Tenn., 148 U. S., p. 521.

This Court has so construed the law from its organization to this day, and so also declare the text writers on international law.

Vattells on the Law of Nations, 2nd Book, ch. 11, Sec. 149;
Wheaton on Int. Law, Pt. 2, ch. 4, Sec. 164;
Twiss on Int. Law, 137;
Halleck on Int. Law, 50.

The reason for this rule is given by Vattel: "The tranquillity of the people; the safety of states; the happiness of the human race do not allow that possession, empire and other rights of the nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars."

VI.

Where two nations or states have as a common boundary line a navigable river, and the original property is in neither, and there is no convention respecting it, each holds to the middle of the stream, and the line is not affected by accretions or erosions on its banks.

Washington v. Oregon, 211 U. S. 127-134.
Louisiana v. Mississippi, 202 U. S. 1.

Missouri v. Nebraska, 196 U. S. 23-35.
Nebraska v. Iowa, 143 U. S. 359.
Iowa v. Illinois, 147 U. S. 1.
Handley v. Anthony, 6 Wheat. 374.

VII.

When an avulsion occurs and the river leaves the old bed or channel and makes for itself a new channel wholly within the territory of one state, the rule is that in such case the boundary is the center of the abandoned bed of the stream, and not the line of steamboat navigation, or the point of deepest water.

Halleck on Int. Law, Sec. 24.
Farnham on Water, Vol. 3, p. 2495.
Woolsey Int. Law, Sec. 58.
Wharton's Digest of Int. Law, Vol. 1, Sec. 30.
Opinions of Attorneys General, Vol. 8, p. 177.
Sandar's Justinian, pp. 168, 169.
Missouri v. Kentucky, 11 Wall. 395.
Buttenuth v. St. Louis Bridge Co., 123 Ill. 535.
Nebraska v. Iowa, 143 U. S. 359, 361, 363.
Indiana v. Kentucky, 136 U. S. 47.
Louisiana v. Mississippi, 202 U. S. 1, 49, 51.
Washington v. Oregon, 211 U. S. 134, 135.
Railroad Company v. Clinton, 88 Iowa 188.
Belle Fontaine Improvement Co. v. Neidringhaus, 181 Ill. 426.

VIII.

Hence, where by an avulsion the main channel changes by cutting off a peninsula from one state and forming an island, or the channel changes so that an island which

was on one side of the main channel of the river is left on the other side, these work no change of boundary or ownership of the island. The dominion and jurisdiction of a state bounded by a river continue as they existed at the time when it was admitted to the Union, unaffected by the action of the forces of nature upon the course of the river, except such changes as may be made imperceptibly and gradually by accretions and erosions.

Missouri v. Kentucky, 11 Wall. 395.
St. Louis v. Rutz, 138 U. S. 226, 246, 247.
Indiana v. Kentucky, 136 U. S. 479.
Washington v. Oregon, 211 U. S. 127, 134, 135, 136.
Letters of Mr. Frelinghuysen, Secty. of State, to Mr. Romero, Mexican Minister, in regard to islands in the Rio Grande.
Wharton's Digest of Int. Law, Sec. 30, pp. 85 to 94.
Letters of Mr. Bayard, Secty. of State, to Mr. Bowen, June 12, 1886.
Wharton's Digest Int. Law, Sec. 30, pp. 94, 95.

IX.

The rule above announced that the boundary line is the center of the abandoned channel or bed of the river, is further modified by the rule that, as the soil under the Mississippi River east of the western boundary of Tennessee belongs to that State, when as the result of an avulsion the water ceases to flow over it, that which has been lost by submersion as the result of erosion, as well as that which has been gained as the result of accretion,

will, when capable of identification, be restored to the original owners.

St. Louis v. Rutz, 138 U. S. 226.
Hardin v. Jordan, 140 U. S. 382.
Stockley v. Cissna, 119 Fed. 831.
Mulry v. Norton, 100 N. Y. 426, 53 Am. Rep. 215.
Packer v. Bird, 137 U. S. 666.
Hughes v. Birney, 107 La. 664.

In applying the rule of reliction as between nations, the Court will follow, as it does in the case of erosions, accretions and avulsions, the rule as applied to individuals.

Rhode Island v. Mass., 12 Pet. 654.
Nebraska v. Iowa, 143 U. S. 361.
Opinions of Attorneys General, Vol. 8, p. 175.

X.

The question of the right of navigation can have no bearing in the decision of the boundary between the States of Arkansas and Tennessee, because the river has at all times been open to navigation under the acts of Congress.

State v. Pulp Company, 119 Tenn. 47, 94.
Handley v. Anthony, 5 Wheat. 374.
Bedford v. U. S., 192 U. S. 225
Jackson v. U. S., 230 U. S. 1.
Wharton's Dig. Int. Law, Sec. 30.
Gould on Waters, Sec. 202.
Treaty between United States and Great Britain, 1783.

Treaty United States with Spain, 1795.
First Statutes, 464, ch. 27, 277, ch. 35, 641, ch. 21, 662, ch. 46, 701, ch. 50, 743, ch. 95.
Third Statutes, 348, ch. 23.

XI.

The whole contention of plaintiff in error is best set forth by him on page 36 of his brief, where he says:

"His whole claim is that while state and property lines or boundaries may be altered by accretion or erosion (being gradual and imperceptible processes or operations) said lines are unaffected by avulsion," and in the legal proposition laid down by him "the doctrine of reliction only applies when land is uncovered gradually and imperceptibly. It has no reference to the effect of an avulsion."

The position of the State of Tennessee is, in applying the rule of relicion as between states, the Court will follow, as it does in the case of erosion, accretion and avulsion, the rule as applied to individuals. That in a case where there has first been erosions from one bank, and later an avulsion takes place, the Court will seek to give effect to the rule governing accretion and reliction on the one part, and that governing avulsion on the other, so as to, as far as possible, reconcile them, and not to permit their seeming repugnance to destroy either the one or the other; in other words, to endeavor to so construe both rules as to preserve the true intent of each.

It was upon this theory that the Supreme Court of Tennessee said:

> "These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted.
>
> It restored all parties to their original status and does justice to them all. If the result of the avulsion had only affected the waters of the river so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned can not change the rights of the parties. The others interested can not be restored to their own by the forces of nature and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She can not in this way be deprived of the property when the same can without doubt be identified and located."
>
> (Rec. p. 683.)

And upon the same theory the Court acted in Mulry v. Norton, supra, when it said:

> "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the

property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main-land have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land, by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Angell Tide Waters, 76, 77; Houck Rivers, p. 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Angell Tide Waters, 77-80, and cases cited."

Mulry v. Norton, 100 N. Y. 426.

The rule of reconciliation was laid down by Mr. Chief Justice Marshall in the case of Cohens v. Virginia, when he decided that the Supreme Court of the United States had jurisdiction to review the decision of the highest Court of a State, in a case where a State was a party, and where a question arose under the Constitution and laws of the United States:

"The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate from are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, *so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them,* and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."

Cohens v. Virginia, 6 Wheat., 293.

So in this case when the Mississippi River left its old bed and made a new channel for itself, the boundary line between the States of Arkansas and Tennessee and the property lines of those individuals in each State owning property bordering upon the River became fixed, that is, permanent and stationary, and the Supreme Court of Tennessee in locating the lines of the states and of individuals sought as far as possible to so construe the two rules—the one governing an avulsion, and the other accretion and reliction—as to preserve the true

intent and meaning of each. The original owners of the property, the surface of which had been temporarily washed away, were entitled to their property on its reappearance, the States of Arkansas and Tennessee to theirs. In this way the intent of both rules were preserved and even and exact justice done to all. An avulsion does not make property lines. The lines are there and were made by covenant, treaty, compact or grant, subject to change it is true, because of erosions and accretions so long as the stream remains the boundary line. When by avulsion the stream changes its course and the old bed is abandoned, it is said the lines become fixed, and so they do. They become fixed because they are no longer subject to change by the action of the waters; still they must be located, and when located and marked the location is permanent and not subject as before to the action of the waters. Through an avulsion lines which theretofore were not permanent, become permanent, when located, and in locating the lines, we submit, it is proper to apply the rule of reliction and restoration to that property which has been lost to its owners by erosion.

XII.

THE LINES OF 1823 AND 1836 THE SAME.

Plaintiff in his brief on pages 36 and 37 lays great stress upon the finding of the Court:

> "The erosive effect of water on the Tennessee shore between 1823 and 1836 necessarily operated to increase the width of the river so that in 1836

it is bound to be true that the river was wider than it was in 1823.

There has been no effort by the State of Tennessee to establish, locate and designate the middle of the Mississippi River as it existed in 1836 and yet, even on the theory of the defendant in error, that must be the boundary line between the two states, for the middle of the river of 1823 was not the boundary line in 1836."

Plaintiff's Brief, pp. 36 and 37.

The river and the property lines set out on Humphrey's map are the river and property lines of 1836. The map is referred to as the map of 1823 as a means of identification, because that was the date of the first grant from the State of Tennessee to Simon Huddleston of two thousand acres. The Court in its opinion in one or more places refers to the river lines as the lines of 1823 to 1830 and Maj. Humphreys in his deposition giving the dates of the grants and surveys upon which he surveyed the river and property lines refers to the same as of the dates of 1823 and 1830, but there is even a more accurate method of ascertaining the exact time of the lines. The grants and surveys were made mostly in 1836, and the Humphrey's map shows each grant and each owner, and the grants and surveys themselves show the date thereof. Taking the grants along the river from just north of the property in controversy and extending south of its south line we find:

Grantee, No. of acres, Date of Grant, Date of Survey and Record Page:

John Trigg, 151 1-3 acres, Sept. 5, 1836, Oct. 14, 1837, page 216.

John Trigg, 152 acres, Sept. 5, 1836, Oct. 14, 1837, page 214.

John Trigg, 37 acres, Sept. 5, 1836, Oct., 1837, page 219.

S. Huddleston, 2000 acres, July 2, 1822, Dec. 19, 1823, page 237.

G. B. Bateman, 155 acres, Dec. 23, 1834, Mar. 7, 1836, page 251.

G. B. Bateman, 256 acres, 1836, Feb. 2, 1837, page 253.

John Trigg, 253 acres, Sept. 1, 1836, page 256.

All of the grants, except the Huddleston grant of two thousand acres and the G. B. Bateman grant of 155 acres were made in 1836, and several of them were actually surveyed in 1837, so, therefore, it was impossible for any change to have taken place in the banks of the river between 1823 and 1836, because the actual lines were surveyed in 1836.

XIII.

Plaintiff also devotes considerable attention to the findings of the Court quoted on page 38 of his brief:

> "(1) The width of the channel, by erosion and caving in of the Tennessee bank south, southwest and

west of Dean's Island along the main land and Island 37, had increased from its former width to that of one mile and a quarter or one mile and a half.

Rec. 650.

(2) We find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

Rec. 675.

Plaintiff's Brief, p. 38.

The quotations do not constitute the finding of the Court on the question of erosions from the Tennessee bank. What the Tennessee Court did find was:

"When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, *much more immediately south of that island than west of it where the premises sued for are situated.* While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

Rec. pp. 674, 675.

The Tennessee Court, of course, meant all of what it said regarding the increase in width of the river at this point, and that was that the river had increased in width

"much more immediately south of that Island (referring to Dean's Island) than west of it where the premises sued for are situated." By referring to Humphrey's map it will be noted that all of the property here in controversy is west and not south of Dean's Island, and the Court says that most of the increase in the width of the river was south of said island and not west.

XIV.

Plaintiff in error insists that when it was brought to the attention of the Chancellor that the State of Arkansas had filed a suit against the State of Tennessee to settle the boundary line between the two States that the Chancery Court should have suspended action in this case until after the decision of the case of Arkansas v. Tennessee. He further insists that the pending suit between Arkansas and Tennessee, or rather the fact that Arkansas had filed a bill against Tennessee, having been brought to the attention of the Supreme Court of Tennessee by the exceptions of the plaintiff in error, that the Tennessee Supreme Court itself should then have suspended action in this cause, until after the decision of the case of Arkansas v. Tennessee.

We submit to the Court that no such action should have been taken by either the Chancellor or the Supreme Court of the State of Tennessee. The bill was filed by Arkansas some eight years after this suit was instituted, six years after the case was first tried by the Chancery Court of Shelby County, four years after

the Supreme Court of Tennessee had decided the case on the plea in abatement of plaintiff in error, and after the case had been remanded to the Chancery Court of Shelby County, the bill of the State of Tennessee amended, additional proof taken by all parties, and the case set for trial, and some two months after the case had been argued in the Chancery Court, and after counsel for the State of Tennessee and counsel for the plaintiff in error had submitted final decrees to the Chancellor. In other words, at the time the petition of Mr. Cissna, asking that proceedings be suspended, was filed, this case had ben tried, the decision of the Chancellor had been announced, and the only thing further to be done was for the Chancellor to pass on the decrees submitted to him. The decree in the Chancery Court was actually entered only four days after Mr. Cissna's petition was filed, and we submit to the Court that it would have been an unheard of action for the Chancellor to hold up the final decree under the circumstances presented.

We submit further that it was not the duty of the Supreme Court of Tennessee to suspend action, pending the determination of the suit of Arkansas v. Tennessee. The question before the Supreme Court of Tennessee was the location of the boundary lines of private property and property belonging to the State of Tennessee, and not the location of the boundary line between Arkansas and Tennessee. There was no Federal question involved. The location of the boundary line was merely

an incident and was necessary only because one of the lines of the property claimd by the plaintiff in error happened to be the boundary line of the States.

The State of Arkansas had already at this time twice declined to join in with the State of Tennessee in locating the boundary line between the States in the abandoned bed of the river. The Supreme Court of the State of Arkansas had more than thirty years ago decided that the State of Arkansas owned to the middle of the bed of the Mississippi River, and the Circuit Court of Appeals of the United States had handed down a similar decision in the case of Stockley v. Cissna. There was no disagreement between the States; on the contrary there was perfect agreement, and acquiescence by each state in the claims of the other. There was no reason, therefore, for the Supreme Court of Tennessee to suspend its decision in this cause for an indefinite period of time.

We submit further that this is not a case in which this court can, should it reach the conclusion that it has jurisdiction of this cause, or should it even reach the conclusion that the Supreme Court of Tennessee was in error, order the bill filed by the State dismissed.

The original bill in this cause was filed against W. A. Cissna, the plaintiff in error, the Muncie Pulp Company, a New York corporation, and Vince Beard.

Original Bill, Rec. p. 393.

The object of the bill was not only to recover the land claimed by the State, but an injunction was also prayed to stop the cutting and removing of timber, pending the decision of the court, and to stop the removal of timber that had already been cut.

Original Bill, Rec. p. 397.

The injunction was granted and issued (Rec. p. 397, 398), but later was modified on the petition of the Muncie Pulp Company, and that company gave a bond in the penal sum of Ten Thousand Dollars, and was allowed to remove the timber that had been cut from the land prior to the issuance of the injunction.

Order Modifying Injunction, Rec. p. 403.

The bond was signed by the American Surety Company.

(Rec. p. 404.)

Later, by agreement of parties, the injunction was again modified, upon the Muncie Pulp Company giving a second bond in the penal sum of Fifteen Thousand Dollars, and the Pulp Company was allowed to cut and remove the balance of the timber from the land. The order modifying the injunction the second time and the bond appear to have been lost.

(Rec. p. 411.)

The second bond issued in the penal sum of Fifteen Thousand Dollars, was also executed by the American Surety Company, and while this bond and order are not

in the record, the facts concerning the execution of the two bonds are given in the deposition of Mr. R. G. Brown, attorney for the Muncie Pulp Company, and later for Leo Oppenheimer, first receiver and then trustee in bankruptcy.

(Rec. pp. 740, 741.)

Pending the decision in this cause in the Chancery Court, the Muncie Pulp Company filed a petition in bankruptcy, and Leo Oppenheimer appointed first receiver and later trustee in bankruptcy, intervened and thereafter appeared as one of the defendants in this cause.

Under an agreement between Mr. Caruthers Ewing, counsel for W. A. Cissna, and Mr. R. G. Brown, counsel for the Pulp Company, and later for Oppenheimer, the timber that had been cut at the time the injunction was granted, and the timber left standing and later cut and removed, was sold, and a part of the proceeds were remitted to Oppenheimer. The amount remitted in round numbers was about the sum of Twenty-three Thousand Dollars.

See Deposition of R. G. Brown, p. 741.

The funds derived from the timber cut from the lands claimed by the State were held by Leo Oppenheimer, trustee in bankruptcy, subject to the order of the United States District Court for the Southern District of New York.

On May 18th, 1910, Oppenheimer was authorized and directed to deposit the sum of Nineteen Thousand Sixty-eight Dollars and Ten Cents, being the balance of said fund on hand after paying some expenses, in the Chancery Court of Tennessee, the State having agreed to release the said Oppenheimer and the American Surety Company from further liability when said fund had been deposited in said Court.

(Rec. pp. 905, 906.)

An order was entered in the United States District Court for the Southern District of New York overruling the order dated May 18th, 1910.

(See Rec. pp. 906, 907.)

A petition was filed by Oppenheimer in the Chancery Court of Shelby County, asking the privilege of depositing said fund in said court. This petition was denied by the Chancellor. It appears that the proceedings on this petition have been omitted from the record, we suppose through an error, but the facts of the filing of the petition, the action of the Chancellor, and the final ruling of the Supreme Court of the State of Tennessee, are set forth in Sec. 8 of the decree of the Supreme Court of Tennessee, Rec. p. 933. The fund there referred to was later paid into the hands of T. B. Carroll, Clerk of the Supreme Court, and is subject to the order of the court in this cause, to be applied on the judgment of the State herein.

We suppose that the omission of the proceedings concerning the payment of this fund into the hands of the Clerk of the Supreme Court of Tennessee, is simply an error on the part of the Clerk in making up the record. It has just come to the attention of counsel for the State, and is not material in this cause further than that with said fund in the court subject to the order of the court to be applied as directed by it should this court order the bill filed in this cause by the State dismissed, this fund would be carried beyond the jurisdiction of the Tennessee Court, and probably dissipated, and the effort of the State to recover its land, and the value of the timber taken from the land, would be defeated, or at least in order to recover the value of the timber it would be necessary for the State to seek recovery outside of the State and beyond the jurisdiction of its courts.

We submit to the Court:

(1) That this Court has no jurisdiction to review the decision of the Supreme Court of Tennessee in this cause, this being a suit between a State and a citizen of another State over the lines of property owned by the State and by an individual, and there being no Federal question involved.

But should the Court differ with counsel for the State in the above conclusion, we submit:

(2) That the boundary line between Tennessee and the property of plaintiff in error is the middle of the main channel or main bed of the river as defined in the Treaty of 1763, and as further defined in the Treaty between the United States and Spain in 1795, and as adjudged in Cessill v. the State, 40 Ark. 501, in Stockley v. Cissna, 119 Tenn. 812, and as further adjudged in this cause.

(3) That the State of Tennessee owns the property lying between low water mark and the middle of the bed of the Mississippi river as shown by Humphrey's map of 1823 to 1836.

(4) That it would be an injustice for this Court to order the bill in this cause dismissed, and thereby to allow funds in the hands of the Clerk of the Supreme Court of Tennessee, the proceeds of timber cut from the State land and now subject to be applied to the judgment of the State in this cause, to be carried beyond the jurisdiction of the Tennesse Courts.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General,

JOHN P. BULLINGTON,
Solicitors for State of Tennessee.



Supreme Court, U. S.
FILED
OCT 1 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

W. A. CISSNA,
Plaintiff in Error,
vs.
STATE OF TENNESSEE,
Defendant in Error.

No. 20

BRIEF AND ARGUMENT

On Behalf of the

STATE OF TENNESSEE.

FRANK M. THOMPSON,
Attorney General,

JOHN P. BULLINGTON,
Solicitors for State of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

W. A. CISSNA,
Plaintiff in Error,
vs. No. 20
STATE OF TENNESSEE,
Defendant in Error.

BRIEF AND ARGUMENT
On Behalf of the
STATE OF TENNESSEE.

May it Please the Court:

This case is before the Court on writ of error to reverse the judgment of the Supreme Court of the State of Tennessee.

The case was originally presented to the Courts by counsel for the State of Tennessee on November 10, 1916, on the theory that the Supreme Court of the

United States has no jurisdiction over a question of the location of a boundary line of a State, as relating to a line of private property, when the question is raised by a non-resident of the States affected, and the States themselves are not both parties to the litigation.

After the case had been stated by counsel for the State, it was suggested by the Honorable Chief Justice of this Court, that the State of Tennessee was in undue haste in seeking a decision of this cause, when there was pending in this Court a suit between the State of Tennessee and the State of Arkansas over this particular boundary line. That a decision in this cause might be controlling in the cause between the States, and might preclude this Court from rendering a proper decision in that case. Thereupon, counsel for the State, not agreeing with the suggestion of the Honorable Chief Justice, but unwilling that it appear that the State of Tennessee was seeking an undue advantage over her sister State, declined further to argue the question.

Thereafter, early in December, 1916, an order was handed down by the Honorable Chief Justice of this Court pre-termitting a determination of the jurisdictional question or a decision on the merits of this case, and ordering that it be restored to the dockets and "hereafter assigned for hearing at the same time and immediately after the coming on for hearing of the Boundary Line Suit, between the two States." Cissna v. Tennessee, 242nd U. S. 109.

The order of the Court postponing a decision and resetting the case to be heard after the Boundary Line Suit, is in effect, an assumption of jurisdiction, and opens the cause on its merits, and requires a review of the pleadings, the proof and the law of the case.

STATEMENT OF CASE.

This controversy arose by reason of an avulsion in the Mississippi River, which occurred on the 7th day of March, 1876, whereby the river cut through a narrow neck of land, separating its stream before and after its flow around Island 37. The result of the avulsion was that the river abandoned its old bed, which gradually filled up and, at the time of the filing of the Bill, was covered with valuable timber. The avulsion is graphically described in the opinion of Judge Lurton, in the Circuit Court of Appeals, for the Sixth Circuit in the case of Stockley v. Cissna, (Rec. pp. 336-337), and in the Opinion of Mr. Justice Shields in this cause (Rec. pp. 648-651). The old river bed, some twenty (20) miles in length and from one (1) to one and one-half (1½) miles in width, gradually filled up, and became valuable both on account of the richness of the soil and the size of the timber. The position of the river as it ran in 1823 and again in 1901, is shown by the map of J. H. Humphreys, C. E., (Rec. p. 931). The lines of the property here involved are shown on the Humphreys map (Rec. p. 931), and the corners are designated on said map by the letters A, B, C, D, E, F, G and H; the changes and alleged changes in the stream of the river from 1823 to 1901 were attempted to be shown by various and sundry maps, charts and surveys made by engineers and produced by complainant and defendant; the maps, charts and surveys and the proof as to changes, produced in this

cause, cover only about one-twentieth (1/20) of the abandoned bed and only about one-twentieth (1/20) of the line involved in the suit between the States.

In 1901, the Plaintiff in Error, W. A. Cissna, a citizen of the State of Illinois, owning Dean's Island, which lay directly east of the property here involved, but in the State of Arkansas (Humphreys' map, Rec. p. 931) had taken possession of all of said property, claiming the same as accretions to Dean's Island, and on August 7, 1901, sold the timber on this and other land, to the Muncie Pulp Company (a New York corporation) for Thirty-five Thousand ($35,000.00) Dollars. (Rec. pp. 747-8). The Pulp Company at once began cutting and removing the timber.

In May, 1901, one W. H. Stockley, a resident of Tipton County, Tennessee, owning lands bordering on the Tennessee side of the Mississippi River adjoining the property here involved and having secured a grant from the State of Tennessee to a portion of the old river bed (Rec. p. 263) and thereby conceiving himself to be the owner of this particular property, filed an ejectment proceeding against the now Plaintiff in error, W. A. Cissna, in the United States Circuit Court for the Western Division of the Western District of Tennessee. (Rec. pp. 1-2).

To this suit W. A. Cissna, on July 23, 1901, filed a plea in abatement on the ground that the property described in the Bill was not in the State of Tennessee, but was

wholly within the State of Arkansas and, therefore, not within the jurisdiction of the Court. (Rec. p. 8).

Issue was joined on this plea (Rec. p. 9) proof was taken, and the case came on for trial on the third (3rd) day of December, 1901. On December 13, 1901, all the evidence having been heard, the defendant, now Plaintiff in Error, W. A. Cissna, in open court, withdrew his plea in abatement, admitted that "a part" of the land was in the State of Tennessee, and that, therefore, the Court had jurisdiction of the subject matter; it was ordered and adjudged by the Court that said plea be over-ruled and dismissed. (Rec. pp. 15-16).

The suit instituted by Stockley being in ejectment, the Court held that he had failed to show title and, upon motion of the defendant, Cissna, ordered the jury to bring in a verdict in favor of the defendant. Motion for a new trial was made by Stockley, over-ruled by the Court, and an appeal taken to the Circuit Court of Appeals of the United States for the Sixth District.

On November 10, 1902, the judgment of the Lower Court was affirmed, Judge (later Mr. Justice) Lurton, handing down the opinion of the Court. (Rec. pp. 337-338).

Judge Lurton, in a most able and learned opinion, among other things, said: "It is clear, whatever the interpretation placed upon the ambiguous judgment re-

lied upon to show that the defendant withdrew his plea to the jurisdiction, that the lands in dispute are on the east side of the middle of the channel of the Mississippi River, and therefore, within the boundary of Tennessee, although now West of the present channel of the Mississippi River." (Rec. pp. 344-345).

The boundaries of the property involved in that controversy, the record of which is a part of this record, are identical in every respect with the lines of the property here involved.

On June 10, 1903, the same W. H. Stockley filed an action of forcible entry and detainer in the Chancery Court of Tipton County, Tennessee, against W. A. Cissna, seeking to recover the same land. The decision in that case is reported in 119th Tennessee, pp. 135-177. It was there again decided that the land lay wholly within the State of Tennessee. (119th Tennessee, pp. 135-177).

Under the ruling of Judge Lurton the property involved in the controversy between Stockley v. Cissna, belonged to the State of Tennessee; it had been seized and was being held by a citizen of the State of Illinois, who had sold the timber to a New York corporation, which was rapidly cutting and removing the timber beyond the jurisdiction of the Courts of Tennessee.

In order to avoid any possible question that might arise with Arkansas on account of a disagreement as to

the proper location of the boundary line as related to the line of the property at issue, the Legislature of the State of Tennessee, on April 13th, 1903, some eight months prior to the filing of the bill in this cause, passed an Act entitled, "An Act to Authorize and Empower the Governor to Appoint a Commission to consist of three men to survey and locate the line between the States of Tennessee and Arkansas at a point where the channel of the Mississippi River has changed since the establishment of the lines between said States, etc." (Acts of Tennessee, 1903, Ch. 420, p. 1215), and further setting forth in the caption of said Act that the purpose thereof is to establish the true line, and thus avoid a possible "unfortunate controversy with our sister State of Arkansas."

Caption of Acts of 1903, Ch. 420, p. 1216.

A similar Act was passed by the Legislature of Arkansas, but was vetoed by the Governor.

The State of Tennessee was left in this position; Arkansas had declined to join with it in locating the boundary line; a citizen of the State of Illinois was in possession of its property; a New York corporation was cutting and removing the timber from its land; it was the duty of the proper officials of the State of Tennessee to conserve the land and timber for the use of all the citizens of the State.

THE PLEADINGS.

In December, 1903, the original bill was filed in this cause, and alleged that, prior to 1876, the Mississippi River flowed between Arkansas and Tennessee and formed the boundary between the two States. The course of the river around a bend in said river, known as Devil's Elbow, is shown by a map exhibited with the bill. (See map, Rec. p. ——). That the middle of the river, as shown on said map, constituted, prior to 1876, as it now constitutes, the boundary line between the States of Tennessee and Arkansas; that, on the 7th day of March, 1876, a sudden change was made in the direction of the main current or channel of the river, whereby in a single night or in a very short time, a new channel was formed for said river, being known as the Centennial Cut-off; that, as the result of the said change, the old bed of the river became, in a short time, dry land, and the State is the owner of that part of the bed of the river lying between the low-water mark on the Tennessee side and the center of the main channel of the river as it flowed prior to the cut-off, as shown upon said map, this property being held by the State of Tennessee for public purposes. It consists of many thousand acres of land, very valuable on account of the timber growing thereon. That the defendant Cissna, without right or authority, had trespassed upon the lands of the State, and especially upon the lands particularly described in the bill, and shown on said plat or map by the figures

A, B, C, D, E, F, G and H, and also upon the land lying immediately north of this tract and west of the middle thread of said river, and also land lying to the south and east of the southern boundary of said tract, and south of the boundary line between the States of Arkansas and Tennessee, and, so trespassing, he had undertaken to sell and, by some sort of a conveyance, had sold to the Muncie Pulp Company, a foreign corporation, all of the timber growing upon the said land. This corporation, it was alleged, had entered upon said land and cut and removed therefrom very valuable timber, and was still so engaged at the time of the filing of the bill. The cutting and removing of this timber by the defendant was alleged to be an irreparable injury to the lands of the State, held in trust for public purposes, and an injunction was sought and obtained. It was also alleged that the defendants had no property in the State of Tennessee subject to execution or attachment. A receiver was asked to take charge of the timber and cord wood which had been cut, and which were then upon the land ready for shipment.

(Rec. pp. 393, 394-5-6-7).

PLEAS OF DEFENDANTS.

We will not refer to the various pleas and answers of the Muncie Pulp Co., Leo Oppenheimer, its receiver and trustee in bankruptcy, or the American Surety Company, in as much as those defendants have accepted the findings of the Supreme Court of Tennessee as final and are not before this Court seeking relief.

The defendant, W. A. Cissna, filed a sworn plea in abatement on the 3rd of February, 1904, in which he averred that the lands mentioned and described, in the bill, were not situated in the State of Tennessee, except a small portion in the northwest corner, and, as to that portion, defendant Cissna averred that he had never asserted any right, title or claim of possession; that he was not then in possession thereof, and had never been. He also averred:

> "*Defendant says that all of the property mentioned and described in the bill, in the year* 1823, *was on the Tennessee side of the middle of the Mississippi River, as it then run;* that, from the year of 1823 to 1874, continuously, there were erosions into the Tennessee shore, and accretions to the Arkansas shore, or to Dean's Island, so that, by the year 1874, Dean's Island had, by gradual and imperceptible accretions, become much enlarged, and, by the gradual and imperceptible encroachments of the river, the land on the Tennessee side had been washed away, and, in the said year, 1874, the land and river lines of the entire territory about and below Dean's Island appeared, as shown on an exemplification marked Exhibit 'B' hereto. (This exemplification is a copy

of Col. Suter's map, Exhibit No. 2, to his deposition).

"Defendant says, that, following the description given in the bill at the same time, to-wit, 1874, *and running the line as described in the bill, the result would be that the southwest corner of said land would be on the Tennessee bank of the Mississippi River, and the northwest corner of the said land would be on the Tennessee bank of the Mississippi River, and the said land, as a body, would have been either on the Arkansas shore, or under the waters of the Mississippi River.*

Said defendant files as Exhibit 'C' hereto an exemplification of Dean's Island and of the Mississippi River, and of the location of the land in controversy as of the year 1874; said land appearing within the dotted lines to be seen in said exemplification.

Defendant states that from the year 1874, *until the year* 1876, *erosions were continuously, gradually and imperceptibly made into the Tennessee shore, and accretions gradually, slowly and imperceptibly formed to the Arkansas shore until what appears on Exhibit C as the west boundary of the land in controversy had become practically the middle of the river in the year* 1876, when a sudden 'cut-off' took place whereby the river abandoned the course between Island 37 and the main Tennessee shore and around Devil's Elbow and Brandywine Bar and by an avulsion cut across there and about the land marked 'Massey' on Exhibit 'B' hereto.

Defendant says that thus the water which had prior to said cut-off gone around Dean's Island on the west side and down McKenzie Chute, as shown on

Exhibit 'C' hereto, adopted as its channel the said new channel made by the 'cut-off' indicated above.

The result was that between Dean's Island and the Tennessee shore there was left the old river bed, *and for a number of years, to-wit, about ten years, the water gradually, imperceptibly and steadily abandoned said old bed, and about the year* 1883 *the accretions of Dean's Island were such that no part or parcel of said land described in the bill was west of the middle of the Mississippi River,* and therefore in the State of Tennessee, except a small and immaterial part on the northwest of said tract No. 2, and a small and immaterial part on the northwest of said tract No. 1, said portion of said land described in the bill which was then, in the year 1883, and which is now on the Tennessee side of the middle of the Mississippi River appears by the dotted lines on the west, and by a black line on the east, on exemplification filed as Exhibit 'D' hereto.

Said defendant says that the exhibit to complainant's bill is made as of the year 1823, in so far as it deals with the land lines and the river lines, and in so far as it undertakes to show the location of the land in controversy, and defendant says that while the middle of the river was as shown on the said exhibit to the original bill in the year 1823, that by gradual and imperceptible encroachments of the river into the Tennessee shore, and by gradual and imperceptible accretions to Dean's Island, the Arkansas shore, that the said middle of the Mississippi River moved westwardly until, in the year 1876, the property in controversy had become entirely on the Arkansas shore, or under the waters of the Mississippi River,

a navigable river, and that after said cut-off the water remaining for a period of about ten years gradually departed, whereby and wherefrom accretions were made to the Arkansas shore and none to the Tennessee shore, it being a high, caving bank, and the property in controversy, except as stated, became and was part of the said territory of the said Arkansas and Dean's Island, or the said State of Arkansas, and defendant has never claimed, and does not now claim, any right, title or interest in and to any property other than that lying on the Arkansas side of the Mississippi River, and which is in the State of Arkansas, and said defendant, W. A. Cissna, disclaims any interest in or title to any of the said property, except that which lies in the State of Arkansas, and which does not lie in the State of Tennessee."

(*Italics are ours.*) (Rec. pp. 400-401.)

REPLICATIONS.

By consent, it was agreed that the State might file more than one replication to the pleas in abatement filed by the defendants. (Rec. p. 404).

On the 3rd of February, the State of Tennessee, by replication, joined issue on these pleas. (Rec. p. 407).

It also, for further replication, averred that the defendant Cissna, in a certain suit wherein a controversy arose, in which said W. A. Cissna was a party defendant, and one H. W. Stockley, was a party complainant, pending in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, on the 13th of May, 1901, had averred and admitted the lands in controversy in this cause to lie within the State of Tennessee, and in said cause then pending, obtained a judgment in said court because of his said averrment.

(Rec. pp. 408, 409, 410).

It also filed a replication to the plea, that, in the United States Circuit Court of Appeals for the Sixth Circuit, in the cause of H. W. Stockley v. W. A. Cissna, being No. 1088, he had likewise averred the jurisdiction of the State of Tennessee over the lands in controversy in this cause, and that it had been held and adjudged by said United States Circuit Court of Appeals for the Sixth Circuit that the lands in controversy in this cause were in the State of Tennessee. A similar replication was filed to the pleas of the Muncie Pulp Company.

(Rec. 410).

ANSWERS OF DEFENDANTS.

After proof had been taken upon the pleas in abatement to the jurisdiction of the court, by consent of counsel (Rec. p. 439), the defendant Cissna filed answer, in which he said:

1. That the land mentioned in the bill is not in the State of Tennessee, but in the State of Arkansas.

2. That, if the land mentioned in the bill was ever in the State of Tennessee, it had long prior to the cut-off in 1876, been gradually and imperceptibly washed away by the erosion of the Tennessee bank of the Mississippi River, and the Arkansas bank of said river had, by gradual shifting and accretions, become correspondingly increased, so that all of the land in controversy had become lost to the State of Tennessee, and the jurisdiction of its court by such gradual erosions, and the State of Tennessee has, therefore, no right to maintain this suit.

3. It asserted the ownership by the defendant Cissna of Dean's Island, in the State of Arkansas, with all accretions thereto, and again set up, as he set up in his plea, the erosions from the Tennessee shore, and the accretions to Dean's Island shore, so much that the beginning point of the land in controversy was, at and prior to the cut-off, in the river, and on the Arkansas side of the said river. It further averred that all of the land in controversy not lying in the State of Arkansas, if any such there should

chance to be, had already been granted by the State of Tennessee to other persons, and whatever may have been the action of the river and the interest of these persons in relamation of the land by any recision of the waters, the State of Tennessee had no title thereto.

It plead in bar of the title of the State of Tennessee, if the said title had not been lost by erosion, Entry No. 7, various and sundry grants made by Tennessee and concluded with the statement:

> "The State having parted with its title, could not acquire title by the naked fact of the reappearance of the land after the submergence, by the gradual shifting of the river."
>
> (Rec. pp. 642-3-4).

The Muncie Pulp Company also, by agreement, filed a similar answer, and Leo Oppenheimer, the trustee in bankruptcy for the said corporation, joined in said answer.

(Rec. pp. 639, 40, 41).

FINAL DECREE.

On the pleadings and proof, this cause was heard before the Honorable Lee Thornton, acting as special chancellor, on the 31st of March, 1905. He sustained the pleas filed by the defendants to the jurisdiction of the court, and dismissed the complainant's bill, at the cost of the State.

(Tr. p. 439.)

The defendants, at the hearing, having objected to the record in the case of Stockley v. Cissna, from the Circuit Court of Appeals, for the Sixth District, No. 1088, as "incompetent, immaterial and irrelevant," the court also sustained the said objections.

(Tr. p. 439).

From the said decree the complainant prayed an appeal to this Court, and by objection and exception to the action of the learned special Chancellor, in sustaining the objections of the defendants to the record in the case of Stockley v. Cissna, it preserved the said record in said cause as a part of the record herein.

The case was carried to the Supreme Court of Tennessee and was elaborately argued, orally and by brief, at the April Term, 1905; it was carried over by the Court and by order of the Court was again argued at the April Term, 1907, and was decided at a special term in October, 1907.

(Rec. p. 648, et seq., 119 Tenn. 47-134).

DECREE OF THE SUPREME COURT.

The Supreme Court of Tennessee, decided:

(1) That the Western boundary line of the State of Tennessee, as declared and fixed by treatise and legislative enactments is the "middle of the Mississippi River" as it ran in 1763.

(2) That by "middle of the Mississippi River" is meant a line along the middle of the main channel or bed of the river equidistant from the visible, defined and established banks within which the waters are confined and flow in their natural and ordinary stages.

(3) That said line has been settled by the duly constituted authorities of the States of Arkansas and Tennessee, by judicial decision, legislative enactments and other authorized official action long acquiescence, the exercise of jurisdiction challenged, and other acts amounting to an agreement or convention.

(4) That the line of 1823, as shown by Humphreys' map, is the western boundary line of the State, there being no evidence to show the location of the line of 1763.

(5) That the presumption is in favor of the permanency of boundary lines and the burden of proof is on the party averring a change.

(6) That the cut-off of 1876 was an avulsion and that

the doctrine of accretion has no application to the filling up of the old bed.

(7) That the evidence was insufficient to show accretions to Dean's Island between 1823 and 1876.

(8) That the State might so amend its Bill as to make proper allegations to entitle it to recover to the line of 1823 instead of 1876.

Thereafter an amended bill was filed by the State of Tennessee with proper averments to recover to the line of 1823.

(Rec. pp. 838-839).

No plea or demurrer was filed to the amended bill by the Plaintiff in Error, W. A. Cissna, but on March 16, 1910, he filed an answer, in which he said:

(1) That the land mentioned and described in the Bill of Complaint was not in the State of Tennessee, but was in the State of Arkansas.

(2) That the center of the Mississippi River as it flowed in 1823 was not the boundary line between the States of Tennessee and Arkansas.

(3) That from 1823 to 1876 the center of the Mississippi River had shifted and changed by erosions into the Tennessee bank and by corresponding accretions to the Arkansas bank. That by these changes Dean's Island

at the time of the cut-off, had become much enlarged; that the line between the States had changed and shifted with the gradual changing and shifting of the river until in 1876, the time of the cut-off, the lands which are now sued for, were entirely in the State of Arkansas.

(Rec. pp. 840-843).

The case was tried in the Chancery Court of Shelby County on the issues raised and joined in the pleadings, and additional proof introduced by the parties, on November 9th, 1910, and was decided on December 19th, 1910.

On February 27th, 1911, more than three months after the case had been argued and submitted to the Chancellor, and more than two months after the Chancellor had announced his decision in open court, the plaintiff in error filed a petition setting up the fact, that Arkansas had filed suit against Tennessee in the Supreme Court of the United States for a settlement of the boundary line along the old river bed and asking that an order be entered staying proceedings in this case, until the suit between the States was settled.

(Rec. pp. 853-4).

On March 2, 1911, the final decree was entered in the Chancery Court adjudging the rights of the parties in accordance with the opinion of the Supreme Court, and ordering a reference as to the value of the timber cut and removed from the States' lands.

(Rec. pp. 916-920).

On March 13, 1911, the State of Tennessee filed a demurrer and answer to the petition of Cissna to suspend proceedings.

(Rec. p. 921).

On March 14, 1911, an order was entered over-ruling the motion to suspend.

(Rec. p. 926).

The case was carried by appeal to the Supreme Court of Tennessee and argued at the April Term, 1911, and was decided at the April Term, 1912. In a memorandum opinion, Judge Lansden said "the evidence upon this appeal is not materially different from the evidence considered upon the former appeal from which the facts stated in the opinion of the Court were found."

(Rec. p. 929).

Upon the 21st day of June, 1912, the decree of the Supreme Court was handed down modifying and affirming the decree of the Chancery Court, and adjudging the rights of the party to be in accordance with the original finding of the court, and ordering a reference by the clerk of the Supreme Court, "to ascertain and report to this Court at its next term, what timber and the value thereof" had been cut and removed from the State's lands.

(Rec. p. 932).

The reference was not taken in 1912 and at the April Term, 1913, the order of reference was revived.

(Rec. p. 936).

At the April Term, 1914, the clerk of the Supreme Court having heard proof, filed his report. The report was excepted to by the plaintiff in error; the exceptions overruled and a final decree was entered, wherein a judgment was rendered against the plaintiff in error, W. A. Cissna, and in favor of the State of Tennessee for the possession of the lands involved in the suit, and for a monetary judgment of $110,103.80 on account of timber cut and removed from the State's land.

In his exceptions to the clerk's report, the plaintiff in error brought to the attention of the Court his application for a stay of proceedings pending the settlement by the Supreme Court of the United States of the boundary line suit between the States, and he then objected to the further consideration of this cause by the Supreme Court of Tennessee and requested that the proceedings be stayed. His exception and request were disallowed.

The foregoing statement is perhaps long and tedious but it is deemed necessary that the Court have before it a full history of the pleadings in this long and extended litigation in view of the insistence by the State that, even should this Court hold that it has jurisdiction of the decision of a State Court in a matter lying wholly within the discretion of the trial Judge, still the petition by plaintiff in error to the Chancellor and the motion before the Supreme Court of Tennessee were filed too late to be seriously considered by either.

In view of the statement by counsel for plaintiff in error in his former brief on page 30 that he recognizes "that every finding of fact on controverted evidence by the Supreme Court of Tennessee will be accepted by this Court," no review of the evidence will be made.

QUESTIONS PRESENTED FOR THE DECISION OF THE COURT.

1.

The jurisdiction of the Supreme Court of the United States to review a decision of the highest Court of a State in a controversy between the State and a citizen of another State over the title to land claimed by the State and by the citizen where the ownership is dependent upon the location of one of the boundary lines of the State.

2.

Has the Supreme Court of the United States exclusive jurisdiction over every cause wherein there is injected a question of the location of a boundary line of a State as related to private property and the question is raised by a non-resident of the States affected and the States are not both parties to the controversy?

3.

Has this Court jurisdiction to review the action of the Supreme Court of Tennessee in declining to stay proceedings upon the motion of the plaintiff in error?

4.

Is the western boundary line of the State of Tennessee,

a—The middle of the main channel or bed of the Mississippi River? or

b—The center of the deepest water? or

c—The center of the channel of steamboat travel? and

d—Is it the center of the river of 1763 as defined in Treaties between Great Britain, France and Spain? (3rd Jenkinson Treaties 177).

e—Or is it the "middle of the Mississippi River" as of 1790, when the territory comprising the State of Tennessee was ceded to the United States by North Carolina? (Vol. 1, Am. St. Papers, Pub. Lands, p. 17), and

f—Is it "a line drawn along the middle of the main channel or bed of the river, equidistant from its visible, defined and established banks" as the river flowed in 1823 to 1836, as set forth on Humphrey's map, and as decided in Stockley v. Cissna, (119 Fed. 812, 831), in Stockley v. Cissna, (119 Tenn. 139) and by Judge Shields in this cause?

g—Or is it along the middle of the channel of navigation or steamboat travel in 1876 immediately before the avulsion as contended by plaintiff in error, and if so, how is that line now to be determined?

BRIEF AND ARGUMENT.

JURISDICTION.

1.

The first and fifth assignments of error are not well taken. No Federal question was raised by the petition of plaintiff in error filed on February 27th, 1911, or by the motion to suspend on June 18th, 1914. Such a petition or motion are unknown to the rules of practice or procedure in courts of law or equity, and are so unusual in their nature that learned counsel for plaintiff in error is unable to cite any authority in support of his contention.

To have granted the petition when filed, some three and a half months after this cause had been finally argued and submitted, and over two months after the Chancellor had, in open court, announced his decision, when the State of Tennessee had not been served with process nor notified that suit had been filed against it by Arkansas, or to have granted the motion made by plaintiff in error on June 18th, 1914, more than three years after the cause had been argued in the Supreme Court of the State of Tennessee, and more than two years after the decision of the Court had been announced when the only remaining action of the Court was to approve the report of the Clerk and Master would have been a denial to the State of its remedy by due course of law and a refusal to administer right and justice without denial or delay as is ordained

by Section 17, of Article 1, of the Constitution of the State of Tennessee.

In order to understand the unreasonableness of the proposition advanced by the plaintiff in error it is only necessary to review the history of this litigation as shown by the pleadings heretofore set forth for the convenience of the Court.

This cause was finally argued before the Chancellor on the 9th day of November, 1910; the Chancellor announced his decision on the 19th day of December, 1910, and asked that a decree be prepared; several decrees were prepared by counsel for both litigants; it was found they could not agree and the decrees as prepared were submitted to the Court; in the meanwhile, more than two months had elapsed and on February 27th, 1912, three months and eighteen days after the trial of the cause and two months and eight days after the Chancellor's opinion was announced in open court, plaintiff in error filed his petition for a stay of proceedings. Three days later, that is, on March 2nd, 1911, the final decree and reference was ordered entered by the Chancellor.

This litigation has been in the Courts of Tennessee since December 1903; it has been twice tried in the Chancery Court of Shelby County and twice in the Supreme Court of Tennessee. Before this suit was instituted the plaintiff in error had been for more than three years in litigation with a citizen of the State of Tennessee over

the same property. In that litigation he solemnly admitted and averred in open court that the land here involved was within the jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, and within the State of Tennessee, and through said admission and averment, he secured a verdict in said Court.

Rec. p. 454.

After the decision by Judge Lurton, the Legislature of the State of Tennessee, in order to avoid a possible controversy with its sister State over this particular property and this particular boundary line, passed an act to authorize and empower a commission to ascertain and fix said line.

Acts of Tennessee, 1903, Chap. 420, p. 1215.

A similar Act was passed by the Legislature of Arkansas but was vetoed by the Governor; thereafter this litigation was instituted in order to preserve for the benefit of all the citizens of the State of Tennessee, property that belonged to the State and that had been seized and was being depredated upon by a non-resident of either State.

The plaintiff in error merited no consideration from the State of Tennessee; he held no title or right of possession of any kind to the property; under the decision by the Supreme Court of Tennessee, the limits of the territory claimed by him, could not reach to the boundary line

between the two States; under the decision of the Supreme Court of Arkansas, his title could in no event extend to the boundary line.

Railroad v. Ramsey, 53 Ark. 314; 8 L. R. A. 559.
Wallace v. Driver, 61 Ark. 429; 31 L. R. A. 317.

The State of Arkansas was not complaining or claiming title to the property. An invitation had twice been extended to it by Tennessee to locate and fix the boundary by joint commission and it had each time declined the invitation. It had notice of the decision in the Circuit Court of Appeals in the case of Stockley v. Cissna, and of the decision of the Supreme Court of Tennessee in the case of Stockley v. Cissna, and in the case at bar.

At the time the petition was filed in the Chancery Court by plaintiff in error the State of Tennessee had not been served with process and had no notice of a suit against it by Arkansas. Under the circumstances presented by this record we submit it was not the duty of the Chancellor to suspend proceedings on the presentation of the petition of plaintiff in error setting forth the filing of the belated suit by the State of Arkansas.

Nor was the Supreme Court of Tennessee in error when it declined to suspend proceedings upon the motion of plaintiff in error made three years after the trial of this cause in that court, two years after the cause had been decided, when the only remaining act to be performed by the Court was to pass on the exceptions to the report

of the Clerk and Master (See p. 942) which had been delayed more than two years in order to give the State of Arkansas an opportunity to prepare and try the boundary line suit. The wisdom of the Courts of Tennessee have been vindicated by the course of the suit between the States. More than six years and a half have elapsed since the filing of plaintiff's in error petition to stay proceedings and the case between the States has not yet been disposed of.

The petition of plaintiff in error to stay proceedings and the motion to suspend presented at most a question that lay purely within the discretion of the Courts, and we submit that this Court has no jurisdiction to review questions of this nature.

2.

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW A DECISION OF THE HIGHEST COURT OF A STATE IN A CONTROVERSY BETWEEN THE STATE AND A CITIZEN OF ANOTHER STATE OVER A LINE BETWEEN THE STATE'S PROPERTY AND THE PROPERTY OF THE CITIZEN.

In a case between a State and a citizen of another State, the Supreme Court of the United States has original, but not exclusive jurisdiction, Section 687 of the Revised Statutes of the United States providing:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and the citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction."

U. S. Rev. Stats., Sec. 687, Fed. Stats. Ann., 436.

The Supreme Court of the United States has appellate jurisdiction to review the judgments and decrees of State Courts on Writ of Error, where there is drawn into question a title, right, privilege or immunity claimed under the constitution, a treaty or statute of or authority exercised under the United States. Section 709 of the Revised Statutes of the United States; Federal Statutes Annotated, p. 467:

"Judgments and decrees of state courts on writ of error. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privileges, or immunity specially set up, or claimed, by either party, under

such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Rev. Stats. of the U. S., Sec. 709.

Fed. Stats Ann., pp. 467-8.

In Murdock v. Memphis, Mr. Justice Miller, discussing the general question of the right of the Supreme Court of the United States to review final decisions of the highest court of a State, laid down the following rules:

"Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court.

2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court."

Murdock v. Memphis, 86 U. S. p. 444, 20 Wall. (U. S.) 645.

In the case of the Capital National Bank v. First National Bank, 172 U. S. 503, Mr. Chief Justice Fuller said:

> "The writ of error from this court to revise the judgment of a state court can only be maintained when within the purview of Section 709 of the Revised Statutes."

In the case of California v. Southern Pacific R. R. Co., 157 U. S. 229, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> "The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and the laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In other description of cases the nature of the case is everything, the character of the parties nothing. • • • •
>
> "By the Constitution, and according to the statute, this Court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a State and its own citizens, and original, but not exclusive, jurisdiction of controversies between a State and citizens of another state or aliens."

In the above case the bill was dismissed, because the

suit was between a State and a citizen of another State and its own citizens.

The only exception to the above rule is that the Supreme Court has been held to have jurisdiction to review a decision of the Supreme Court of a State in controversy between a State and a citizen of another State where a question involving some title, right, privileges or immunity claimed under the Constitution or a treaty or statute of or authority exercised under the United States, or the validity of a statute or authority exercised was drawn into the question, or specially set up and claimed, and the opinion of the State Court was adverse to such title, right, privileges or immunity.

Cohens v. Virginia, 6 Wheat. 393.

In this case, discussing the question of the jurisdiction of the Supreme Court in a case where the State was a party, Mr. Chief Justice Marshall said:

> "The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.
>
> "Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a constitution or a law, the

jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnance to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."

Cohens v. Virginia, 6 Wheat. 393.

The reason given by Mr. Chief Justice Marshall for this construction was that to construe it otherwise "would be to construe a clause dividing the power of the Supreme Court in such a manner as to in a considerable degree defeat the power itself."

To bring this case within the rule laid down by Mr. Chief Justice Marshall, it must appear (1) that some question stated in Section 709 of the Revised Statutes of the United States did arise, and (2) that the question was decided by the Supreme Court of the State of Tennessee, as required in that section; and it must also appear that this cause was decided on the Federal question raised and not upon the construction by the Supreme Court of Tennessee of general laws or local statutes.

The case of the Commercial Bank v. Buckingham, 5 How. 342, was dismissed by this Court, because of want

of jurisdiction, and Mr. Justice Greer, in discussing the question, said:

> "To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1, that some of the questions stated in that section did arise in the State Court; and, 2, that the question was decided in the State Court, as required in the section.
>
> "It is not enough that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the Court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and 'that this claim was overruled by the Court;' but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

In Brown v. Atwell, 92 U. S. 327, the Court said:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts, for the record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it."
>
> Brown v. Atwell, 92 U. S. 327.

In the case at bar, no treaty or statute of or authority exercised under the Constitution of the United States is,

or has been, at issue, nor has there been drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States; nor has any title, right, privilege or immunity been claimed under the Constitution of or any treaty or statute of or commission held or authority exercised under the United States.

The boundary line between the States of Tennessee and Arkansas is not involved. The location of the boundary line was an incident. It was necessary to locate it in relation to the lines of property claimed by the State of Tennessee and held by the plaintiff in error. The questions involved are questions of general law and not Federal questions.

The question upon which the plaintiff in error relies in this Court is purely a question dependent upon the general laws of the land. It was upon the construction by the Supreme Court of the State of Tennessee of the effect of the avulsion of 1876 that the Court decided that the lands here involved belonged to the State of Tennessee.

> "The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Ten-

nessee what it held before the erosions upon its banks. The rights of restoration to their lands was one of the vested rights of those grantees, and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted."

Rec. p. 683.

It has uniformly been held that in order to give this Court jurisdiction on a writ of error to the highest Court of a State, it must appear not only that a Federal question was presented, but that its decision was necessary to the determination of the case, or that the judgment of the State Court as rendered, could not have been given without deciding it, and where the decision complained of rests upon independent grounds not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering any Federal question that may also have been presented.

California Powder Works v. Davis, 151 U. S. 389-393.
Eustis v. Bowles, 150 U. S. 361.
Mo. Pac. R. R. Co. v. Fitzgerald, 160 U. S. 556.
Capital Nat. Bank v. First Nat. Bank, 172 U. S. 427.
Murdock v. Memphis, 20 Wall. 105.
Winter v. Montgomery, 156 U. S. 385.

Gillis v. Stenchfield, 159 U. S. 658.
Giles v. Little, 134 U. S. 645.
Stryker v. Goodnow, 123 U. S. 527.

In Capital National Bank v. First National Bank, supra, Mr. Justice Fuller, delivering the opinion of the Court, said:

> "Moreover, even though a federal question may have been raised and decided, yet, if a question not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this Court will not review the judgment."

This enunciation of this rule is plain, and is in line with decisions too numerous to quote.

In his plea to the jurisdiction of the Court, and in his answer to the original bill filed by the State of Tennessee in this cause, plaintiff in error presented to the Court the construction of the law governing riparian rights. His contention was that land lost by erosion could not be regained by alluvian or reappearance brought about by an avulsion. It is a question dependent upon the general laws of the land and, even if the Supreme Court of Tennessee has reached a wrong conclusion, or if its rulings are contrary to previous rulings of this Court in other cases where the same question was raised, such error, or such difference of opinion and construction would not confer jurisdiction upon this Court.

The title to land acquired by accretion or reliction is a title acquired under the law of the State where the accretion occurs, subject only to the right of the United States in navigable water for the purposes of commerce.

Frank v. Gaddin, 193 Mo. 390; 90 S. W. 1057; 112 A. S. R. 493; 12 L. R. A. 637, Note.
Barney v. Keokuk, 94 U. S. 324; 24 L. Ed. 224.
St. Louis v. Rutz, 138 U. S. 226; 34 L. Ed. 951.
St. Louis v. Myers, 113 U. S. 556.
Wilson v. Blackbird Creek Marsh Co., 27 U. S. (2 Pet.) 245.
Case v. Laflin, 5 L. R. A. 684.
Eisenbach v. Hatfield, 12 L. R. A. p. 632.

Questions of riparian rights, of the effect of accretion, erosion, reliction and dereliction, in the several states, whether it be upon navigable river or the ocean, are settled by the respective states for themselves. The original states succeeded to all the rights of both the king and Parliament and became the absolute owners of all navigable waters and the soil under them within their respective territorial limits. The new states have the same rights, sovereignty and jurisdiction over this subject as the original states.

Eisenbach v. Hatfield, 2 Wash. p. —; 12 L. R. A. 632.

In Martin v. Waddell, where this question was fully discussed by this Court, Mr. Chief Justice Taney said:

"When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Martin v. Waddell, 41 U. S. (16 Pet.) 367.

In Pollard v. Hagan, where the question of the ownership of lands under tide water was raised in an ejectment suit for a lot of land in the City of Mobile, Alabama, which lay below high water mark and which had been granted by Congress, after approving the decision in the case of Martin v. Waddell, above, Mr. Justice McKinley said:

"Then to Alabama belong the navigable waters and the soil under them, subject to the rights surrendered by the Constitution to the United States; *and no compact that might be made between her and the United States could diminish or enlarge those rights.*"

Pollard v. Hagan, 44 U. S. (3 How.) p. 212.

In McCready v. Virginia, this Court went even further and held that not only the soil under tide waters, but the waters themselves and the fish in the waters belong to the State, and that the Legislature had the constitutional right to pass a law prohibiting any person not a citizen of the State from fishing in such waters.

McCready v. Virginia, 94 U. S. 391.

If the plaintiff in error has the right to have the ruling of the Supreme Court of Tennessee in this case reviewed by the Supreme Court of the United States, then every squatter along the old and abandoned bed of the river, when the State undertakes to put him off its land, has the same right by claiming that the land lies within the State of Arkansas, and not within the State of Tennessee. Going even further, every claimant of land near the boundary line between two States would have the right to carry a sovereign State into the Federal Court in any contest between the State and the claimant over the lines of any of the State's property.

At the time this suit originated there was no contest between Tennessee and Arkansas over the boundary line. Both States had agreed upon the construction of the treaty of 1763, that the middle of the bed of the Mississippi River constituted the boundary line, and both States for many years had acted upon that assumption. Both States had asserted their jurisdiction to that line, and each State had acquiesced in the claim of the other. In the assertion of this claim the learned Attorney General of the State of Arkansas, Hon. Hal L. Norwood, (who as Attorney-General filed the bill in the case of Arkansas v. Tennessee) in the case of Wolf v. the State, in his brief filed on behalf of the State, taking the same position as announced in the case of Cessell v. State, 40 Ark. 501, which is the same position taken by the Supreme Court of the State of Tennessee in this case, filed a brief

to sustain the contention of Arkansas, from which we here quote:

> "The boundary line is a point equidistant from the principal or well-defined banks of the river, 10 Heis. (Tenn.) 283; 119 Tenn. 47; 79 N. W. 449; 138 U. S. 226; 143 Id. 359; 196 Id. 230; 5 Wheat. 375; 133 Ill. 535; 40 Ark. 501; 53 Id. 314; 24 Howard 41; 1 La. Ann. 372; 3 Sm. & M. (Miss.) 356; 55 Ia. 558; 119 Fed. 812."

There being perfect accord between the States themselves, has a citizen of a foreign State (the State of Illinois) the right to raise the question of the boundary line between the States?

The opinion of the Supreme Court of Tennessee affords sufficient evidence of the time and attention devoted by the Court to the consideration of this cause. The case was argued in the spring of 1905. It was held by the Court under advisement, and a reargument was ordered in the April Term, 1907, and the case was decided at an extra term in September, 1907. The opinion of Judge Shields, covering some eighty pages of printed matter in 119 Tennessee Reports, reviews the history of the treaties and conventions under which the boundary line of Tennessee was fixed, and the laws and decisions of text writers and courts on questions of avulsion, relliction, erosion and accretion. The opinion also reviews the contentions of the parties; the proof introduced by each; applies the law to the conditions existing, and announces

the finding of the Court on the construction of general laws, and not upon any question arising under the constitution or a law of the United States.

(a) The contention of the parties:

"The defendant has undertaken to prove that a change took place in this case by accretion to Dean's Island, and erosion upon the opposite Tennessee bank. Their exact contentions are that by erosion upon the banks of what are now Centennial Island and Island 37, and the accretions to the banks of Dean's Island, since 1823, both before and after the cut-off in 1876, the middle of the river and the line separating the two States had advanced gradually westward towards the Tennessee bank, and that at the time of the cut-off the middle of the river was where the eastern boundary line of the Huddleston and Trigg lands had been before they were washed away and become a part of the bed of the river, and, that being the boundary between the two States, complainant can recover nothing east of it, and having previously granted that portion of the channel covering the Huddleston and Trigg lands, it can not recover that, because those who hold under the original grants are entitled to such lands since restoration or reappearance caused by the abandonment of the channel by the waters, and therefore the bill of complainant must be dismissed."

Rec. p. 674.

(b) The proof:

"The great volume of the testimony introduced in this case by both parties was for the purpose of proving that the channel of the river at that place where the lands sued for now lie, increased in width since 1823 and prior to 1876, and the extent of such increase; by the complainant to prove that no accretions had formed upon Dean's Island after 1823, and by the defendants that the area of the Island had in this way, since that date, been greatly increased and extended westward."

Rec. p. 674.

(c) Findings of the Court:

"When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, much more immediately south of that island than west of it where the premises sued for are situated. While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between a mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank."

Rec. p. 675.

"We do not think that there were any accretions to Dean's Island previous to 1876."

Rec. p. 675.

"It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than, the erosions upon the Tennessee bank,

and therefore there was no room for any accretions to the Arkansas bank. These are the facts clearly established in this record, and to our minds they demonstrate that in 1876 there had been no appreciable change in the banks of Dean's Island since 1823."

Rec. p. 675.

The contentions of the parties were over questions of general law applicable to the conditions that existed. The proof was of those conditions. The findings of the Court were based on the Court's construction of the law as pertaining to those conditions. The findings of the Court on the location of the boundary line between Tennessee and Arkansas were an incident to the findings of the Court in this case, and were rendered necessary only because of the plea in abatement of the plaintiff in error, and because one of the lines of the property owned by the State happened to be the boundary line between the State of Tennessee and Arkansas, and one of the lines of the property claimed by plaintiff in error happened to be the same line.

We submit that this Court has no jurisdiction in this or in any similar case; that the question of the location of the boundary line between the two States is a question to be raised by the States themselves, and cannot be raised by a citizen of another State—certainly not unless both States are parties to the litigation; that the location of the lines of property belonging to a State in a litigation with an individual, because as an incident to the

location of said lines it becomes necessary to locate the line of the State, does not confer jurisdiction upon the Supreme Court of the United States to review the decision of the highest court of the State on the ground that the location of the boundary lines between the States is solely within the jurisdiction of this Court; that the question of riparian rights, of the effect of accretion, avulsion, erosion, etc., in the several States are to be settled by the several States for themselves, and the Courts of the State have jurisdiction of the lands of the State even when the issues raised require the relocation of a boundary line when the adverse claimant is an individual and not another State.

THE WESTERN BOUNDARY LINE OF THE STATE OF TENNESSEE IS A POINT EQUIDISTANT FROM THE PRINCIPAL, WELL DEFINED AND VISIBLE BANKS OF THE MISSISSIPPI RIVER WITHIN WHICH THE WATERS ARE CONFINED AND FLOW AT THEIR ORDINARY AND NATURAL STAGES.

1.

The western boundary of the Colony of North Carolina as defined in the Treaties between Great Britain, France and Spain, made in February, 1763, was a line "drawn along the middle of the Mississippi River."

3rd Jenkinson Treaties, 177.

Also as set forth in Treaty made with Great Britain November 30th, 1782, "thence by a line to be drawn along the middle of said river, Mississippi, until it shall intersect the northernmost part of thirty-one degrees of the Northern Latitude."

Treaties and Conventions between the United States and other Powers since July 4th, 1775. Government Printing Office at Washington, 1889, p. 371.

On February 25th, 1790, North Carolina ceded to the United States that territory which subsequently became the State of Tennessee, describing the western boundary

line of said territory as "the middle of the Mississippi River."

Vol. 1, Am. St. Papers, Pub. Lands, p. 17.

The Code of Tennessee, in describing the western boundary of the State, designated "the middle of the stream of the Mississippi River, including within the State of Tennessee all such islands as are held under grants from the State of Tennessee and North Carolina."

Shannon's Code of Tenn., Sec. 80.

The Treaty of 1763 defining the western boundary line of that territory which later became the State of Tennessee, was construed by this Court as early as 1871. In Missouri v. Kentucky, Mr. Justice Davis said:

> "It is unnecessary for the purposes of this suit, to consider whether on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of an express agreement to the contrary, because the Treaty between France, Spain and England in February, 1763, stipulated that the middle of the river, Mississippi, should be the boundary between British and French Territories on the Continent of North America, and this line established by the only sovereign powers at the time interested in the subject, has remained ever since they settled it."
>
> Mo. v. Ky., 11 Wal. 395.

It was so construed by the Supreme Court of Arkansas more than thirty years ago in the case of Cessill v. The State, 40 Ark. 501.

II.

Arkansas was admitted into the Union on June 23rd, 1836, and its boundary was fixed as "the middle of the main channel of the Mississippi River."

5 U. S. Stats. L. 50, 51.

III.

The State of Tennessee having been first admitted to the Union and its boundary line fixed and determined, Congress had neither the intention nor the power to change its boundary line.

Wash. v. Oreg., 211 U. S. 127.
La. v. Miss., 202 U. S. 40.
Md. v. W. Va., 217 U. S. 41, 43.
State v. Cissna, Rec. p. 354.

Mr. Justice Brewer in the case of Washington v. Oregon above, said:

> "The northern boundary of the State of Oregon was established prior to that of the State of Washington, and it is not within the power of the national government to change that boundary without the consent of Oregon."
>
> Wash. v. Oreg., 211 U. S. 127.

In the case of Louisiana v. Mississippi, Mr. Justice Fuller said:

> "It is enough to say that Congress after the admission of Louisiana could not take away any portion of that State and give it to the State of Mississippi."
> La. v. Miss., 202 U. S. 40.

IV.

The boundary line between Tennessee and Arkansas has always been construed to be the middle of the bed of the Mississippi River equidistant from the visible, well defined and substantially subsisting banks within which the waters are confined and flow at their ordinary and natural stakes, and not the middle of the channel of steamboat navigation. It has always been construed and uniformly adjudicated by the highest courts of the States that the boundary line between the said States is the middle of the Mississippi River, and not the middle of the channel of commerce or navigation. Every court and every authority of both States which has had occasion to consider the subject, has so considered and has acted upon that assumption.

Treaty between Great Britain, France and Spain, Feb. 1763.
3rd Jenkinson's Treaties, 177.
Cessell v. the State, 40 Ark. 501.
Wolf v. The State, 104 Ark. 140.
Foppiano v. Snead, 113 Tenn. 173.

Moss v. Gibbs, 10 Heisk. 283.
Stockley v. Cissna, 119 Tenn. p. 139.
Cissna v. The State, Rec. p. 654.
Morgan v. Reading, 3rd Sm. & Mar. (Miss.) 366.

As early as 1869 Justice Nicholson, in delivering the opinion of the Court in the case of Moss v. Gibbs, above, said:

> "By the Treaty of 1763 between France, Spain and England, the middle of the Mississippi River was made the dividing line between the British and French territories on this continent."

And through his entire opinion it is evident that the phrases "middle of the river" and "middle of the main channel of the river" are used as synonymous terms to designate the center of the bed of the main stream of the river, measuring from one well-defined bank to the other, and not "the channel of navigation."

Moss v. Gibbs, 10 Heisk. 263.

In Foppiano v. Snead, Mr. Justice Neal said:

> "The center of the Mississippi River is the line between Tennessee and Arkansas."

Foppiano v. Snead, 113 Tenn. p. 173.

The ruling of Chief Justice Shields in this cause is in strict accordance with the ruling of the highest courts of Arkansas. In the case of Cessell v. The State, Judge Eakin, speaking for the Court, said:

> "It will be observed that the principle upon which the court proceeded is, that the line of deepest water

in the river bed is the boundary of the State, and continues such as it fluctuates. No question arises in this case upon either of the two qualifications, and the sole matter left for us to decide is this: What is meant by the "Main channel" and what is the middle of it? The channel of a river, bay or sound is, in boatman's parlance, the course over its bed over which the water is deepest, and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow, and which may be at sometimes full and at others nearly if not quite dry. In this sense it is of common use in law. It is the more obvious signification in connection with the boundaries, inasmuch, as it presents something of a permanent nature, or at least at all times visible; and when changed leaving traces of the old landmarks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas, channels in the sense of the river pilot are ever shifting, invisible—discoverable only by patient soundings and then imperfectly. We cannot suppose that such channels would be adopted as state boundaries, or as references to determine them.

"The Mississippi River is full of islands having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within

the State by taking the largest of those water conduits as the true river. The middle of the channel then, must mean the point or line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but is far less so, and to no very inconvenient degree. Gradual attrition on one side, with the accretion on the other, making a change in the permanent banks, might perhaps change the boundary with regard to absolute space. But it is not necessary, for practical purposes, that a boundary should be a fixed mathematical line, and this could only apply to changes in the banks of a channel which remain substantially the same. For if the main body of the water were to find a new channel, and abandon the old one, leaving intervening lands in a natural state, the old boundary would still be ascertainable, and would govern. This has been decided in the case between Kentucky and Missouri (infra) and results, with regard to surveyed lands, from the additional clause above noted, in the constitution of 1874. It seems that the largest channel determines which is the river and the central line that makes the state boundary.

"The boundary line in question is a very old one, and does not concern this State alone. It originated with the treaty between England, France and Spain in February, 1763, which made the middle of the Mississippi River the boundary between British and French territories. This line has been ever since observed in subsequent treaties, in Federal legislation, in state Constitutions and judicial decision, and there are not lacking unmistakable indications of the mean-

ing of the middle of the river. For instance, in the treaty between the United States and Spain, in October, 1795, before our purchase of Louisiana, the fourth article provides 'that the western boundary of the United States, which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi from the northern boundary of said States to the completion of the 31st degree of latitude north of the equator.'

"In the case of Myers v. Perry, et al., 1 La. Ann., which resulted from a steamboat collision on the Mississippi, it became necessary to ascertain the locus in quo as affecting jurisdiction between the States of Louisiana and Mississippi. The middle of the river was taken as the boundary line, without reference to depth of the water. See also, on the same subject, a case very replete with historical learning, that of Morgan & Harris v. Reading, reported in 3 Sm. & Mar. 366, in which this great empire boundary is described, with reference to the treaty of 1763, as a 'line drawn along the middle of the Mississippi.' This would not be a good description of a steamboat track, zigzagging from bank to bank amongst sand bars in low water.

"In the case of Missouri v. Kentucky, 11 Wall. 395, which was a contest between states for the jurisdiction over Wolf Island, in the Mississippi, Mr. Justice Davis said that by virtue of the treaties above named together with the treaty of peace with England in 1873, the ancient right of Virginia, to which Kentucky has succeeded, extended to the middle of the bed of the Mississippi River.

"It seems that where there are several channels, the principal one is considered the river, and in this the medium filum makes the boundary.

"There was only one channel in this case, which was the river bed between Arkansas and Tennessee shores at Osceola. The Court and attorneys treated the case throughout as if the channel meant the line of the deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1874, no question could arise as to change of the channel. The instructions asked by the defense were erroneous, but those given for the State were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendant guilty or innocent accordingly."

Cessill v. State, 40 Ark. 501.

In the case at bar, Judge Shields said:

"We concur fully with the Supreme Court of Arkansas in the construction given the treaties of 1763 and 1783 in that opinion and hold, as held by that Court, that the boundary line between the British possessions in America, which then included all the territory now composing the States bordering upon and having for their western boundary the Mississippi River, and the territory of Louisiana, then belonging to Spain, was fixed and defined as a line

along the middle of the main channel of the river, equidistant from the visible and permanent banks confining its waters, and that the several acts of Congress admitting into the Union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties and must be construed to mean the same thing. This question has not before been before this Court, but in a case involving property rights upon an unnavigable stream called for as a boundary line of private estates it was held that 'the shores, irrespective of the depth of the channel, taking them in the natural and ordinary state of the water, at medium height, neither swollen by freshets nor shrunk by drouths." Barnham v. Turnpike Co., 1 Lea, 706.

"The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating this State from Arkansas is as defined in the case of Cessill v. State, supra. This appears from an act of the General Assembly of the State approved April 15, 1903, Chapter 420, Acts of 1903, in which the lands in controversy and all others lying upon the Tennessee side of the old bed of the river are declared to be the property of the State, and the Governor authorized to appoint Commissioners to act with other Commissioners to be appointed by the State of Arkansas, to run and mark the line, and also to report to the Governar the extent and value of such lands. The General Assembly of

Arkansas passed a similar act, but it was vetoed by the Governor of that State, and therefore no commissioners were appointed under the act passed by the Legislature of Tennessee. This suit was brought by the direction of the Governor of this State, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the Acts of Congress admitting other States bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary lines is effective between them, and controlling in this and other questions involving the question."

Rec. p. 658.

In the case of Morgan v. Reading, in discussing the boundary line between Mississippi and Louisiana, and particularly with reference to the treaty of 1763, Judge Sharkey said:

"France, although not the first to discover, was the first owner by appropriation, of the Mississippi and all the territory of its tributaries. By treaty with Great Britain in 1763, to which Spain was a party, France ceded to Great Britain all her territory east

of the Mississippi and north of the river Iberville, and the two powers fixed the boundary between them 'by a line drawn along the middle of the river, and the Lakes Maurepas and Ponchartrain to the sea.' Great Britain continued to be the power of the ceded territory until the 30th of November, 1782, when, by provisional treaty, she acknowledged the independence of the United States, bounded on the west above the 31st degree of north latitude by a line drawn along the middle of the Mississippi River, corresponding exactly with the boundary in the treaty with France. This provisional treaty with France and Great Britain, and all its provisions, were incorporated in the definitive treaty of peace concluded on the 3rd of September, 1783. Great Britain, at the same time, ceded West Florida, which by that government had been extended to the mouth of the Yazoo to Spain; but as, by the provisional treaty, the southern boundary of the United States had been fixed at the 31st degree of north latitude, Spain acquired nothing above that parallel, as Great Britain had previously control of it. Thus, the United States succeeded to all the territory east of a line drawn along the middle of the Mississippi above the 31st degree of latitude. This left Louisiana bounded on the east by the same line, the middle of the river, above Iberville, as it had been established by the treaty of 1763; and by that boundary it was ceded by France to Spain, and by Spain retroceded to France, and ultimately by France in 1803, to the United States; so

that no variation of this line, up to that time, had taken place. In 1798, whilst this was still the line between the United States and the province of Louisiana, Congress established the Mississippi territory, bounding it on the west 'by the Mississippi.'"

3 Sm. & Marsh., Rep. p. 397.

V.

This Court has many times held that as between the States of the Union long acquiescence in the assumption of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive whatever the international rule may be.

R. I. V. Mass., 4 Howard, 591, 639.
Mo. v. Ky., 11 Wall. 395.
Ind. v. Ky., 136 U. S. 479.
Va. v. Tennessee, 148 U. S. 503.
La. v. Miss., 202 U. S. 54.
Md. v. W. Va., 217 U. S. 1-41-43.

In the case of Rhode Island v. Massachusetts above, Mr. Justice McLean, speaking for the Court, said:

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall within the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim

of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in the case of the disputed boundary."

R. I. v. Mass., 4 Howard, 637.

In Indiana v. Kentucky, Mr. Justice Field said:

"It is a principle of the public law unanimously recognized that long acquiescence in the possession of a territory and the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority."

Ind. v. Ky., 136, U. S. p. 471.

In Virginia v. Tennessee, Mr. Justice Field said:

"A boundary line between states or provinces as between private persons, which has been run and located and made upon the earth, and afterwards acquiesced in by the parties for a long course of years is conclusive."

Va. v. Tenn., 148 U. S. p. 521.

This Court has so construed the law from its organization to this day, and so also declare the text writers on international law.

Vattells on The Law of Nations, 2nd book, Ch. 11, Sec. 149.
Wharton on Int. Law, Pt. 2, Ch. 4, Sec. 164.
Twiss on Int. Law, 137.
Halleck on Int. Law, 50.

The reasons for this rule is given by Vattell:

> "The tranquillity of the people; the safety of states; the happiness of the human race do not allow that possession, empire and other rights of the nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars."

VI.

Where two nations or states have as a common boundary line a navigable river, and the original property is in neither, and there is no convention respecting it, each holds to the middle of the stream.

Washington v. Oregon, 211 U. S. 127-134.
Louisiana v. Mississippi, 202 U. S. 1.
Missouri v. Nebraska, 196 U. S. 23-25.
Nebraska v. Iowa, 143 U. S. 359.
Iowa v. Illinois, 147 U. S. 1.
Handley v. Anthony, 6 Wheat. 374.

VII.

When an avulsion occurs and the river leaves the old bed or channel and makes for itself a new channel wholly within the territory of one state, the rule is that in such case the boundary is in the center of the abandoned bed of the stream, and not the line of steamboat navigation, or the point of deepest water.

Halleck on Int. Law, Sec. 24.
Farnham on Water, Vol. 3, p. 2495.

Wharton's Digest on Int. Law, Vol. 1, Sec. 30.
Opinions of Attorneys General, Vol. 8, p. 177.
Sandar's Justinian, pp. 168, 169.
Missouri v. Kentucky, 11 Wall. 395.
Buttenuth v. St. Louis Bridge Co., 123 Ill. 535.
Nebraska v. Iowa, 143 U. S. 359, 361, 363.
Indiana v. Kentucky, 136 U. S. 47.
Louisiana v. Mississippi, 202 U. S. 1, 49, 51.
Washington v. Oregon, 211 U. S. 134, 135.
Railroad Company v. Clinton, 88 Iowa 188.
Belle Fontaine Improvement Co. v. Neidringhaus, 181 Ill. 426.

VIII.

Hence, where by an avulsion the main channel changes by cutting off a peninsula from one state and forming an island, or the channel changes so that an island which was on one side of the main channel of the river is left on the other side, these work no change of boundary or ownership of the island. The dominion and jurisdiction of a state bounded by a river continues as they existed at the time when it was admitted to the Union, unaffected by the action of the forces of nature upon the course of the river, except such changes as may be made imperceptibly and gradually by accretions and erosions.

Missouri v. Kentucky, 11 Wall. 395.
St. Louis v. Rutz, 138 U. S. 226, 246, 247.
Indiana v. Kentucky, 136 U. S. 479.
Washington v. Oregon, 211 U. S. 127, 134, 135, 136.

Letters of Mr. Frelinghuysen, Secty. of State, to Mr. Romero, Mexican Minister, in regard to islands in the Rio Grande.
Wharton's Digest of Int. Law, Sec. 30, pp. 85 to 94.
Letters of Mr. Bayard, Secty. of State, to Mr. Bowen, June 12th, 1886.

IX.

The rule above announced that the boundary line is the center of the abandoned channel or bed of the river, is further modified by the rule that, as the soil under the Mississippi River east of the western boundary of Tennessee belongs to that State, when as the result of an avulsion the water ceases to flow over it, that which has been lost by submersion as the result of erosion, as well as that which has been gained as the result of accretion, will, when capable of identification, be restored to the original owners.

St. Louis v. Rutz, 138 U. S. 226.
Hardin v. Jordan, 140 U. S. 382.
Gilbert v. Eldridge, 47 Minn. 210.
Stockley v. Cissna, 119 Fed. 831.
Gale v. Kenzie, 80 Ill. 132.
Mulry v. Norton, 100 N. Y. 426; 53 Am. Rep. 215.
Ocean City Assn. v. Shriver, 51 L. R. A. 426, and Note.
Packer v. Bird, 137 U. S. 666.
Chicago v. Ward, 169 Ill. 392, and Note.
Hughes v. Birney, 107 La. 664.
Crandal v. Allen, 118 Mo. 403.

In applying the rule of reliction as between nations, the Court will follow, as it does in the case of erosions, accretions, and avulsions, the rule as applied to individuals.

Rhode Island v. Mass., 12 Pet. 654.
Nebraska v. Iowa, 143 U. S. 361.
Opinions of Attorneys General, Vol. 8, p. 175.

X.

The question of the right of navigation can have no bearing in the decision of the boundary between the States of Arkansas and Tennessee, because the river has at all times been open to navigation under the acts of Congress.

State v. Pulp Company, 119 Tenn. 47, 94.
Handley v. Anthony, 5 Wheat. 374.
Bedford v. U. S., 192 U. S. 225.
Jackson v. U. S., 230 U. S. 1.
Wharton's Digest Int. Law, Sec. 30.
Gould on Waters, Sec. 202.
Treaty between the United States and Great Britain, 1783.
Treaty United States with Spain, 1795.
First Statutes, 464, Ch. 27, 277; Ch. 35, 641; Ch. 21, 662; Ch. 46, 701; Ch. 50, 743; Ch. 95.
Third Statutes, 348, Ch. 23.

The claim of plaintiff in error is based wholly upon the proposition that the doctrine of reliction can have

no application where there is an avulsion. In his former brief on page 26, he said:

> "His whole claim is that while state and property lines or boundaries may be altered by accretion or erosion (being gradual and imperceptible processes or operations) said lines are unaffected by avulsion."

And in the legal proposition laid down by him:

> "The doctrine of reliction only applies when land is uncovered gradually and imperceptibly. It has no reference to the effect of an avulsion."

The position of the State of Tennessee is, that in applying the rule of reliction as between States, the Court will follow, as it does in the case of erosion, accretion and avulsion, the rule as applied to individuals. That in a case where there has first been erosion from one bank, and later an avulsion takes place, the Court will seek to give effect to the rule governing accretion and reliction on the one part, and that governing avulsion on the other, so as to, as far as possible, reconcile them, and not to permit their seeming repugnance to destroy either the one or the other; in other words, to endeavor to so construe both rules as to preserve the true intent of each.

It was upon this theory that the Supreme Court of Tennessee said:

> "These were the rights of the parties that existed at the time of the avulsion, and were fixed and set-

tled by it, and which they had the right to have worked out and adjusted.

"It restored all parties to their original status and does justice to them all. If the result of the avulsion had only affected the waters of the river so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned can not change the rights of the parties. The others interested can not be restored to their own by the forces of nature, and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of the property when the same can be without doubt identified and located."

Rec. p. 684.

And upon the same theory the Court acted in Mulry v. Norton, supra, when it said:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership

temporarily lost will be regained. When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in the case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land, by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Angell Tide Waters, 76, 77; Houch Rivers, p. 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Angell Tide Waters, 77-80, and cases cited."

Mulry v. Norton, 100 N. Y. 426.

The difficulty under which learned counsel for plaintiff in error seems to labor is a failure to differentiate between the old common law rule of England and the different conditions and circumstances which surround our streams. That a riparian owner, under the common law, owning to high water mark, as in Arkansas, or to low water mark, as in Tennessee, which forms his boundary, is subject to the results of erosion, and is entitled to the gain of accretion and reliction is a truism that all are familiar with. It is a rule emanating from England where rivers and other bodies of water are the natural bound-

daries of land, and where as such they enter into the description in all their conveyances, and where the people readily understand the nature of the landed estates conveyed and that the boundaries are as varying and as variable as the streams themselves. This system of boundaries and descriptions differ widely from our system, which is imaginary, parallel, and perpendicular lines forming parallelograms, and fractions of such as occasion may make necessary, that are fixed lines permanently located, and will ever include exactly and definitely the same portion of the earth's surface whether it be wholly on dry land or wholly in water, and which is always susceptible of location and measurement, and always remains the same definite amount of land, in the same definite and fixed location as originally conveyed. Mr. Gould, in his work on Waters, says, "When the line along the shore is clearly and rigidly fixed by a deed or survey, it is not so certain that it will afterwards be changed because of its accretion (and of its erosion), although as a general rule, the right to alluvion passes as a riparian right."

Gould on Waters, p. 313, Sec. 155.

"If the sea swallow land, if the bounds can be ascertained, the owner may have them again if they are subsequently left dry or are regained by him, and if the former extent of the land can be known, it shall be returned to the owner."

Hale, De Jure Maris, Ch. 4; 2 Rolle, Abr. 168.

It is conceded here that the Humphrey's map correctly shows the river as it existed in 1823 to 1836, and that the western boundary of the State of Tennessee extended to the middle of the main channel of the river at that time. It is further conceded that *"all the property mentioned and described in the bill, in the year* 1823, *was on the Tennessee side of the middle of the Mississippi River, as it then ran."*

Plea in Abatement of Cissna, Rec. p. 400.

It is further conceded *"that following the description given in the bill at the said time, to-wit,* 1874, *and running the line as described in the bill, the result would be that the southwest corner of said land would be on the Tennessee bank of the Mississippi River, and the northwest corner of the said land would be on the Tennessee bank of the Mississippi River."*

Plea in Abatement of Cissna, Rec. p. 400.

But says the plaintiff in error *"from the year* 1874 *until the year* 1876 *erosions were continuously, gradually, slowly and imperceptibly made into the Tennessee shore, and accretions gradually, slowly and imperceptibly formed to the Arkansas shore, until what appears on Exhibit C as the west boundary of the land in controversy had become practically the middle of the river in* 1876."

The Supreme Court of Tennessee decided that there were no accretions to Dean's Island between 1823 and 1876; this finding is upon controverted facts and is bind-

ing on this Court. What then has plaintiff in error lost and for what is he contending? Under the laws of Arkansas his title extends only to high water mark; he has lost nothing by erosion, gained nothing by accretion and is not interested in the property here involved. Applying the most strict construction of the law against the State of Tennessee and the most favorable construction to the Arkansas line plaintiff is at most a mere trespasser against the State holding the property of one state or the other, cutting and removing the timber and enjoying all the benefits of ownership.

The case is an unusual one, embracing as it does different conditions existing at different times, but all in one and the same locality. First there was erosion from the Tennessee shore and a temporary loss to the owner of the part of their land which was covered by water. Later an avulsion and a gradual return by reliction of the lands which had been submerged. It must be borne in mind that the laws of alluvian, accretion, erosion, avulsion and reliction are founded on principles of natural justice. It would be difficult to find any grounds consistent with justice that would deprive the owners of the Tennessee grants of their land because the same had been lost to them for a time through the action of the waters or that would deprive the State of Tennessee of its part of the bed of the river when it made a new bed and give the same to a riparian owner of an island in Arkansas. What has happened to cause the defendant in error to lose its

property? or its citizens to lose their property? When the Mississippi River left its old bed and made a new channel for itself, the boundary line between the States of Arkansas and Tennessee and the property lines of those individuals in each State owning the property bordering upon the river which had theretofore been subject to the actions of the water became fixed, that is, permanent and stationary, and the Supreme Court of Tennessee in locating the lines of the States and of individuals sought as far as possible to so construe the two rules—the one governing an avulsion, and the other accretion and reliction—as to preserve the true intent and meaning of each. The original owners of the property, the surface of which had been temporarily washed away, were entitled to their property on its reappearance, the States of Arkansas and Tennessee to theirs. In this way the intent of both rules were preserved and even and exact justice done to all. An avulsion does not make property lines. The lines are there and were made by covenant, treaty, compact or grant, subject to change it is true, because of erosions and accretions so long as the stream remains the boundary line. When by avulsion the stream changes its course and the old bed is abandoned, it is said the lines become fixed, and so they do. They become fixed because they are no longer subject to change by the action of the waters; still they must be located, and when located and marked the location is permanent and not subject as before to the action of the waters. Through an avulsion lines which theretofore were not permanent, become per-

manent, when located, and in locating the lines, we submit, it is proper to apply the rule of reliction and restoration to that property which has been lost to its owners by erosion.

The case of Fowler v. Wood, (Kan.) 6 L. R. A. (N. S.) 162, cited by plaintiff in error, is the only case cited which is in any way similar to the case at bar.

This case arose through an action of ejectment and partition in the District Court of Kansas. In 1857 the United States patented to Silas Armstrong an irregular tract of land lying in the fork of the Missouri and Kansas Rivers, north of Turkey Creek, containing some 274.7 acres. By purchase and descent various parties acquired undivided interests in the land. In January, 1867, an action was brought to partition it. In April, 1867, the court ordered that a survey be made to ascertain the quantity of land to be partitioned, and a decree of partition was entered; in September, 1867, the Commission appointed to partition the land made their report, in which they said that in April, 1867, a survey had shown 208.4 acres; that in July a second survey showed only 200 acres; allotments were made accordingly. Subsequent to the partition the Missouri River continued to encroach on the property until in 1868, when an agreement was made with one Joy to riprap the bank; work was completed by Joy in the fall of 1868, and as consideration for his work Joy was deeded the entire Missouri

River frontage from the mouth of the Kansas River to the State line. Later the title of the various riparian owners to whom had been given lots passed to the Fowler Land Association and others. From 1868 to 1889 the deep water channel of the Missouri River lay next to the riprap bank, and large business enterprises requiring access to the water were established there. About 1889 the main current was diverted to the Missouri side of the stream, the old channel filled up and the riprap bank was separated from the river by a wide stretch of land many acres in extent. The suit arose over the land lying north of what was known as the Miller survey, and where the river ran in 1889. The plaintiffs claimed their respective parts of the lands that had been submerged by erosion and avulsion prior to the partition. The defendants claimed that the complainants had no interest in the land restored and were estopped from claiming that all the lands had not been partitioned, and were estopped from claiming that the partition allotments followed the recession of their movable boundary. Upon trial the plaintiffs and their cotenants were restored to their property. This case involved the consideration of erosion, avulsion, reliction and accretion all in one locality, and is, therefore, to that extent parallel with the case at bar.

Certain questions were submitted to the jury, and it found:

1. That the Armstrong grant in 1856 contained 274.7 acres.

2. That when the partition proceeding was commenced in 1867 it contained only 250 acres.

3. That a new channel was cut through the land in controversy by the high waters of the river in 1867.

4. That the land was suddenly and perceptibly submerged by the violent rise of the river in that year.

5. That the ice gorge of that year caused the river to cut a new channel and to wash away the bank.

6. That in 1865 to 1866 the Missouri River began to wash away the bank forming the border of the Armstrong grant, and in 1866 to 1867 the land caved into the river and washed away quite rapidly.

7. That, as distinguished from that process, a portion of the land was cut off by the channel of 1867, and left lying to the north of it in an island.

8. That the high water continued during the entire season of 1867 and that during that time the island was entirely submerged, and the top of it scoured and washed away, and that it did not reappear until very low water next year, and then in a new formation of sand and soil.

9. That a portion of the land in controversy was formed by accretion to the island.

Discussing the findings of the jury in this cause the Court said they "require consideration in the light of the legal doctrines of avulsion, submergence, and reappearance, and accretion, and reliction to determine the rights of the parties to the suit."

In deciding this cause, the Court said: "Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206, is a leading case upon this subject," and quotes largely from the syllabus thereof, also quoting largely from the case of Morris v. Brooks, Del. Common Pleas, July, 1815, reported in 53 Am. Rep. p. 215, in which Judge Wilson said, "The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the little Tinicum was destroyed by the winds and the waves, and it was consequently overflowed by the waters of the river, yet the owner did not lose the property of the remaining land covered by the water. If it was regained either by natural or artificial means it continued to belong to the original owner," also to the case of Hughes v. Birney, 107 La. 664, where the court said: "If after submergence, the water disappears from the land either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity or boundary lines, the proprietorship returns to the original owner." The court held that the lands lost by erosion and avulsion were restored to the plaintiffs by reliction and accretion, citing and approving Mulry v. Norton and Morris v. Brooke, supra. In this case the Court, while adhering to the general rule of accretion, erosion, reliction and avulsion, decided the cause in a roundabout way on equitable principles, and returned to the original

owners the land that had been lost by erosion and avulsion and restored by reliction and accretion, citing among other writers the statement from Farnham on Water, Vol. 3, Sec. 848, where the author said: "The title to the land itself is of more importance that the riparian right of access to the water or convenience of having a natural, rather than a mathematical boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its owner," and says, "If, through some catastrophe, the river makes its bed upon private land, the burden should fall as lightly upon the owner as possible. It is sufficient for the State that control be retained over the stream for the preservation of its public highway character. More than this, the State ought not to take. Whatever the riparian owner lost should not be withheld when the water recedes and the need of public supervision is at an end. Whether originally he had or had not, some land under water can not affect his rights."

THE LINE OF 1823 TO 1836, AS SHOWN BY HUMPHREYS' MAP, IS THE WESTERN BOUNDARY LINE OF THE STATE OF TENNESSEE. IT IS THE ONLY KNOWN LINE AND THE ONLY LINE SUSCEPTIBLE OF LOCATION.

"The correctness of the survey of Maj. Humphreys is not seriously controverted in this record, and we do not think it could be. It was evidently made in

a careful manner, and is accurate and correct. The defendant Cissna concedes in his plea that this was the situation in 1823."

119 Tenn. p. 112. Rec. p. 673.

An examination of the dates of the grants along the river front as shown by Humphreys' map will disclose the fact that the line generally referred to as the line of 1823 is in reality the line of 1836 and 1837.

Grantee, No. of Acres, Date of Grant, Date of Survey and Record Page:

John Trigg, 151 1/3 Acres; Sept. 5, 1836; Oct. 14, 1837; page 216.

John Trigg, 152 Acres; Sept. 5, 1836; Oct. 14, 1837; page 214.

John Trigg, 37 Acres; Sept. 5, 1836; Oct., 1837; page 219.

S. Huddleston, 2,000 Acres; July 2, 1822; Dec. 19, 1823; page 237.

G. B. Bateman, 155 Acres; Dec. 23, 1834; Mar. 7, 1836; page 251.

G. B. Bateman, 256 Acres; 1836; Feb. 2, 1837; page 253.

John Trigg, 253 Acres; Sept. 1, 1836; page 256.

All of the grants, except the Huddleston grant of two thousand acres, and the G. B. Bateman grant of 155 acres, were made in 1836, and several of them were actually surveyed in 1837, so, therefore, it was impossible for any change to have taken place in the banks of the river be-

tween 1823 and 1836, because the actual lines were surveyed in 1836.

There were some changes in the river between 1836 and 1876; it had increased in width to a considerable extent to the south of Dean's Island and to some extent to the west (where the property in controversy is located).

> "When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, much more immediately south of that island than west of it where the premises sued for are situated."
>
> Rec. pp. 674, 675.

There were no accretions to Dean's Island between 1836 and 1876. The Court said:

> "We do not think that there were any accretions to Dean's Island previous to 1876. This is also clearly established by the evidence of witnesses who were living in the neighborhood and navigated the river immediately preceding the cut-off, and were thoroughly familiar with the situation at it then existed."
>
> 119 Tenn. pp. 115 and 116; Rec. p. 675.

Also:

> "It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than the erosion upon the Tennessee bank, and therefore there was no room for any accretion to the Arkansas bank. These are facts clearly established in this record."
>
> 119 Tenn. p. 116; Rec. p. 675.

As to the chart or map made by Col. Suter, the Court said:

> "The chart is not the result of careful survey of the river and its banks, but, in the main, from an inspection of it made from the deck of a steamboat. It was a mere steamboat reconnoissance."
>
> 119 Tenn. pp. 116 and 117; Rec. p. 676.

And of the testimony introduced by plaintiff in error, to show accretion to Dean's Island, it said:

> "The testimony of all these witnesses is largely conjectural and speculative, and of that character that can only be relied upon in the absence of better testimony and from the necessity of the case."
>
> 119 Tenn. p. 119; Rec. p. 677.

An effort was made by plaintiff in error to show that there was an elevation along the old river bed, considerably west of the original Dean's Island bank, which they called the bank of 1876. Of this testimony the Court said:

> "This is mere speculation upon the part of these witnesses. They did not reside in the neighborhood previous to 1876, and they know nothing of the condition of things as they existed. The witnesses examined in the case, old men who lived in the neighborhood all their lives, and are familiar with the country and with the effects of freshets in the Mississippi River, say that there is no such bank."
>
> 119 Tenn. p. 121; Rec. p. 678.

These facts were decided by the Court on controverted testimony:

1st—The line of 1823, as shown by the Humphreys' map, is the correct line between the States on that date.

2nd—The line of 1823 and 1830 are the same.

3rd—There was no change in the line between 1823 and 1836.

4th—Between 1836 and 1876 there had been some erosion from the Tennessee shore at the point where this property is located.

5th—But there had been no accretion to Dean's Island.

6th—And the bank of 1876 is a mythical bank and never existed.

7th—The Suter chart or map is not accurate. It was a mere steamboat reconnoisance taken from the deck of a boat in passing and is not entitled to very great weight.

We respectfully submit to the Court that even should this Court hold:

1st—That it has jurisdiction of this cause, and

2nd—That the doctrine of reliction applies only where there has been erosion and accretion and has no application in the case of an avulsion, and

3rd—That there had been erosion from the Tennessee shore between 1836 and 1876, the date of the avulsion, to the west of Dean's Island.

Still in this case, the line of 1823 to 1836, having been located, established and admitted by plaintiff in error, and the Court being unable from the record to locate the bank lines of 1876, just preceding the avulsion, it was the duty of the Court to adopt as the boundary line, the line of 1823 to 1836, which is the only known and established line between the States at this point. The presumption is in favor of the permanency of boundary lines, and the burden was on plaintiff in error not only to establish that the line had changed but to establish its location definitely and certainly at the date of the avulsion; failing in this, that line, the location of which is known, must prevail.

The location of boundary lines are not to be guessed at; they may be changed or relocated by consent of the States with the assent of the United States, but they cannot be changed by the decree of any Court.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.

JOHN P. BULLINGTON,
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Office Supreme Court, U. S.
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JAMES D. MAHER
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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1917

W. A. CISSNA, Plaintiff in Error,

vs.

STATE OF TENNESSEE, Defendant in Error

REPLY BRIEF FOR PLAINTIFF IN ERROR

CARUTHERS EWING,
Solicitor for Plaintiff in Error

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In the Supreme Court of the United States

OCTOBER TERM, 1917.

W. A. CISSNA, Plaintiff in Error,

vs.

STATE OF TENNESSEE, Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In view of the position taken by the State of Tennessee in the brief and argument recently filed herein and the denial of the jurisdiction of this Court (the matter of jurisdiction was not discussed in the original brief filed by plaintiff), it is deemed proper to state in more succinct form than has been done for the defendant-in-error the history of this particular suit, following the termination of the litigation between private individuals over the property involved in this controversy.

Stockley v. *Cissna*, 119 Fed. 812.

On December 15, 1903 (Rec. 398), the State of Tennessee sued the Muncie Pulp Co. and others (among the defendants being plaintiff-in-error here) and charged that prior to March, 1876, "the Mississippi river flowed between Arkansas and Tennessee and on the west boundary of Tipton county" and that "the middle of the Mississippi river as *it then flowed* constitutes the boundary line between the States of Arkansas and Tennessee" (Rec 394).

It was then averred that in March, 1876, the avulsion known as "Centennial Cut-Off" took place and that Tennessee owned "that part of the bed of the river lying *between the low water mark* on the Tennessee side and *the center of said river as it flowed* prior to the cut-off in 1876." (Rec. 394.)

It was charged that the defendant Cissna, without right or authority, had taken possession of the lands mentioned in the bill, had sold timber therefrom, and the prayer of the bill was to have Tennessee declared to be the owner of the land, and a decree for the value of the timber taken therefrom was sought.

Rec. 394-397.

When the bill was filed W. A. Cissna lived in Chicago (Rec. 393) and claimed to be the owner of Dean's Island and accretions thereto. (Rec. 595.)

Subpoena to answer issued and was returned December 30, 1903, not served on W. A. Cissna (Rec 391). However, on January 3, 1904, W. A. Cissna pleaded in abatement to the State's suit, that the land in controversy was in Arkansas, disclaimed any interest in any land that was on the Tennessee side of the boundary line between the States, and that the Tennessee Court was without jurisdiction of the subject matter.

Rec. 400-402.

Nothing of importance was done in the case thereafter until January, 1905, when the State of Tennessee filed a

petition in the Chancery Court, wherein the action had been instituted (Tipton County), seeking the removal of the case to the Chancery Court of Shelby County, where all interested counsel resided. In that petition it was said:

> *"In this cause the boundary lines between the States of Arkansas and Tennessee will necessarily have to be adjudicated."* Rec. 416.

All parties joined in the request that the case be removed to the Shelby County Chancery Court (Rec. 418) and on January 11, 1905, the case was so removed. (Rec. 419-420.)

The first proof taken by the State was in January, 1905, and proof-taking continued from time to time, at the convenience of counsel, without the case being heard on the plea in abatement. So it was that on March 25, 1905, to expedite a final hearing, the parties agreed that an answer might be filed without waiving the plea in abatement (Rec. 639), and, accordingly, on March 30, 1905, W. A. Cissna answered the bill, reaffirming that the land in controversy was not in Tennessee, and that defendant only claimed that land which was known as Dean's Island and accretions thereto. Rec. 643.

On March 31st, 1905, the case was heard by the Chancellor and the plea in abatement was sustained and the suit dismissed. From this decree there was an appeal to the April term, 1905, of the Supreme Court of Tennessee. Rec. 646.

The case was heard by the Supreme Court of Tennessee at its April term, 1905, and not determined in 1905, nor in 1906, nor at the April term, 1907, but at a special term held in September, 1907.

Rec. 647, bottom of page.

The Supreme Court reversed the Chancellor and held that the effect of the avulsion was *to press back the line* to where the river ran prior to the cut-off of 1876, but as no pleading justified a recovery on this theory the case was remanded with leave to the State to amend its bill so as to make a claim in accordance with the conclusions of the Supreme Court. Rec. 683.

An amended bill was filed, but was lost or mislaid (Rec. 687) and was supplied on March 4th, 1910.

This amended bill was not directed against W. A. Cissna, but set out that H. W. Stockley had sued W. A. Cissna, claiming the land in controversy, and it was with respect to Stockley's claim that the amendment was filed. (Rec. 763.)

The amendment which was in conformity to the suggestions of the Supreme Court was not filed until April 29th, 1910, so the record shows. Then the claim was made that the State was "suing to recover to the center of the channel of the Mississippi river in 1823."

Rec. 838.

(It is obvious that this amendment was treated as filed prior to March 16th, 1910, and the date of filing was erroneously marked thereon, because W. A. Cissna answered the amended bill on March 16th, 1910. Rec. 840).

W. A. Cissna, replying to the original and amended bills, insisted that the boundary line between Tennessee and Arkansas was according as the river ran in 1876 just prior to the avulsion; he disclaimed owning or claiming to own any land in Tennessee; he asserted "ownership only to that property lying on the Arkansas side of the Mississippi river and being within the boundary line and jurisdiction of the State of Arkansas."

Rec. 840-841.

W. A. Cissna further challenged the jurisdiction of the Court, (it was understood by all parties and so later stated time and again by the Supreme Court that the case involved the location of the boundary line between Arkansas and Tennessee and involved nothing else), and submitted that "this proceeding should have been brought and can only be maintained, in so far as it determines or undertakes to determine the boundary line between the States of Tennessee and Arkansas in the Supreme Court of the United States and in an action to which the said States are parties."

Rec. 841.

Defendant further set up and pleaded Section 2, Article 3 of the Constitution of the United States as depriv-

ing the Tennessee Court of jurisdiction to determine that which was admittedly a boundary line question and other incidental matters were set up.

Rec. 841-843.

On February 27, 1911, while the cause was still pending in the Chancery Court on remand, W. A. Cissna, by petition, brought to the Court's attention that on February 20th, 1911, the Supreme Court of the United States had granted the application of the State of Arkansas to file a bill against the State of Tennessee and have the matter of this boundary line settled. The position was taken by Mr. Cissna that the Supreme Court of the United States had taken jurisdiction of this very matter and that its judgment would control; that no judgment pronounced by the Supreme Court of Tennessee on the subject would be binding or effective.

Rec. 853-855.

On March 2nd, 1911, the Chancellor entered a decree in conformity with the opinion of the Supreme Court and directed a reference to the Clerk and Master to take proof and report as to the timber taken from the land and the value thereof.

Rec. 916-920.

At that time the petition of Cissna for a stay of proceedings, as above shown, was before the Court and in the order of reference, (which was not a final decree),

"the Court reserved all other questions until the coming in of the report."

Rec. 919.

On March 13, 1911, Tennessee demurred to and answered the petition to suspend and insisted that the State was entitled to have the case "proceeded with according to the usual practice of this Court, to the end that justice may neither be denied nor delayed."

Rec. 921-922.

The parties agreed that the reference which had been ordered by the Chancellor could not be executed prior to the meeting of the Supreme Court of Tennessee, on the first Monday in April, 1911, (Rec. 925), so, on March 14th, 1911, the Chancellor disallowed the petition to stay proceedings and filed (March 17th, 1911) a memo. opinion on the merits, adverting to the inconsistency in the opinion of the Supreme Court of Tennessee.

Rec. 926-927.

In the decree which was entered by the Chancellor he recited that he was bound by the opinion of the Supreme Court and was "not at liberty by reason of any proof in the cause or by reason of a different view of the law applicable to the facts of the case, to disregard, change or modify such adjudication but that it is the duty of the Court to decree in accordance therewith."

Rec. 916.

The case was heard by the Supreme Court of Tennes-

see at the April term, 1912, and the Court then held that, without regard to alleged inconsistency in its former opinion and the new evidence offered on the trial had in obedience to the order of remand, "the former opinion is the law of the case and determines the rights of the parties to the property in controversy."

Rec. 929.

This statement was made in the memo. opinion handed down by Judge Lansden.

The decree of the Supreme Court was:

> "That the boundary line between the State of Tennessee and the State of Arkansas, is that line which is equidistant from the defined banks of the Mississippi river as it *run* in 1823, so that the land sued for in this cause is within the State of Tennessee and the County of Tipton, and that the complainant State of Tennessee is entitled to recover of the defendant, W. A. Cissna, and the other defendants in this cause the said lands which are more particularly described as follows:"

Rec. 931.

In accordance with this holding there was a reference ordered to ascertain those facts which would have been ascertained by the Court below on a reference to the Clerk and Master but for the agreement of the parties transferring the case to the Supreme Court. The reference was not immediately executed because of an agreement between the parties (Rec. 927) and the case came on for

final hearing before the Supreme Court of Tennessee at its April term, 1914.

At this time W. A. Cissna filed exceptions to the report and insisted that the very question involved was before the Supreme Court of the United States and that it was the only court which could settle the question of the boundary line; "that the decision of said court will be final and conclusive on all parties; that after the submission of said case to the only court having jurisdiction of the subject matter and while said Honorable Court is considering said case no steps or proceedings shall be had in the present case; that this case should be stayed until it is settled and determined by the Supreme Court of the United States where the line between Tennessee and Arkansas is to be located, because the determination by this Court not in accord with the determination of the Supreme Court of the United States is void and would be in conflict with the decision of the Supreme Court of the United States."

Rec. 941.

The Tennessee Supreme Court held that it would not stay the proceedings and rendered judgment accordingly.

Rec. 943.

The foregoing is an exact and accurate statement of the course of the litigation.

Thereon it is submitted that this Court has jurisdic-

tion to review the final judgment rendered by the Supreme Court of Tennessee.

In the argument for Tennessee, in this Court, it is said, at page 38:

> "The boundary line between the States of Tennessee and Arkansas is not involved."

In a pleading filed in the case at its inception, on January 16th, 1905, defendant-in-error said:

> "In this cause the boundary lines between the States of Arkansas and Tennessee will necessarily have to be adjudicated."

Rec. 416.

In a pleading seasonably filed by W. A. Cissna it was said that "the question here involved is solely and exclusively the settlement of the boundary line between the State of Tennessee and the State of Arkansas."

Rec. 841.

So that below it was claimed by both parties that the sole question involved was the location of the boundary line between Tennessee and Arkansas and the Supreme Court of the State of Tennessee said that the right of Tennessee to recover depended on "the location of the boundary line between Tennessee and Arkansas."

Rec. 648.

The said Court further observed that the question presented was "an important question affecting the States of Tennessee and Arkansas in their sovereign capacity

and their jurisdiction along this entire joint boundary line." Rec. 654.

The same Court further said: "The question involved is the location of a boundary line.

Rec. 687.

So this Court has before it a litigant, to-wit, the State of Tennessee, asserting in a judicial proceeding and thereon invoking judicial action, that "the boundary line between the States of Arkansas and Tennessee will necessarily have to be adjudicated;" the other party to the lawsuit, to-wit, W. A. Cissna, agreeing that the question involved was the location of the boundary line; the Supreme Court of Tennessee, which finally determined the cause, saying that the question involved was "the location of the boundary line between Tennessee and Arkansas."

We now have the State of Tennessee in this Court asserting that "the boundary line between the States of Arkansas and Tennessee is not involved."

It is not permissible that in one forum a litigant may assert and claim that a certain question is involved, with the other party agreeing to that contention and with the case being tried on that theory, and the same litigant be heard to say in a reviewing court that what it asserted below was untrue; that what the Court which rendered final judgment said about the case was untrue. Courts do not look with favor on utterly inconsistent statements by the same litigant in the same proceeding. And it might

be added that preliminary to the discussion of the questions which resulted in the decree sought to be reviewed the Tennessee Court said:

> "We are now to determine where the line between Tennessee and Arkansas should be located at the place where the lands sued for lie and are bounded by it."
>
> Rec. 673.

Yet we are now gravely informed, for the first time, that "the boundary line between the States of Arkansas and Tennessee is not involved!"

In the brief filed by the writer, as attorney for Mr. Cissna, when this case was originally before the Supreme Court of Tennessee, in 1905, the contention that the Tennessee Court could not settle the boundary line between the states was made:

> "It is wholly unlikely that Arkansas or its courts would accept any decision settling the boundary line in this cause. The defendants are non-residents and would look to Arkansas for protection."
>
> "The State of Tennessee can go into the Supreme Court of the United States and have the line between it and the State of Arkansas definitely and forever settled, and there can then be no unseemly conflict between the two States."

If this case involves the location of the boundary line between Tennessee and Arkansas, as Tennessee has, on the record, asserted, and as the Tennessee Court time and again declared, making the location of the line the basis

of the very judgment sought to be reviewed, it would seem to follow that the Tennessee Court had no jurisdiction of the question because that Court was without authority to fix the said boundary line.

The Tennessee Court, accepting the insistence of the defendant-in-error, said that the determination of Tennessee's title to the property in question and her right to recover a money judgment involved the fixing of the boundary line between Tennessee and Arkansas. (Rec. 648, 654, 673, 678.)

Submitting, without elaboration, that the Tennessee Court had no jurisdiction of the question (invoking the judgment of this Court, however, on that proposition) it is confidently claimed that this is a case peculiarly within the jurisdiction of this Court.

It is not unworthy of mention that Tennessee's learned counsel fully understand that this suit was instituted because Tennessee had otherwise failed to have this disputed boundary-line question settled. At page 29 they advert to the passage by the Tennessee Legislature, on April 13th, 1903, of an act, copied in their brief, which they say was "to avoid a possible controversy with its sister State over this particular property and this particular boundary line."

It is said, however, at page 43, that "there was no contest between Tennessee and Arkansas over the boundary

line," and, at page 44, that there was "perfect accord between the States themselves."

They explain, at page 29 of their brief that the failure of the legislative effort to locate this line by agreement of the States made it necessary for Tennessee to institute this action.

The plaintiff-in-error, therefore, is entitled to treat this as a suit which involves only one question, to-wit, the location of the boundary line between Tennessee and Arkansas. Not only was that the sole question which the parties understood and asserted was involved, but it was the sole question which the Tennessee Court discussed and decided.

This involved, too, the determination of rights which plaintiff-in-error asserted were based on statutes of and authority exercised under the laws of the United States.

Not only was it shown by the undisputed evidence of W. A. Cissna that he owned Dean's Island, in the State of Arkansas (Rec. 595), but the original patents issued by the United States to Robert C. Dean and others, through whom title was deraigned, were exhibited.

Rec. 721-738.

These were the grants called for by the counsel for the State of Tennessee (Rec. 695) and they show that Mr. Cissna's title was deraigned from the United States Government according to the provisions of an act of Congress of April 24th, 1820, which fact is recited in each convey-

ance. Every conveyance was executed on behalf of the United States by the President and countersigned by the Recorder of the General Land Office.

W. A. Cissna, claiming only to own land in Arkansas and deraigning title to that land under grants from the United States Government, and certainly claiming a right, title, privilege or immunity under a statute of or authority exercised under the laws of the United States and the decision of the Supreme Court of Tennessee being against the title, right, privilege or immunity, this cause comes within the letter and the spirit of the laws governing the jurisdiction of this Court.

It is indisputably true that the decision of the boundary line between Arkansas and Tennessee would be necessary to the judgment or decree rendered in this cause; it is indisputably true that plaintiff-in-error defended solely on the ground that under Federal legislation fixing the boundary line between the two States the land in controversy was not subject to the jurisdiction of the Tennessee Court.

If there had been no controversy as to the effect of the acts of Congress admitting the two States into the Union, in so far as it relates to the designation of a boundary line, that is, if the location of the property on the one side or the other of an admitted line had been the question before the Supreme Court of Tennessee, then a different question might possibly have arisen. The controversy

waged about the construction of the acts of Congress admitting the two States into the Union and the legal effect on the boundary line, as fixed by Congress, of the cut-off that admittedly took place.

The location of the boundary line between the two States was not an issue of fact but one of law dependent upon the proper construction of the acts of Congress admitting the two States into the Union and further dependent upon whether the line thus fixed ran where it indisputably was immediately previous to the avulsion or was thereby changed.

Construing the Act of June 1st, 1796, 1 St. 491, c. 47, by which Tennessee was admitted into the Union, in connection with the Act of June 15th, 1836, 5 St. 50, c. 100, the Tennessee Court held that the middle of the main channel of the river was the boundary line and, dealing with the effect of the avulsion of 1876 on that line, held that it was materially affected thereby and "pressed back" from its location in 1876 to where it was in 1823.

Not only did the determination of this question involve a matter peculiarly of Federal cognizance, but as a result of the pressing back process the plaintiff-in-error was denied rights and privileges which he derived from the United States Government, and, by virtue of his claim based on rights derived from the United States Government, the decision was essentially against the asserted right.

When properly understood, this Court has jurisdiction of the case, according to the statement of that which confers jurisdiction as made by the learned counsel for the defendant-in-error.

In the brief for the State of Tennessee it is said, at page 29, that defendant-in-error, in the suit of *Stockley* v *Cissna* (a lawsuit which ante-dated the instant case) "solemnly admitted in open court that the land here involved was within the jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee and within the State of Tennessee, and through said admission, he secured a verdict in said Court."

Such is not the fact.

The learned counsel who now make the statement that in a previous lawsuit plaintiff-in-error "solemnly admitted in open court that the land here involved" was in Tennessee is the same counsel who wrote the brief which was filed in this case on the first hearing and at pages 3 and 4 of that brief stated the facts and also correctly stated the facts in this behalf at page 6 of the brief now filed.

To plaintiff's declaration in that action W. A. Cissna pleaded in abatement that the lands described in the declaration were in the State of Arkansas.

Rec. 8.

On that issue oral evidence was introduced before the jury and, believing that the plaintiff had failed to show title in himself, Mr. Cissna withdrew his plea in abatement and admitted "that *a small part* of the land sued on is in the State of Tennessee and that this Court for that reason has jurisdiction of a part of the subject matter of this suit." Rec. 16.

It was doubtless the view of counsel in that case that a trifling and insignificant part of the land was within the territorial limits of Tennessee and that it was immaterial to the matter presented to the Court, (the right to a directed verdict), whether any or all of the land was in Tennessee. The Court sustained the motion of the defendant for a directed verdict (Rec. 16) and on appeal the action of the trial judge was affirmed.

Rec. 337-361.

It is said, however, that the finding of fact, by the Supreme Court of Tennessee, that there had been no accretions to Dean's Island, is of some importance.

In this connection it is said that in Arkansas title of the individual only extends to high water mark and that plaintiff in error does not own the lands.

In the first place, that is a matter between the plaintiff in error and the State of Arkansas. In the second place, the State of Tennessee, in this action, has recovered a money judgment largely in excess of $100,000.00 against

the plaintiff in error, based on the theory that Tennessee owns this land. This being an action of ejectment and to recover the value of timber removed from certain land, it is a complete defense that the State of Tennessee is utterly without title. It is wholly immaterial whether Arkansas or plaintiff in error has title to the land in controversy. The State of Tennessee must recover on its own title.

The failure of this Court to take jurisdiction of the case would result in an anomalous situation. Undoubtedly this Court will fix the boundary line between the States of Arkansas and Tennessee in the suit here pending to accomplish that result. If the boundary line is fixed in accordance with the opinion of the Supreme Court of Tennessee in this cause, then the judgment here sought to be reviewed is a correct judgment. If, on the contrary, this Court should hold that the land, or any part of it, involved in this controversy is in the State of Arkansas, then the State of Tennessee will have a decree that it is the owner of certain land that, of course, it does not own and the plaintiff in error will be made to pay the State of Tennessee for timber to which the State of Tennessee never had title.

In other words, Tennessee is in this court and cause insisting that even if plaintiff in error took none of its timber, still it wants a judgment for that which it did not own and, therefore, wants a recovery to which it is not legally or morally entitled.

I do not deem it necessary to elaborately discuss the location of the boundary line in this proceeding. That matter will be determined by this Court in the case of *Arkansas* v. *Tennessee*.

I will advert to the claim at page 72 of the brief for the defendant in error, as follows:

> "First there was erosion from the Tennessee shore and a temporary loss to the owner of the part of their land which was covered by water. Later an avulsion and a gradual return by reliction of the lands which had been submerged."

The above means that it is insisted for the State of Tennessee that an alleged "reliction," resulting from an avulsion, restored land which had been lost by the gradual and imperceptible erosive effect of the river. Every avulsion which results in the diversion of a water course, would, of course, produce the same sort of "reliction."

Undoubtedly Tennessee owned that part of the river bed within its territorial limits from which the water receded as the result of the avulsion. To be of service to the defendant in error, the proposition must be carried further. It must go to the extent that the withdrawal of the water, as the result of the evulsion, enlarged the territorial limits of the State of Tennessee and consequently correspondingly diminished the territorial limits of the State of Arkansas.

It is said at page 65 that "when as the result of an avul-

sion the water ceases to flow over it, that which has been lost by submersion as the result of erosion, as well as that which has been gained as the result of accretion, will, when capable of identification, be restored to the original owners."

The Court is asked to examine the above in the light of the facts of this case and thereby test its soundness. As Tennessee lost territory by the erosive effect of the water thereon, its territorial limits were to that extent diminished. Assuming that there were no accretions to the Arkansas shore, it must be true that if the river widened on account of the erosion of the Tennessee bank, Arkansas gained in territorial extent because it seems to be admitted that the boundary line followed the gradual and impereceptible shiftings of the middle of the river. If "as the result of an avulsion" the water receded, then either the boundary line was left in the center of the abandoned channel or the boundary line was changed by the avulsion. It would necessarily be changed if it was "pressed back" so as to increase the territorial limits of Tennessee. Here again is it necessarily true that to maintain the proposition advanced for defendant in error it is necessary to hold that the avulsion altered the boundary line between the states, whereas, just the reverse is well settled law.

I will not here repeat the argument made in the case of *Arkansas* v. *Tennessee*, that the boundary line between the two States is the middle of the main or naviga-

ble channel of the Mississippi river as it existed just before the "cut-off" and that by "middle of the river" is meant the middle of the river at low water. By so defining the "middle of the river" the Court will approve the rule laid down in the following cases:

Hendley's Lessee v. Anthony, 5 Wheat. 375.
Iowa v. Illinois, 147 U. S. 1.
Lamb v. Rickets, 11 Ohio 311.
Franzini v. Layland, 120 Wis. 72; 97 N. W. 499.
Child v. Starr (N. Y.), 4 Hill 369.
Howard v. Ingersol, 17 Ala. 786.
Micelli v. Andrews, 61 Ore. 78; 120 Pac. 737.

There are many other cases to the same effect.

The reason why the middle of the river at low water, especially when dealing with the Mississippi river, should be taken as the middle of the main channel or the middle of the river, is that this insures to each State equality of navigation and is the nearest possible approach to fixing an unvarying line.

When low water stage exists and the middle of the river is then taken, it is as near a fixed and permanent line as can be designated when dealing with a large river.

The middle of the river at low water stage is essentially a point equidistant between the banks of the river. The bank of a river is that land between low and high water mark. A river bank necessarily begins where the bed of the river ceases. A division of the bed of the river is a division of the water which flows between the banks.

In Tennessee the riparian owner holds title to low water mark. That is, his title runs to the stream. He, therefore, owns the bank of the river. In Arkansas the riparian owner holds title only to high water mark. He, therefore, does not own the river bank. A river bank is that ground which lies between the water at low water stage and water at an ordinarily high stage. With the river in a normal stage of water a portion of the bank is submerged. The extent of the submerged bank depends on the character of the bank, that is, whether it is a bluff or sloping bank.

The proposition of the State of Tennessee is that the middle of the river means a line drawn midway between partially submerged banks. The mind will feel itself embarrassed in selecting any particular part of the bank except its base, to-wit, where the land touches the water at a low stage, in an effort to get at the middle of a stream such as the Mississippi river. The proposition of Tennessee is that the measurements hould run from that part of the bank which is unsubmerged at a normal stage of the water, whereas, the plaintiff-in-error insists that the line should be run from the base of the bank.

In *Child v. Starr,* 4 Hill 369, Chancellor Walworth said:

> "The shore of tide water is that portion of the land which is alternately covered by water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no *shores,* in the legal sense of

the term. It has *ripam* but not *littus*. The term shores, however, when applied to such a river, means the river's banks above the low water mark; or, rather, those portions of the banks of the river which touch the margin or edge of the water of the stream. A grant, therefore, which is bounded by the *shore* of a fresh water river conveys the land to the water's edge, at low water; and, as in the case of lands bounded upon tide waters, that boundary of the grant is liable to be changed by the gradual alterations of the shore by alluvial increment, or the attrition of the water."

As to the middle of a non-navigable river it was said in *Micelli* v. *Andrews*, 61 Ore. 78; 120 Pac. 737:

"It will be remembered that as to non-navigable rivers, the soil under which was originally owned by the United States, an early Act of Congress made different owners of land on opposite banks of such streams tenants in common of the bed and waters thereof. The courts of last resort in most of the States, probably acting on such recognition by the Federal Legislature of the rights of riparian proprietors, have practically partitioned their estate in common into estates in severalty by making the bed of the stream a boundary of the respective owners' premises. Such border would be of little practical benefit if the middle of the stream were to be determined from the measurement of lines along the banks which might be reached at some stages of the water, but which, when receding, left what had once been the thread of the river on dry land, thereby depriving one of the riparian proprietors from access to the stream except

during high water, when it was not needed, and giving to the opposite riparian owner both banks and the entire bed at low water when its use might be of great advantage. Upon principle it is believed that the thread of a non-navigable river is to be ascertained from the measurement of the water at its lowest stage."

In *Howard* v. *Ingersoll*, 17 Ala., 780, it was said:

"The bank of a river may be said to be that space of rising ground above low water mark, which is usually covered by ordinary low water. We cannot conceive of any other definition more accurate than this; for the rising ground above low water cannot with any propriety be said to be the bed of the river, and therefore it must be the bank. We then see that the term bank of a river is an imperfect, or rather an indefinite guide, when we seek by it to fix upon a precise point of locality; for the bank of a river extends, or may extend, over a considerable space; in this respect, therefore, the term is indefinite and indeterminate. We know the precise line that divides the two jurisdictions must be fixed on the bank of the river, but this bank extends from usual low water to usual high water mark.

The above case went to the Supreme Court of the United States on the construction of an Act of the Commissioners establishing part of the western boundary of Georgia on the west bank of the Chattahoochee river and is reported in 13 How. 381.

Georgia ceded to the United States certain territory and described the ceded property as "west of a line beginning

on the western bank of the Chattahoochee river....running thence up the said river Chattahoochee and along the western bank thereof" to a certain point.

Mr. Justice Wayne, in locating the boundary, took the words "along the western bank" of the river as controlling the uncertainty of the description, and said:

> "The words 'along the bank,' added to the words 'on the bank,' distinguish this case from all those in which courts have had the greatest difficulty where a line was to be fixed when it is on the bank without a call for the stream or along the river, or up or down the river. *Angell*, 19. Along the bank, is strong and definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia."

He continued:

> "We repeat, 'along the bank thereof' is the controlling call in the interpretation of the cession. It excludes the idea that a line was to be traced at the edge of the water as that may be at one or another time or at low water, or the lowest low water. Water is not a call in the description of the boundary, though the river is, and that, as we have shown, does not mean water alone, but banks, shores, water and the bed of the river. If water, as one of the river's parts, had been meant, it would have been so expressed."

The learned justice concluded that each and every part of the bank was retained by Georgia independent of "an attempt to trace the line by either ordinary low water or low water."

Mr. Justice Nelson, writing an opinion in the same case, stated the contention of the parties:

> "On the part of Georgia it is claimed that her boundary extends to high water mark, on the western bank of the Chattahoochee river for the whole length of this line. On the part of Alabama, that it stops at ordinary low water mark, on the western bank of said river."

He discussed *Handley's Lessee* v. *Anthony*, 5 Wheat. 374, but pointed out the terms of the cession:

> " 'Ordinary low water,' however, like 'low water,' is a relative term, and in the abstract, and without practicable application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question. I freely admit, that if the terms of the cession would justify the interpretation given to that of the territory northwest of the Ohio, I should greatly prefer the line adopted in *Handley's Lessee* v. *Anthony*, which was *low-water mark.*"

Mr. Justice Curtis concurred in the result reached, but withheld assent "from much of the reasoning contained in the opinion." He discussed what constituted the bed and the banks of a river, and said:

> "Taking along with us these views respecting the bed and banks of a river, it will be obvious that the lowest line of the bank, being the line which separates the bank from the bed, is a natural line, capable of being found in all parts of the river, impressed

on the soil; and this is true of no other line on the bank; for though in some places the banks of a river may have so marked a character, that there would be no difficulty in tracing the upper line of the bank, and pronouncing, with certainty, that the bank there terminates, yet it is not to be supposed that this would be true throughout the course of a long river; and one of these cases finds, that in some places the banks of this river are low, and the adjacent lands on either side subject to occasional inundation."

He referred to the lowest edge of the bank as the "natural line which divides the banks from the bed of the river."

In *Alabama* v. *Georgia,* 23 How., 505, a boundary dispute between Georgia and Alabama, the Court had the question before it which was considered in the case just cited and concluded that the soil and jurisdiction in the bed of the river was in Georgia and construed the language of the cession to refer to that part of the bank which contained the water at its average and mean stage.

The Court adverted to the definition by Mr. Justice Story in *Thomas and Hatch,* 3 Sumner, 178, of a bank to be that which contained the water in its greatest flow; and to *Bouvier's* statement that the bank of a river was that which marks the point where the greatest flow of water was contained.

In ascertaining what is the middle of the main channel of a river these authorities are helpful in determining

between what points on the opposite banks of a river the measurement should be made.

In the case last cited it was said:

> "*Grotius, ch.* 2, 18, says a river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such *channel.* Hence, there is water having a bank and a bed, over which the water flows, called its *channel,* meaning by the word *channel,* the place where the river flows, including the whole breadth of the river."

In *Iowa* v. *Illinois,* 147 U. S. 1, the Court said that the word "channel" indicated "the space within which ships can and usually do pass," and observed:

> "It is apprehended it is in this sense the expressions 'middle of the river,' 'middle of the main *channel,*' 'mid-channel,' 'middle thread of the *channel,*' are used in enabling acts of Congress and in State Constitutions establishing State boundaries."

On these authorities it is insisted on behalf of the plaintiff in error that the "middle of the river," "middle of the main channel," "middle of stream," have reference to the middle of the bed of the river at low water stage, which is the nearest possible approach to the channel of navigation, and that this Court was right in saying, in Iowa v. Illinois, that these expressions are used in acts with respect to boundary lines as indicating the center of the channel of navigation.

In *Louisiana* v. *Mississippi*, 202 U. S. 1, the rule announced in *Iowa* v. *Illinois* was approved and attention was called to the fact that the majority of the arbitration tribunal in the Alaskan boundary case sustained the American contention in regard to the thalweg.

In *Whiteside* v. *Norton*, 205 Fed. 5, the Circuit Court of Appeals, Eighth Circuit, followed *Louisiana* v. *Mississippi* and held with respect to "the main channel" of the St. Louis river as a boundary, that "the doctrine of the 'thalweg,' meaning the middle, or deepest, or most navigable channel, is applicable in determining the line of boundary between the two states." The learned Judge who delivered the opinion in that case called attention to the application of this doctrine in the San Juan water boundary controversy between the United States and Great Britain and remarked that the words "the main channel" have now "in law a very definite meaning."

(In *Iowa* v. *Illinois*, 202 U. S. 59, on a consideration of a motion for final decree, the Court "ordered, adjudged and decreed that the boundary line between the State of Iowa and the State of Illinois is the middle of the main *navigable* channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river.")

In conclusion, if Tennessee owns the middle of the river of 1823, ascertaining the "middle" by measuring the width of the river at a normal stage, the opinion of the Tennessee Supreme Court is sound.

If the boundary line between the States of Tennessee and Arkansas is in the river bed which was abandoned by reason of the avulsion of 1876, then the judgment of the Tennessee Court was wrong, without regard to where the line may be located by this court in that abandoned bed.

Respectfully submitted,

CARUTHERS EWING,
Solicitor for Plaintiff-in-Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 20.

W. A. CISSNA, PLAINTIFF IN ERROR,

vs.

STATE OF TENNESSEE, DEFENDANT IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR.

ANSWER TO THE REPLY BRIEF OF PLAINTIFF IN ERROR.

May it please the court:

This brief on behalf of the State of Tennessee is rendered necessary because of charges of inconsistency and bad faith made by the plaintiff in error against the sovereign State of Tennessee and its counsel in a reply brief, just filed herein.

The reason given by plaintiff for the necessity of the reply brief is stated in the opening sentence to be, because of "the position taken by the State of Tennessee in the brief and argument recently filed herein, and the denial of the juris-

diction of this court." This is not a sufficient explanation of the reason for filing an additional brief of almost equal length as the original brief. Plaintiff in error and his counsel, who is the same counsel that has represented him since the inception of this litigation and in many other litigations over the same property in many courts for more than sixteen years, have known the position that would be taken by counsel for the State of Tennessee since the writ of error was granted in this cause. The sole question before this court, until that question has been determined, is the question of the jurisdiction of the court and this was recognized by plaintiff in error in the original brief filed herein in October, 1916, when he said on page twenty-six (26): "I assume that the jurisdiction of this court will be challenged, because a jurisdictional question naturally arises when it is sought by writ of error to review the judgment of the highest court of a State."

The matter of which plaintiff in error complains is set forth, among other places on page twelve (12) of his brief where he says: "We are now gravely informed, for the first time, that the boundary line between the States of Arkansas and Tennessee is not involved," quoting, but not fully, from page thirty-eight (38) of the brief for the State. And upon this statement plaintiff in error proceeds on the bottom of page eleven (11) of his brief to read the State of Tennessee and its counsel a lecture on consistency.

The position of the State of Tennessee is not inconsistent; it has assumed since the writ of error in this cause was granted and it now maintains that the boundary line between the States of Tennessee and Arkansas is not involved in this litigation; that the location of the boundary line is a mere incident; that there was no dispute between the States themselves over the boundary line, but perfect accord and understanding each of the position of the other, and that a non-resident property owner could not inject a Federal ques-

tion into a litigation by the mere assertion of a territorial right which Arkansas itself did not claim.

Nor is the statement that the plaintiff in error is "now informed, for the first time," that the boundary line is not involved a correct statement. The statement complained of reads as follows:

> "The boundary line between the States of Tennessee and Arkansas is not involved. The location of the boundary line was an incident. It was necessary to locate it in relation to the lines of property claimed by the State of Tennessee and held by the plaintiff in error" (Page 38, Brief of Tennessee).

This statement is a mere repetition of the claim of the State of Tennessee asserted on page 28 of the brief filed in October, 1916.

The statement that the boundary line is not involved, that the location thereof is merely an incident, necessary because one of the lines of the State's property happened to be the western boundary line of the State of Tennessee, was made in the Supreme Court of the State of Tennessee by plaintiff in error in the able brief filed for him by the same counsel who *now* claims to be surprised by the position taken by the State of Tennessee, and who claims that this is the *first time* that this claim has been made. We quote from page 32 of a printed brief designated "Brief of W. A. Cissna," signed "Ewing & Williamson," "filed in the Supreme Court of Tennessee," at the April term, 1905.

> "We do not think that this can properly be said to be a suit which involves the determination of the boundary line between the States of Arkansas and Tennessee. That question was only incidentally presented."

The position of the plaintiff in error (then appellee) in the Supreme Court of Tennessee as set forth in his pleadings and maintained in his brief was that, while the lands contended

for had originally been east of the middle of the main channel of the Mississippi river and within the boundary of the State of Tennessee, by erosions from the Tennessee bank of the river and accretions to Dean's Island from 1823 to 1883, both before and after the avulsion of 1876, the entire property here involved had been lost to the State of Tennessee and to the Tennessee owners and had been gained by plaintiff in error.

The plea to the jurisdiction sets forth those claims in clear and unmistakable language.

> "Defendant says that all of the property mentioned and described in the bill, in the year 1823, was on the Tennessee side of the middle of the Mississippi River as it then ran."
>
> Plea in Abatement (Rec., p. 400).

There can be no question that this was an admission of the location of the original boundary lines between the States—

> "from the year 1823 to 1874, continuously there were erosions into the Tennessee shore, and accretions to the Arkansas shore, or Dean's Island."
>
> Plea in Abatement (Rec., p. 400).

The Tennessee Supreme Court has decided that there were no accretions to Dean's Island, and that finding being on controverted facts is not before this court—

> "for a number of years, to wit, about ten years, the water gradually, imperceptibly and steadily abandoned said old bed, and about the year 1883 the accretions of Deans Island were such that no part or parcel of said land described in the bill was west of the middle of the Mississippi River, and therefore in the State of Tennessee."
>
> Plea in Abatement (Rec., p. 401).

The above quotations from the plea in abatement of plaintiff in error clearly and definitely define his position in the courts of Tennessee; that through erosion from the

Tennessee bank of the river and accretion to Deans Island, both before and after the avulsion, Tennessee had lost and his client had gained the entire property now involved. Those claims were based, not as now contended in this court, "upon the proper construction of the acts of Congress admitting the States into the Union," (Reply brief, page 16), but upon general laws of the land governing erosion, accretion, reliction, avulsion and the reappearance of submerged lands.

That there was no contest between Tennessee and Arkansas over the construction of the treaties of the United States and other nations by which the boundary lines of the territory of Tennessee and Arkansas were fixed, or over the acts of Congress admitting the two States into the Union or as to the location of this particular line at the *locus in quo* is borne out by the uniform decisions of the highest courts of each State in every instance where this question has come before them.

ARKANSAS, 1883.

The first reported decision of either State regarding the boundary line between them is the case of Cessill *vs.* State, decided by the Supreme Court of Arkansas and reported in 40 Ark., p. 501. As this case has been cited as an authority and largely quoted from in the original brief for the State, we will not discuss it further than to state the issue involved as stated by the court itself, which said:

> "The sole matter left for us to decide is this: What is meant by the main channel and what is the middle of it."
>
> Cessill *vs.* State, 40 Ark., 501.

U. S. CIRCUIT COURT OF APPEALS, 1903.

The next reported decision bearing on this line is the case of Stockley *vs.* Cissna, the record of which case is included

in the record now before this court. The opinion of Judge Lurton (Rec., p. 337, 361) speaks for itself.

TENNESSEE, 1907.

In the case at bar and Stockley *vs.* Cissna, 119 Tenn., p. 139, the Supreme Court of Tennessee follows Cessill *vs.* State *supra*, and Judge Lurton's opinion in Stockley *vs.* Cissna.

Stockley *vs.* Cissna, 119 Tenn., p. 139.

These decisions are also in accord with the decision in Branham *vs.* Bledsoe, where the court said:

> "The thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water, at its medium height, neither swollen by freshets nor shrunk by droughts."
>
> Branham *vs.* Bledsoe, 1 Lea, 704.

ARKANSAS, 1912.

The next decision was in the case of Wolfe *vs.* State, decided by the Supreme Court of Arkansas in 1912. Wolfe was convicted of selling liquor in the Osceola District of Mississippi County, Arkansas. The sale was made on a boat in the Mississippi river off the Arkansas shore, opposite Mississippi County. Defendant contended that the State failed to prove the venue of the offense and assigned as error the charge of the trial court relating thereto. The Supreme Court of Arkansas affirmed the decision of the lower court, saying:

> "The location of the eastern boundary line of the State of Arkansas in Mississippi County was discussed and determined by this court in the opinion rendered by Mr. Justice Eakin in the case of Cessill *vs.* State, 40 Ark., 501."
>
> Wolfe *vs.* State, 104 Ark., 140.

Arkansas, 1912.

Following Wolfe *vs.* State came Kinnane *vs.* State (106 Ark., 286), decided in 1912. Kinnane was convicted upon an indictment charging him with running a dram-shop and drinking saloon in the Osceola District of Mississippi County, Arkansas. One of the questions raised was the venue, defendant contending that he was on the Tennessee side of the Mississippi river. (Mississippi County, Ark., is directly opposite the property here involved, plaintiff's in error contention being that his property is in Mississippi County.)

The following charge was given by the trial judge over the exception of defendant:

> "You are instructed further that in determining this question it will be necessary for you to determine the location of the boundary line between the States of Arkansas and Tennessee in front of the Osceola District of Mississippi County, in Arkansas * * *. On this question you are instructed that the boundary line between the States of Arkansas and Tennessee * * * is the middle of the main channel of the Mississippi river or the equdistant point between the ascertained and well-defined banks on the Tennessee and Arkansas shores of said river, without reference to the track of navigation or line of river followed by steamboats."

This charge was assigned as error on the appeal.

The court said: "This court in a well-considered opinion has already declared the law relating to our Eastern boundary upon the Mississippi River," citing, quoting from, and approving Cessill *vs.* State above and the opinion of the Supreme Court of Tennessee in the case at bar, of which it said: "The Supreme Court of Tennessee has also considered and determined the matter of its western boundary, which is the eastern boundary of our State, in Tennessee *vs.* Muncie

Pulp Co., 119 Tenn., p. 47. It considered the boundary line fixed by the treaty of 1763, the middle of the Mississippi River and the boundary of the two States as fixed by the Acts of Congress admitting them into the Union, and, in a well-considered and exhaustive opinion, after reviewing this court's decision in Cessill *vs.* State, *supra,* said—(quoting extensively from the opinion of the Supreme Court of Tennessee in this case at bar)—both States agree upon it as the true and correct line separating their respective territories, and others cannot be heard to complain."

Kinnane *vs.* State, 106 Ark., 286, 291.

ARKANSAS, 1915.

The next and latest case we find is Hearne *vs.* State, 121 Ark., 470. Sam Mauldin, the sheriff of Mississippi County, Arkansas, was shot to death on July 30, 1915, while raiding the joint of Andy Crum on Island 37. The killing occurred in sec. 23, T. 10, N. R. 9 E. Mississippi County, Ark., said point being at the north bend of the old river and north of the property here involved. The main question was one of venue. The lower court granted the following instructions over the exception of defendant.

> "On the question of venue * * * you are instructed that the boundary line between the State of Arkansas and the State of Tennessee in the vicinity of the alleged crime is the middle of the main channel of the Mississippi River, as the same existed on the 16th day of June, 1836, the date of the admission of the State of Arkansas, and by the middle of the main channel of the Mississippi River is meant the equidistant point in the main channel of said river between the well defined banks on either shore at said time, and all the water and lands which may now occupy the space between the middle line as same then existed, and the Arkansas shore as same now exists, is within the jurisdiction of the Osceola District of Mississippi County, Arkansas."

The lower court also charged:

> * * * "If you find from a preponderance of the evidence that the alleged crime was committed north of the middle line of the main channel of the Mississippi River, as it existed on the 16th day of June, 1836, at said place, the Osceola District of Mississippi County, Arkansas, has jurisdiction in this case," etc., etc.

These charges were assigned as error on the appeal.

The Supreme Court of Arkansas said:

> "In Kinnane *vs.* State, 103 Ark., 286, this court approved an instruction relative to the boundary line between the States of Arkansas and Tennessee, declaring the law in effect as given in said instruction numbered one and quoted in the opinion, the holding and declaration of the Supreme Court of the State of Tennessee in Tennessee *vs.* Muncie Pulp Co., 119 Tenn., 47, to like effect, recognizing the boundary between the States to be as declared by the Supreme Court of Arkansas * * * for the State of Tennessee is making no claim of title herein to the territory upon which the offense was shown to have been committed, and as held in Tennessee *vs.* Muncie Pulp Co., *supra*, the States having agreed upon the true and correct line separating their territory * * * others cannot be heard to complain." P. 471.
>
> Hearne *vs.* State, 121 Ark., 470, 1, 2.

These decisions of the highest courts of the States of Tennessee and Arkansas are cited and quoted from so extensively in order to demonstrate the contention of the State of Tennessee in the case at bar, that the boundary line between the States is not involved in this litigation, but that the location thereof is merely an incident thereto, and further, that there was perfect accord and understanding between the States themselves when this litigation was instituted.

The lecture on inconsistency, read to the State of Ten-

nessee in the concluding paragraph on page eleven (11) of the reply brief of plaintiff in error and the charge that the State of Tennessee is now asserting as untrue what it had, in the court below, averred as true is not warranted.

The charge made in the concluding paragraph on page nineteen (19) that "the State of Tennessee is in this court and cause insisting that even if plaintiff in error took none of its timber, still it wants a judgment for that which it did not own," is not only unwarranted, but is without semblance of foundation.

These charges, if they were to be made, should have been made in the original brief filed for plaintiff in error, for the position of the State has been the same since the day when this suit was first brought before this court by writ of error.

Tennessee seeks only to protect its property from marauders and trespassers, and to conserve for the benefit of all its citizens that property which rightfully belongs to it.

Tennessee claimed in the State courts that its western boundary line was the center of the river as it ran in 1823 as set forth on Humphrey's map which was made an exhibit to the original bill. The original bill in setting forth the claim of the State specified the line of 1876, but described the property claimed by metes and bounds and set forth the corners thereof as marked by actual survey upon the ground and as set forth on Humphreys' map which was made a part of the bill and which clearly outlined each boundary of the property claimed by the State.

There could have been no confusion in the mind of plaintiff in error (then appellee) either as to the property claimed by the State, or as to line claimed by the State to be its western boundary.

Orig. Bill, R., p. 393 to 397; R., p. 391.

The Supreme Court of Tennessee held that complainant sued only for the line of 1876, but that inasmuch as the case was only before it on the question of jurisdiction, and

must be remanded for a hearing upon the answer of defendants, that the State could amend its bill so as to make proper averments to entitle her to recover to the line of 1823.

Counsel for the State believed then and believes now that the Supreme Court of Tennessee misconstrued the original bill; that the land claimed being particularly described by metes and bounds and laid down on a map clearly delineating the lines and corners thereof and its location in relation to the old river bed, the property of plaintiff in error and the State of Arkansas, that the certain and particular description should have been considered rather than the general description of "the line of 1876" which referred more to the date of the cut-off than to the claim of the State.

But whatever may have been the view of the court as to the line claimed by the State there was no confusion in the mind of counsel for plaintiff in error as to the property and lines claimed, for one of the headings in the brief filed for the State and referred to and discussed in the brief filed for plaintiff (then defendant) in error was as follows:

> "The center of the river of 1823 is the present boundary between the States of Tennessee and Arkansas."

The suit was remanded, an amended bill filed by the State of Tennessee, an answer filed by plaintiff in error, additional proof taken by the parties and the case went again to the Supreme Court of Tennessee, and it was again decided, under proper pleadings, that the line of 1823 is the present western line of the State, the court saying:

> "It is hardly worth while to undertake to convince learned counsel, as well as the learned chancellor below, that the opinion of the court is consistent with its decree. The former opinion is the law of the case, and determines the rights of the parties to the property in controversy. The evidence upon this appeal is not materially different from the evidence considered on the former appeal."
>
> Rec., p. 929.

On page 17 of his reply brief plaintiff in error quotes and excepts to the statement made on page 29 of the State's brief, wherein it is said that plaintiff in error "solemnly admitted in open court that the land here involved was within the jurisdiction of the Circuit Court of the Western District of Tennessee, and within the State of Tennessee, and through said admission he secured a verdict in said court," and plaintiff in error says "such is not the fact."

Again we say that this matter should have been discussed in the original brief filed by plaintiff in error.

The statement objected to is a part of the original pleadings in this cause; the charge was made in the replications of the State of Tennessee to the plea filed to the original bill (Rec., p. 408, p. 410).

It was maintained for the State of Tennessee in the lower court that the plaintiff in error was precluded by his admission in open court in Stockley *vs.* Cissna, from now denying that the land in controversy was in the State of Tennessee; that by the judgment of the Circuit Court of Appeals it was established that the land in controversy was within the State of Tennessee, being within its boundaries, and thereby was established the location of the line now the subject of dispute, and the rule is as to immediate parties to the suit in which the judgment was rendered, it is *res judicata,* while as to others it is only *prima facie* evidence.

Wharton on Evidence, vol. 2, sec. 794, and authorities cited in note 1, page 35.

Herman on Estoppel, vol. 1, sec. 246.

Am. and En. Enc. of Law, vol. 4, 2 ed., p. 858, citing Tyler's Law of Boundaries, p. 307.

The error that learned counsel for the plaintiff in error has fallen into is a failure to differentiate between a dispute concerning the construction of the treaties and acts of Congress making the boundary line, and a dispute concerning the actual location thereof on the ground at a given point.

Disputes will ever arise concerning the actual location of the boundary lines of the States at given points so long as marauders seek to trespass upon the properties of the States or crimes are committed near the borders and questions of jurisdiction can be raised.

The line of 1823-36 is a certain and known line; it has been surveyed, platted and the corners have been marked. There are no elements of uncertainty about it. Around the entire bed of the abandoned channel it can be traced by the simple process of tying the surveys of the original grants from the State in Tennessee to the original Government surveys in Arkansas. Any other line is impracticable and impossible. In the words of the learned counsel for plaintiff in error, in his brief before the Supreme Court of Tennessee,

> "There are many elements of uncertainty about the survey of 1874.
>
> "The cut-off two years thereafter multiplies the confusion.
>
> "The difficulty that would confront this court is insurmountable and challenges the most serious consideration."

In conclusion we most earnestly insist that this court has no jurisdiction to review this cause; that the decisions of the highest courts of both States in an unbroken line of cases, three of which have been handed down since the decision in this cause, and one since this case has been before this court, constitute the law of this case; that the States themselves having agreed on their boundary lines, no one else may object and the writ of error in this cause should be dismissed and the costs of this cause assessed against the plaintiff in error.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of the State of Tennessee.

JNO. P. BULLINGTON,
Solicitor for the State of Tennessee.

CISSNA *v.* STATE OF TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 20. Argued November 10, 1916; restored to docket for reargument December 11, 1916; reargued October 9, 10, 1917.—Decided March 11, 1918.

If the state supreme court treats federal questions as necessarily involved and to reach its judgment necessarily decides them adversely to the plaintiff in error, this court has jurisdiction to review them, although not specially characterized as federal questions by the plaintiff in error in the state courts.

This court has jurisdiction to review a judgment of the supreme court of a State where the issues as to whether lands in question were owned by the State, and whether they, and alleged trespasses upon them, were within the State and so within the state court's jurisdiction, were determined affirmatively through a location of the state boundary based upon interpretation of various treaties and acts of Congress.

Whether two States of the Union, either by long acquiescence in a

practical location of their common boundary or by agreement otherwise evidenced, have changed the limits of their jurisdiction as laid down by the authority of the general government in treaty or statute, is in its nature a federal question.

Whether the state court has correctly followed the rules of erosion, accretion or avulsion applicable to interstate boundary streams so as to give proper effect to treaties and acts of Congress establishing a river as an interstate boundary, is a question of federal law.

Upon the merits, which concern the location of the boundary between Tennessee and Arkansas in the Mississippi River, this case is decided upon the authority of *Arkansas* v. *Tennessee*, *ante*, 158.

119 Tennessee, 47, reversed.

THE case is stated in the opinion.

Mr. Caruthers Ewing for plaintiff in error.

Mr. John P. Bullington, with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, was on the briefs, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The State of Tennessee sued Cissna and others in a court of equity of that State, setting up ownership by the State of that portion of the dry lands formerly a part of the bed of the Mississippi River which lay between low-water mark on the Tennessee side and the middle of the river as it flowed prior to the change in the channel made in the year 1876 by the opening of the Centennial Cut-off; alleging that the defendant Cissna claiming ownership, but having none, and the Muncie Pulp Company acting under him, were cutting and removing timber from a particularly described portion of those lands; and praying for an injunction against further acts of trespass and against the removal of the timber cut, and a recovery of the value of the timber. Cissna pleaded in abatement that the land described in the bill, except a small portion to

which he disclaimed title, was in the State of Arkansas and not in the State of Tennessee, and hence that the court had no jurisdiction over the controversy. His codefendant having raised a similar issue, the cause came on to be heard before a chancellor, who sustained the pleas to the jurisdiction and ordered that the bill be dismissed. Upon appeal, the Supreme Court of Tennessee, disregarding the form of the pleadings, treated the action as brought to recover the land as well as to stay waste in cutting and removing timber; and deeming that the question of jurisdiction which depended upon the location of the boundary line between Tennessee and Arkansas and the question of the right of the former State to recover the land were practically the same question, considered them together. The facts bearing upon the location of the boundary, recited in the opinion of the court, were substantially the same as those upon which this court passed in the boundary suit of *Arkansas* v. *Tennessee*, No. 4 Original, recently decided, *ante*, 158. The state court held, contrary to the rule laid down by this court in *Iowa* v. *Illinois*, 147 U. S. 1, and still adhered to, that the boundary line did not follow the middle of the channel of commerce, but was fixed and defined as "a line along the middle of the main channel of the river equidistant from the visible and permanent banks confining its waters." The court found that the change made in the channel in the year 1876 at Centennial Cut-off was an avulsion, and declared that "the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel." But, not carrying this into effect, it concluded that at the place where the lands sued for are situate the correct boundary between the States was midway between the banks of the river as they existed in the year 1823 as shown by the Humphreys map, notwith-

standing the fact that between that date and the time of the cut-off the river had gradually encroached upon the Tennessee shore, to a large extent in the aggregate; the court holding that the effect of the avulsion was to press back the line between the two States so as to restore to Tennessee what it held before the erosions upon its banks. And since it appeared that complainant had sued only for the land lying on the hither side of the middle of the channel as it was in 1876, and therefore could not recover to the middle of the channel of 1823, the court, on remanding the cause for a hearing upon the answers of defendants, ordered that the bill might be amended so as to make the proper averments to enable the State to recover under the principles laid down in its opinion. *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47.

The cause was remanded, the pleadings were amended, and the suit remained pending in the trial court, when the State of Arkansas filed its bill in this court against the State of Tennessee to settle the boundary line between these States along that part of the former bed of the Mississippi River which was left dry as a result of the avulsion of 1876, including the portion in dispute in the present case; this being the same action above mentioned as No. 4, Original. The pendency of that action was brought by Cissna to the attention of the trial court in the present case, and made the basis of an application for a stay of proceedings until the boundary line between the States should have been fixed and located by this court. This application was overruled and the cause proceeded, with the result that the chancellor made a decree against Cissna on the merits in conformity with the opinion of the Supreme Court, subject however to an accounting with respect to the amount and value of the timber cut and removed during the pendency of the suit. Upon appeal to the Supreme Court this decree was affirmed, with modifications not necessary to be mentioned, that

court ordered that a writ of possession be issued to place the complainant State in possession of the tract of land in controversy, and retained the case for an accounting respecting the value of the timber. By way of objection to the entry of a decree pursuant to the accounting that followed, Cissna again called the attention of the court to the boundary suit pending in this court, and prayed for a stay of proceedings in the suit against him upon the ground that any determination by that court not in accordance with the determination of this court would be void. This objection was overruled, a final judgment or decree went against him for upwards of $110,000, and the case was brought here by writ of error under § 237, Judicial Code (36 Stat. 1156, c. 231), before the amendment of September 6, 1916, c. 448, 39 Stat. 726.

It was first argued at the October Term, 1916, when, for reasons stated in 242 U. S. 195, it was restored to the docket, and thereafter was heard at the same time with the suit of *Arkansas* v. *Tennessee*.

Our jurisdiction is invoked upon the ground that the decision of the state court of last resort was adverse to the federal rights of plaintiff in error in two respects: (1) in overruling his prayer for a stay of proceedings to await the determination of the suit pending in this court to settle the boundary line between the States; and (2) in coming to an erroneous conclusion upon the merits of the question of the proper location of that boundary. We need not pass upon the first point, since we are of the opinion that we have jurisdiction on the second ground, and that the judgment under review must be reversed.

The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the State treated federal questions as

necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257; *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, 49.

The opinion of that court (119 Tennessee, 47) shows that it treated the question of jurisdiction presented by the pleas in abatement and the question of the title of the State of Tennessee to the lands in controversy as both dependent upon the location of the boundary, because the State claimed the lands as a sovereign under the same treaties and acts of Congress by which its western boundary was defined and established; and the court held that the location of this boundary depended upon the interpretation of the Treaty of 1783 between the United States and Great Britain (8 Stat. 80, 82, Art. II), the act of cession from North Carolina to the United States made in 1790 (1 Stat. 106, c. 6), the Treaty of 1795 between the United States and Spain (8 Stat. 138, 140, Art. IV), the Act of Congress of June 1, 1796, admitting Tennessee into the Union as a State (1 Stat. 491, c. 47), the Louisiana Purchase Treaty of 1803 (8 Stat. 200), and the Act of Congress of June 15, 1836, c. 100, 5 Stat. 50, admitting Arkansas as a State. Upon a consideration of the Treaty of 1783, which employed the expression "middle of the said River Mississippi" to define the western boundary of the United States, and interpreting this in view of the use of the same expression in the previous Treaty of 1763 between Great Britain, France, and Spain (3 Jenkinson's Treaties, 177), and declaring that the treaty with Spain, which provided that the western boundary of the United States should be "in the middle of the channel or bed of the river," was not only an interpretation of the former treaties, but superseded them, and construing the phrase "middle of the main channel," employed in the act ad-

mitting Arkansas, as introducing no new meaning, the court held that the expression "middle of the river," by true interpretation, meant not the middle of the channel of commerce, but a line midway between the visible and fixed banks of the stream, and that any general rule of international law to the contrary must yield to the intent which the court deemed to be expressed in the treaties and acts of Congress referred to.

Since the decision adverse to plaintiff in error turned so clearly and essentially upon questions of federal law, we have jurisdiction to review the resulting judgment. And as the conclusion reached by the state court upon the question of interpretation is directly opposed to that reached by us in *Arkansas* v. *Tennessee* upon a consideration of the same pertinent treaties and acts of Congress, we need only refer to our opinion in that case for a statement of the grounds upon which we hold that the state court erred.

Two additional errors entered into the judgment, so intimately connected with the question of interpretation as to be inseparable from it.

The first of these was a decision to the effect that the question of boundary had been settled by the duly constituted authorities of the two States, by judicial decisions, legislation, long acquiescence, exercise of jurisdiction, and other acts amounting to an agreement or convention defining the limit between the States to be the line midway between the visible banks of the river. Obviously, whether two States of the Union, either by long acquiescence in a practical location of their common boundary, or by agreement otherwise evidenced, have definitely fixed or changed the limits of their jurisdiction as laid down by the authority of the general Government in treaty or statute, is in its nature a federal question. We have stated briefly, in *Arkansas* v. *Tennessee*, the reasons why we are unable to concur with the state court in its decision upon this point.

The remaining error arose in the determination of the consequences of the avulsion of 1876. It is a part of the law of interstate boundaries, that where a running stream forms the boundary, if the bed and channel are changed by the natural and gradual processes of erosion and accretion, the boundary follows the varying course of the stream; while if the stream suddenly leaves its old bed and forms a new one, the resulting change of channel works no change of boundary, which remains in the middle of the old channel although no water be flowing in it. *Arkansas* v. *Tennessee*, *supra*. A correct application of this rule to changes in the Mississippi is necessary in order that proper effect may be given to the treaties and acts of Congress by which that river was established as an interstate boundary, and hence this is a question of federal law. The state court acknowledged the rule in theory, but departed from it in fact. Starting with the Humphreys map as showing the location of the banks of the river as they were in 1823, the date to which the earliest records related, and finding from the evidence that between that date and the time of the avulsion there had been gradual erosions from the Tennessee bank at the place where the land in controversy is situate, to an extent sufficient in the aggregate to increase the width of the river from a little less than a mile to between 1¼ and 1½ miles, the court held that the subsequent emergence of the bed of the river at this place, consequent upon the avulsion of 1876, had the effect of pressing back the line between the States to the middle of the old channel as it ran in 1823, so as to restore to Tennessee what it held before the erosions from its banks. This result was reached by grafting upon the acknowledged rule as to boundary streams an exception deduced from the rule of the common law that lands once swallowed by the sea, if afterwards exposed by its recession, are restored to the former owner if they can be identified. As we have pointed out in

Arkansas v. *Tennessee*, it is a misapplication of this doctrine to treat it as forming an exception to the established rule respecting the effect of erosion, accretion, and avulsion upon the course of a boundary stream.

We conclude, therefore, that the court erred in awarding to the State of Tennessee a recovery of any land or damages for cutting and removing timber from any land lying without the limits of the State as defined in our opinion in *Arkansas* v. *Tennessee*, *supra*, being a line drawn along the middle of the main channel of navigation of the Mississippi River (as distinguished from a line midway between the visible and fixed banks of the stream) as it was at the time when the current ceased to flow therein as a result of the avulsion of 1876, and without regard to changes in the banks or channel that had occurred through the natural and gradual processes of erosion and accretion prior to the avulsion.

It results that the judgment of the state court must be *Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.*